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# **Two worlds apart: a comparative analysis of the effectiveness of domestic abuse law and policy in England and Wales and the Russian Federation**

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## **Subject:**

**Keywords:** Domestic Abuse; Comparative Law; Control and Coercion; Criminalisation

**Abstract:** In 2015, Section 76 of the Serious Crime Act 2015 ('SCA 2015') introduced the new criminal offence of 'controlling or coercive behaviour in an intimate or family relationship'. This is just one of many steps the UK government have taken in recent years to acknowledge the different forms of domestic abuse and power imbalances that can be present in intimate relationships. In contrast, in February 2017 the Russian government passed an amendment to the Russian Criminal Code to decriminalise some forms of assault, a step which many human rights activists have opposed. This article will compare the seemingly dichotomous approaches to domestic abuse adopted by England and Wales and Russia and will examine the effectiveness of both approaches in deterring domestic violence, providing adequate support for victims and meeting state obligations under international law. There has been extensive commentary on the approach to domestic abuse in England, the USA and Australia. In comparison, consideration of the approach in the Russian Federation is limited. This is in part due to the approach taken in Russia to dealing with domestic abuse as a private issue and the associated lack of available data. This article seeks to go behind closed doors to explore the Russian approach to tackling domestic abuse in a way that it has not previously been considered.

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## Introduction

Domestic abuse is a large-scale problem in England and Wales, with recent statistics indicating that in the year ending March 2018, 1.23 million women and 695,000 men had experienced domestic abuse.<sup>3</sup> These statistics are more concerning because it is generally accepted that incidents of domestic abuse are underreported.<sup>4</sup> The statistics also only consider domestic abuse experienced by adults aged 16-59 years old, ignoring domestic abuse experienced in younger teenage relationships or between individuals aged 60 and above. Bows found that 43% of homicides of older people recorded between 2010 and 2015 were in fact domestic homicides.<sup>5</sup> The real figures for domestic abuse experienced in England and Wales are therefore likely to be much higher than those highlighted by the Office for National Statistics (ONS). The key reasons suggested by academics and practitioners for this underreporting is considered later in this article.

In England and Wales, domestic abuse is understood to be a gendered offence in that it is both a cause and a consequence of gender inequality. This is because physical and emotional abuse, domestic servitude, forced marriage, female genital mutilation, sexual violence and harassment are disproportionately perpetrated against women and girls<sup>6</sup>. Women are twice as likely as men to experience domestic abuse and men are more likely to be perpetrators.<sup>7</sup> On average, two women are killed each week by their current or former partner in England and Wales.<sup>8</sup> The Home Office Statutory Guidance Framework on Controlling or Coercive behaviour states that

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<sup>3</sup> Office for National Statistics, 'Domestic abuse in England and Wales: year ending March 2018' (Office for National Statistics, 22 November 2018) Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018> (accessed 05 January 2019).

<sup>4</sup> HM Government, 'Transforming the Response to Domestic Abuse' (Government Consultation, 8 March 2018) Available at: [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 05 January 2019); Women's Aid, 'Survival and Beyond: The Domestic Abuse Report 2017' (2017) Available at: <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/Survival-and-Beyond.pdf> (accessed 05 January 2019).

<sup>5</sup> H. Bows, 'Domestic Homicide of Older People (2010-15): A Comparative Analysis of Intimate-Partner Homicide and Parricide Cases in the UK' (2018) *The British Journal of Social Work*, 1-20.

<sup>6</sup> The European Institute for Gender Inequality, 'Strategic Framework on Violence against Women 2015-2018' (2015) (Luxembourg: Publications Office of the European Union). Available at: <https://eige.europa.eu/rdc/eige-publications/strategic-framework-violence-against-women-2015-2018> (accessed 05 January 2019).

<sup>7</sup> The Equality and Human Rights Commission, 'Response of the Equality and Human Rights Commission to the Consultation: Transforming the Response to Domestic Abuse' (2018). Available at: The response can be accessed: <https://www.equalityhumanrights.com/sites/default/files/consultation-response-transforming-response-to-domestic-abuse-may-2018.pdf> (accessed 05 January 2019).

<sup>8</sup> Office for National Statistics 'Crime Statistics, Focus on Violent Crime and Sexual Offences, Year ending March 2016, Chapter 2: Homicide' (2016).

domestic abuse is 'primarily a form of violence against women and girls and is underpinned by wider societal inequality'.<sup>9</sup> Similarly, the Equality and Human Rights Commission notes that:

The continuum of violence against women, in its many forms, reflects the wider structural gender inequalities that make it one of the most pervasive human rights issues in the UK: it impacts on women's health and independence, reduces their ability to work and creates a cycle of economic dependence. Women's inequality limits their ability to escape from abusive relationships; it can make it more difficult for them to enforce their rights.<sup>10</sup>

Domestic abuse is not, however, necessarily synonymous with gender-based violence in that the latter can take place in the public sphere and can be perpetrated by those outside domestic relationships.<sup>11</sup> This understanding of domestic abuse informs and is reflected in the policy approach to domestic abuse in England and Wales which is state-driven, multi-agency and, increasingly, criminal justice focussed.

The discourse surrounding domestic abuse in Russia contrasts starkly to the position in England and Wales. Rather than being viewed as an expression of gender inequality and a human rights infringement, the prevention of which is primarily the Government's responsibility to address, domestic abuse in Russia is viewed as a private family matter which necessitates minimal state, legal or police intervention.<sup>12</sup> Campaigns aimed at raising awareness of tackling domestic violence have met with some success,<sup>13</sup> but perceptions of domestic violence in Russia are

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<sup>9</sup> Home Office 'Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework' (2015) 7. Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/C\\_controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/C_controlling_or_coercive_behaviour_-_statutory_guidance.pdf) (accessed 05 January 2019).

<sup>10</sup> See The Equality and Human Rights Commission, above n. 7.

<sup>11</sup> Law Commission 'Reform of Offences against the Person: A Scoping Consultation Paper' CP 217 (2014), para. 150. Available at:

[http://www.lawcom.gov.uk/app/uploads/2015/06/cp217\\_offences\\_against\\_the\\_person.pdf](http://www.lawcom.gov.uk/app/uploads/2015/06/cp217_offences_against_the_person.pdf) (accessed 05 January 2019).

<sup>12</sup> J. E. Johnson, 'Privatizing Pain: The Problem of Woman Battery in Russia' (2001) 13(2) *National Women's Studies Association Journal*, 153-168.

<sup>13</sup> The Russian Orthodox Church, for example, has promoted a zero-tolerance attitude towards familial violence through working in conjunction with domestic abuse organisations to develop an effective response to incidents of violence, including providing training for priests and establishing religious support services for women<sup>13</sup>. Collectives such as "Papa-groups" have also attempted to promote gender equality and encourage men to assume a joint approach to parental responsibility with the children's mother. This has been reported in ANNA – Centre for the Prevention of Violence 'Domestic Violence against Women in the Russian Federation: An Alternative Report to the United Nations Committee on the Elimination of Discrimination against Women' (62<sup>nd</sup> Session, October 2015). Examination of the eighth periodic report submitted by the Russian Federation. Available at:

reported as being dominated by a 'renaissance of traditional values' which reinforce archaic gender norms around a 'woman's place' in the family unit.<sup>14</sup> In a 2015 review on the position in Russia, the Committee on the Elimination of Discrimination against Women noted that they were concerned about the:

persistence of patriarchal attitudes and stereotypes concerning the roles and responsibilities of women and men in the family and in society, which consider women primarily to be mothers and caregivers, discriminate against women and perpetuate their subordination within the family and society... and perpetuate their unequal status in family relations.<sup>15</sup>

The Committee also reported that such stereotypes are one of the root causes of violence against women and therefore it is concerning that the Russian government has not taken any steps to modify or eliminate discriminatory stereotypes and negative traditional attitudes. The Committee recommended that Russia put in place a strategy aimed at eliminating patriarchal attitudes concerning the roles and responsibilities of women and men in the family and in society.<sup>16</sup>

The scale of domestic abuse in Russia is largely unknown. This is principally because, unlike the UK government, Russia has not sought to implement a statutory definition of 'domestic abuse', which creates difficulty in clarifying the parameters of behaviour that will fall within its remit. In addition, because domestic abuse is not seen as a government concern, let alone a priority, the Russian government does not collect centralised statistics on domestic abuse. In any event, the lack of legal recognition of domestic abuse as a criminal matter makes collecting data in Russia a futile task. Russia is one of only three countries in Europe and Central Asia which does not recognise domestic violence as a discrete offence.<sup>17</sup> There is currently no legal recognition of coercive and controlling behaviour, economic abuse, emotional abuse, honour violence, and stalking or harassment. Victims of these offences therefore have no legal recourse

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[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/RUS/INT\\_CEDAW\\_NGO\\_RUS\\_21870\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/RUS/INT_CEDAW_NGO_RUS_21870_E.pdf) (accessed 05 January 2019).

<sup>14</sup> Ibid.

<sup>15</sup> CEDAW, 'Concluding Observations on the Eighth Periodic Report of the Russian Federation (UN Doc CEWAD/CO/RUS/8) (20 November 2015) which can be accessed at: [http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnINnqKYBbHCTOagVs8CBP2%2fEJqS2uWhk7nuL22CY5Q6EygEUW%2bboviXGrJ6B4KEJr4JaIKJZyYib0P1wYeq13mjbxpuvqBQIHs8S\\_aZvXdjX](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnINnqKYBbHCTOagVs8CBP2%2fEJqS2uWhk7nuL22CY5Q6EygEUW%2bboviXGrJ6B4KEJr4JaIKJZyYib0P1wYeq13mjbxpuvqBQIHs8S_aZvXdjX) (accessed 05 January 2019).

<sup>16</sup> Ibid.

<sup>17</sup> Bianca Chamusco (2017) 'If he beats you, it means he loves you' University of Chicago Law School, Chicago Unbound: Student Papers.

under the criminal justice system against their perpetrators. As such, any representation of the scale of the Russia's domestic abuse problem would be grossly distorted.

Nonetheless, family violence is reported to be an endemic and gendered social problem in Russia. Johnson's 2001 study found that intimate partner violence in Russia takes many forms including emotional and psychological torture, beating, sexual violence and murder.<sup>18</sup> Johnson's findings are supported by the Russian Ministry of Internal Affairs which report that 40% of violent crimes take place within the family,<sup>19</sup> 74% of victims of abuse are women and in 91% of cases, violence was perpetrated by a husband.<sup>20</sup> On a conservative estimate, it is believed that 30% to 40% of murders take place in the family.<sup>21</sup> This mirrors statistics from the World Health Organisation which estimate that approximately 38% of all murders of women worldwide are committed by intimate partners.<sup>22</sup> In Russia, this equates to approximately 14,000 women and 2,000 children being murdered annually as a result of family violence.<sup>23</sup> These figures will be a gross underestimation, because regressive attitudes towards domestic abuse mean that reporting family violence is discouraged as undermining family honour. Those victims who do report abuse often find 'extreme difficulty' in securing help from the police or state organisations as their calls are ignored or cases are not investigated.<sup>24</sup> It has been reported that police frequently tell victims that domestic abuse does not fall within their jurisdiction<sup>25</sup> and that victims should "come and see us after he's killed you".<sup>26</sup> This reflects an archaic English adage in which incidents were dismissed as "just a domestic", indicating that they could be resolved within the family without the intervention of the criminal justice system. As this article will go on to consider, in contrast to the position in England and Wales, the Russian response to domestic abuse is arguably characterised by a lack of government accountability to resolve the issues, minimal criminal and civil protection and fledgling investment into much needed support services<sup>27</sup>.

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<sup>18</sup> See Johnson, above n. 12.

<sup>19</sup> The Law Library of Congress, 'Russia: Decriminalisation of Domestic Violence' (2017). Available at: <https://www.loc.gov/law/help/domestic-violence/russia-decriminalization-domestic-violence.pdf> (accessed 05 January 2019).

<sup>20</sup> See ANNA – Centre for the Prevention of Violence, above n. 13.

<sup>21</sup> See Johnson, above n. 12.

<sup>22</sup> World Health Organisation, 'Violence against women: Factsheet' (2017). Available at: <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (accessed 05 January 2019).

<sup>23</sup> C. Mahserjian, 'We're All in this Together: A Global Comparison on Domestic Violence and the Means Necessary to Combat It' (2016) 79(1) *Albany Law Review*, 297- 324.

<sup>24</sup> See B. Chamusco, above n. 17.

<sup>25</sup> See ANNA – Centre for the Prevention of Violence, above n. 13.

<sup>26</sup> See B. Chamusco, above n. 17.

<sup>27</sup> See ANNA – Centre for the Prevention of Violence, above n.13 and B. Chamusco, above n. 17.

This article will compare the seemingly opposite approaches to domestic abuse adopted by England and Wales and Russia. The first part of the article will set out the legal and policy frameworks for responding to domestic abuse in England and Wales and the Russian Federation. The second part of the article will examine the effectiveness of both approaches in deterring domestic violence, providing adequate support for victims and meeting state obligations under international law. Throughout the article, suggestions will be made as to the ways in which victims of domestic abuse could be better supported.

### **The domestic abuse framework in England and Wales**

This section will consider the criminal, civil and family justice response to domestic abuse in England and Wales. The analysis reveals that a key feature of the English response is the sheer number of options available to protect victims or punish perpetrators. However, as this article will go on to explore, the volume of protective methods does not necessarily result in the most effective protection for victims. This is partly because of funding cuts which have resulted in reduced support services to underpin the legal and policy framework. In addition, as a result of the complexity of the English approach, the extent to which these options are fully understood and implemented by practitioners working in the area of domestic abuse is questionable.

#### **(a) The family law response**

In England and Wales, victims of domestic abuse can apply for protection in both the civil courts and the family courts. Victims can apply to the civil courts for an injunction under the Protection from Harassment Act 1997 (PHA 1997), however they will more commonly apply to the family courts for an injunctive order. This is because of the wider range of orders available and also because the issues surrounding an abusive relationship can rarely simply be dealt with by way of an injunctive order alone and other inter-related family proceedings may be required. For example, there may be property issues to resolve, arrangements to be made for children or, if the victim and the perpetrator are married, divorce proceedings to be considered. The different types of protective orders available through the family courts include: an application under Section 8 of the Children Act 1989 to regulate contact between the perpetrator and any relevant children; a non-molestation order to prohibit the perpetrator from contacting or harassing the victim; an occupation order<sup>28</sup> to regulate the occupation of the family home; a forced marriage protection order;<sup>29</sup> and a female genital mutilation protection order.<sup>30</sup> There may be a number of reasons why victims seek to pursue

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<sup>28</sup> See Part IV of the Family Law Act 1996.

<sup>29</sup> See section 63 of the Family Law Act 1996 as amended by the Forced Marriage (Civil Protection) Act 2007.

<sup>30</sup> See the Female Genital Mutilation Act 2003 as amended by the Serious Crime Act 2015.

family law proceedings over criminal prosecutions. These include the potential availability of legal aid to fund a legal representative, the lower standard of proof as civil cases only need to be proven on the 'balance of probabilities' rather than the criminal standard which is 'beyond reasonable doubt' and the fact that family law proceedings are heard in private judges' chambers rather than open court, thereby securing the parties' privacy.

(b) The civil law response

Victims can also seek compensation under the civil law through a personal injury claim for trespass to the person (assault/battery), a claim under the PHA 1997 and/or the Criminal Injuries Compensation Authority. The purpose of a civil claim is to compensate victims for the physical or psychological injuries they have suffered as a result of the offence. There are strict time limits to pursue claims and victims will require evidence (such as medical evidence and police reports) to support their claim. This can be difficult to obtain, particularly for victims who have never sought assistance. Victims will incur costs in pursuing a civil complaint. These expenses may include the cost of legal advice (legal aid is not available), fees to obtain evidence such as medical reports or police disclosure, and the court fee to issue and hear the claim. Many perpetrators do not have sufficient financial means to pay compensation awarded against them. Victims may therefore be successful in a civil case but never receive the compensation due to difficulties in enforcing the judgment.

(c) The criminal justice response

There are also criminal sanctions in place for individuals who perpetrate domestic abuse. Until recently, these criminal sanctions were largely limited to cases involving actual violence and where an offence was committed under the Offences against the Person Act 1861 (OAPA 1861). The non-fatal offences listed under the OAPA 1861 did capture some non-violent and otherwise abusive behaviour but this was very limited. For example, in *R v Ireland* repeated silent telephone calls were deemed to constitute an assault but only if it caused the victim to 'apprehend immediate and unlawful violence'.<sup>31</sup> Some fear of violence therefore still needed to be present and the behaviour alone was insufficient to constitute an offence under this Act. The approach under the OAPA 1861 also focuses on single incidents rather than a course of conduct which is more commonly associated with an abusive intimate relationship.

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<sup>31</sup> *R v Ireland* [1997] All ER 225 HL.

The PHA 1997 offers slightly more scope for criminal sanction, where the conduct is non-violent and involves a “course of conduct” rather than a single incident. For example, section 4A provides that:

A person (“A”) whose course of conduct—  
 (a) amounts to stalking, and  
 (b) either—  
     (i) causes another (“B”) to fear, on at least two occasions, that violence will be used against B, or  
     (ii) causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities,  
 is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

This potentially brings into scope domestic abuse cases where the victim has not suffered physical violence but has suffered psychological/emotional harm. There has been a reluctance on the part of the judiciary to interpret this section in a way that would include coercive and controlling behaviour in an intimate relationship, thereby limiting the scope of this section. For example, in *R v Widdows*, Pill LJ stated:

[Section 4A] is not normally appropriate for use as a means of criminalising conduct, not charged as violence, during incidents in a long and predominantly affectionate relationship in which both parties persisted and wanted to continue.<sup>32</sup>

Writers such as Stark<sup>33</sup> and Douglas<sup>34</sup> suggested that abusive relationships often involve “periods of violence interspersed with periods of non-violence”<sup>35</sup> and that the latter can form part of the controlling behaviour. At a Justice for Women event in 2018 on the subject of coercive control,<sup>36</sup> Walmsley-Johnson<sup>37</sup> explained that, in her own abusive relationship, the

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<sup>32</sup>*R v Widdows (David Roger)* [2011] EWCA Crim 1500 at [29].

<sup>33</sup> E. Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press: New York, 2007).

<sup>34</sup> H. Douglas, ‘Do we need a specific domestic violence offence?’ (2015) 39(2) *Melbourne University Law Review* 434, 440.

<sup>35</sup> *Ibid.*

<sup>36</sup> Justice for Women Conference ‘Coercive Control: Punishment and Resistance’ (November 2018) (unreported).

<sup>37</sup> H. Walmsley-Johnson, ‘Look What You Made Me Do: A Powerful Memoir of Coercive Control’ (MacMillan Publishers 2018).

periods of violence were interspersed with periods of grand generosity which were designed to make her feel grateful for the relationship and encourage her to remain, despite the violence that was certain to happen again. The *Widdows* case therefore highlights a lack of understanding on the part of the judiciary of the nature of domestic abuse and the psychological impact that the behaviour can have on a victim. Unfortunately, concerns about lack of understanding extend beyond the judiciary and this is an issue that will be explored later in this article.

Since 2007, it is also now also a criminal offence to breach a non-molestation order.<sup>38</sup> Prior to 2007, a power of arrest would need to be attached to an order and the onus would be on the victim to pursue contempt of court proceedings in the event of a breach. It could be argued that this relatively small change significantly increased the powers of the police to intervene in non-physical domestic abuse cases. To pursue criminal sanctions, the victim has to wait for the perpetrator to conduct themselves in a way that breaches the order. In the year ending December 2017, 3,154 individuals were convicted of breaching a non-molestation order.<sup>39</sup> It is difficult to compare this figure to the number of non-molestation orders actually being made because the data is gathered at different times in the year. For illustration purposes, in the year ending March 2018, 26,332 non-molestation orders had been granted.<sup>40</sup>

In the same year that breaches of non-molestation orders were criminalised, the Family Law Act 1996 was also amended to introduce civil protection orders against forced marriage.<sup>41</sup> This was an acknowledgement by the government that forced marriage is a form of domestic abuse. Due to concerns at the time that criminalisation would mean that 'victims would be reluctant to seek help and forced marriage would be driven underground',<sup>42</sup> forced marriage was not made a criminal offence in its own right until 2014.<sup>43</sup>

The police approach to domestic abuse was strengthened in 2014 with the introduction of the Domestic Violence Disclosure Scheme (DVDS), Domestic Violence Protection Orders (DVPO) and Domestic Violence Protection Notices (DVPN). The DVDS allows a person to ask to the police for information about whether their partner has a previous history of domestic violence and violent acts. The DVDS is not currently set out in legislation, although there

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<sup>38</sup> Family Law Act 1996, s. 42A (as amended by the Domestic Violence Crime and Victims Act 2004, s. 1)

<sup>39</sup> See Office for National Statistics, above n. 3.

<sup>40</sup> Ibid.

<sup>41</sup> Family Law Act 1996, s. 63A (as amended by the Forced Marriage (Civil Protection) Act 2007)

<sup>42</sup> R. Gaffney-Rhys, 'The Criminalisation of Forced Marriage in England and Wales: one year on' (2015) 45(11) *Family Law*, 1378 -1380.

<sup>43</sup> Anti-Social Behaviour, Crime and Policing Act 2014.

are plans to change this under the draft Domestic Abuse Bill.<sup>44</sup> It involves the police using their common law power of disclosure. When deciding to make a disclosure, however, the police must ensure they are complying with relevant legislation such as the Data Protection Act 2018, the General Data Protection Regulation and the Rehabilitation of Offenders Act 1974.

In contrast, the powers given to the police through DVPOs and DVPNs are set out in the Crime and Security Act 2010 (CSA 2010) and allow them to provide immediate protection to a victim where they are asked to intervene in a domestic violence incident. A DVPN is very similar to a non-molestation order, in that it contains provisions preventing the perpetrator from molesting the individual it is designed to protect, contacting the individual and/or returning to the family home. As with a non-molestation order, it can only be used where the victim and perpetrator are “associated persons”. Unlike non-molestation orders there must be actual violence or a threat of violence.<sup>45</sup> One advantage of the DVPN scheme over a non-molestation order is that it can be issued by the police immediately, without the need for the victim taking any action themselves to commence court proceedings. A person in alleged breach of a DVPN can be arrested by the police without warrant but must be brought before the magistrates’ court within 24 hours.<sup>46</sup>

Where the police issue a DVPN, they are obliged under section 27 of the CSA 2010 to make an application to the magistrates’ court for a DVPO within 48 hours. The justification for this time limit is because a DVPN restricts the alleged perpetrator’s freedom without any determinations being made about the alleged behaviour. It is comparable to a non-molestation order made on an *ex-parte* basis with the requirement of a return hearing in the near future to give the respondent opportunity to contest the order. The timescales are therefore in place to ensure compliance with the Human Rights Act 1998. However, the reality of situation may be that these timescales deter the police from using this type of notice. Police forces in England and Wales are often under resourced and over worked, with statistics for the year ending March 2018 showing numbers of police officers to be at a record low.<sup>47</sup> They may therefore be reluctant to utilise an order that obliges them to take further

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<sup>44</sup> HM Government, ‘Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill’ (2019), clause 53. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/772202/CS1218158068-Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CS1218158068-Web_Accessible.pdf)

<sup>45</sup> Crime and Security Act 2010, s. 24(2).

<sup>46</sup> *Ibid.* s. 26.

<sup>47</sup> Home Office, ‘Police Workforce, England and Wales, 31 March 2018’ (2018) Statistical Bulletin 11/18.

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steps within a short period of time. Instead, they may instead seek to rely on a more general Police Information Notice, which does not have the same subsequent obligations and importantly cannot be used as gateway evidence to allow the victim to secure legal aid in family law proceedings.

Where an application is made for a DVPO, the court can only make an order if it is satisfied on the balance of probabilities that the recipient of the order has been violent towards or has threatened violence towards an associated person and making the DVPO is necessary to protect that person from violence or a threat of violence by the recipient.<sup>48</sup> The DVPO can last for no fewer than 14 days and no more than 28 days from the day it is granted.<sup>49</sup> It is therefore not designed to be a long-term protective order but rather, to provide the victim with breathing space to make decisions about their next steps and seek support. As explained above, however, DVPNs and DVPOs only assist in cases where there has been actual violence or a threat of violence. This demonstrates the emphasis placed on actual violence by the criminal justice system and an ignorance of other types of domestic abuse. It should be noted that amendments have been proposed as part of the draft Domestic Abuse Bill. Part 3 of the draft Domestic Abuse Bill proposes replacing DVPNs and DVPOs with Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs). The proposed provisions widen the scope of individuals who can apply for an Order, will extend the potential duration of those orders and will make breach of an order a criminal offence. In many ways, this will make DAPOs similar in scope to non-molestation orders but with the added ability of the police being able to apply on a victim's behalf. There are no proposals in the draft Bill to repeal the provisions of the Family Law Act 1996 relating to non-molestation orders and it is therefore to be presumed that both orders will continue to exist as alternative options for victims of domestic abuse.

There was no specific domestic abuse offence covering non-physical forms of abuse until 2015 in England and Wales; the government sought to change this position by introducing a new offence of 'controlling or coercive behaviour in an intimate or family relationship',<sup>50</sup> under section 76 of the SCA 2015. The offence came into force on 29 December 2015. Under section 76:

A person A commits an offence if:

- (a) A repeatedly or continuously engages in behaviour towards another person B that is controlling or coercive;

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<sup>48</sup> Crime and Security Act 2010, s. 28.

<sup>49</sup> Ibid. s. 28(10).

<sup>50</sup> Serious Crime Act 2015, s. 76.

- (b) At the time of the behaviour, A and B are personally connected;
- (c) The behaviour has a serious effect on B; and
- (d) A knows or ought to know that the behaviour will have a serious effect on B.<sup>51</sup>

If a person is convicted of the offence, they face a maximum sentence of 5 years' imprisonment if convicted on indictment or of 12 months' imprisonment if it is dealt with as a summary offence.<sup>52</sup> In comparison to sentences available in a case involving physical violence, this is higher than the maximum sentence for common assault but lower than the maximum sentence available for assault occasioning bodily harm.<sup>53</sup>

The introduction of the s.76 offence corresponded with the proposed expansion of the cross-governmental definition of domestic abuse:

Any incident or pattern of incidents 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 sexuality. The abuse can encompass but is not limited to: psychological, physical, sexual, financial, emotional.<sup>54</sup>

The cross-governmental definition also defines controlling and coercive behaviour, something that was interestingly omitted of the SCA 2015 legislation.

'Controlling behaviour' is defined 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>55</sup>

'Coercive behaviour' is defined as:

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid. s. 76(11).

<sup>53</sup> Offences Against the Person Act 1861, s. 47.

<sup>54</sup> Home Office, New Definition of Domestic Violence (November 2012) Available at: <https://www.gov.uk/guidance/domestic-violence-and-abuse#domestic-violence-and-abuse-new-definition> (accessed 05 January 2019).

<sup>55</sup> Ibid.

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>56</sup>

This was a clear public acknowledgement by the UK government that domestic abuse extends beyond physical violence and that all forms of domestic abuse are equally harmful to victims. It also acknowledged that controlling and coercive behaviour is often at the centre of an abusive relationship. These concepts were addressed by writers such as Stark<sup>57</sup> and Williamson,<sup>58</sup> long before the introduction of the offence.

Based on statistics available, it might be argued that the approach of the police and the Crime Prosecution Service (CPS) has significantly improved. Recent data indicates that conviction rates for domestic-abuse related offences are at their highest level since 2010, with 76% of prosecutions resulting in a conviction.<sup>59</sup> This percentage needs to be considered in the context of the other data available. Out of the nearly 2 million adults who experienced domestic abuse within the last year, only 599,549 domestic-abuse related crimes were recorded by the police and only 225,714 arrests were made for domestic-abuse related offences.<sup>60</sup> Therefore, whilst the criminal justice approach is statistically the best it has been in eight years, more can and should still be done.

Acknowledging this issue, the UK government has demonstrated a commitment to improving the response of the criminal justice system to domestic abuse. This was demonstrated in the publication of the draft Domestic Abuse Bill<sup>61</sup> with many of the provisions focusing on improving the criminal justice response to this issue. As explained above, the draft Bill even proposes expanding the possible criminal approach with the introduction of a new criminal order, a 'Domestic Abuse Protection Order' (DAPO).

In relation to criminal sentencing, a new domestic abuse sentencing guideline was released in February 2018<sup>62</sup>. The starting point in the guidelines is that the domestic nature of the

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<sup>56</sup> Ibid.

<sup>57</sup> See E. Stark, above n. 32.

<sup>58</sup> E. Williamson, 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control Violence against Women' (2010) 16(2) *Journal of Violence against Women*, 1412-1423.

<sup>59</sup> See Office for National Statistics, above n. 3

<sup>60</sup> Ibid.

<sup>61</sup> HM Government, 'Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill' (2019). Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/772202/CS1218158068-Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CS1218158068-Web_Accessible.pdf)

<sup>62</sup> Sentencing Council, Domestic Abuse Sentencing Guideline (2018) Available at: <https://www.sentencingcouncil.org.uk/publications/item/overarching-principles-domestic-abuse-definitive-guideline/> (accessed on 19 February 2019)

offence makes the offending more serious because it 'represents a violation of the trust and security that normally exists between people in an intimate or family relationship'.<sup>63</sup> It is also recognised that cases concerning 'serious violence' or where severe emotional harm is caused, will usually warrant a custodial sentence. The guidelines state that the victim should not be responsible for the sentence imposed as this may lead to victims being threatened by perpetrators if it is understood that they can impact the sentence awarded.

In addition to the overarching principles stated above which assess the seriousness of a domestic abuse offence generally, the guidelines provide comprehensive details of factors which may be viewed as aggravating or mitigating factors. Aggravating factors include where the victim is particularly vulnerable, where the perpetrator has attempted to prevent the victim from reporting the incident, where there is a proven history of violence or threats and where there is a direct or indirect effect on children. Either party can ask the court to consider the interests of children in sentencing. This recognises both that further violence could be harmful to children and that longer custodial sentences can disrupt the perpetrator's relationship with their children. In contrast, mitigating factors may be relied on where there is evidence of 'genuine recognition' of the need to change and evidence of obtaining help or treatment to effect that change. This article will go on to consider Domestic Violence Perpetrator Programmes which aim to achieve a behavioural change in perpetrators.

As this section has considered, on the face of it, England and Wales has adopted a comprehensive approach to regulating domestic abuse. It is an approach which increasingly draws on the criminal justice system to deter offenders, punish perpetrators and provide protection for victims. For reasons this article will go on to consider, however, it is not necessarily the case that criminalisation is the most effective route to combatting domestic abuse. This is ostensibly because criminalisation can lead to victims becoming passive bystanders in the process and because funding cuts has led to difficulties in effectively implementing legislation.

The next section will set out the framework regulating domestic abuse in Russia.

### **The domestic abuse framework in the Russian Federation**

This section will set out the legal and policy framework regulating domestic abuse in Russia. The approach taken in Russia will be contrasted with the position in England and Wales. The analysis reveals that the Russian response is characterised by institutional passivity to domestic abuse, a lack of legal provisions in relation to core domestic abuse offences and draconian provisions

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<sup>63</sup> Ibid, 3.

which make it very difficult for victims to achieve access to justice and are in urgent need of review.

Similarly to England and Wales, domestic abuse is not recognised as a discrete criminal offence but rather physical violence can be prosecuted as a crime against the person, under Part VII of the Russian Criminal Code. In contrast to England and Wales, however, there is no legislative recognition of, or protection for, victims of non-physical forms of domestic abuse. A working group comprised of non-government organisations and representatives of the State was convened in 2012 to develop legislation aimed at protecting victims of abuse. The resulting draft law 'On Prevention and Response to Domestic Violence' has not been passed to date. As the current law stands, the following offences are likely to be relevant in a case of physical abuse:

- Article 112 (intentional infliction of injury to health of average gravity)
- Article 115 (intentional infliction of light injury)
- Article 116 (battery and aggravated battery)
- Article 117 (torture, the causing of physical and mental suffering by means of the systematic infliction of beatings or other forcible actions)
- Article 119 (threat of murder or infliction of grave injury to health)

In contrast to England and Wales where many of the criminal offences (such as coercive and controlling behaviour) acknowledge the intimate relationship between the parties, none of the offences in Russia take into account the nature of the relationship between the victim and the perpetrator. In addition, this is unlikely to be viewed in determining the seriousness of an offence for the purposes of sentencing. It is only under Article 117 that the circumstances would be regarded as aggravating if the victim was either a minor or 'materially or otherwise dependent on the guilty person'. This will not be a feature of all intimate relationships involving domestic abuse. As this article has examined, this can be contrasted to the position in England and Wales, where the Sentencing Council has expressly stated that the domestic nature of the offence makes the offending more serious because of the relationship of trust and security between the parties.

There have been a series of threats to the legal provisions which can be applied to domestic abuse cases in recent years. This can be considered in the treatment of Article 116 of the Criminal Code (battery and aggravated battery). Prior to 2015, a perpetrator of domestic abuse could be prosecuted under Article 116(1) where their behaviour amounted to 'battery or similar violent actions, which cause physical pain but have not amounted to light injury' or aggravated assault under Article 116(2) if the battery was committed through 'ruffian-like motives'. The offence of battery was punishable as a criminal offence by a fine of up to 40,000 rubles

(approximately £455), by a three-month detention or six-month period of mandatory work with reduced income at a place designated by the authorities. This could be compared with the offence of common assault in England where the maximum sentence for assault carries a maximum penalty of six months' imprisonment and/or a fine whereas assault occasioning actual bodily harm carries a maximum penalty on indictment of five years' imprisonment and/or a fine. In Russia, the more serious offence of aggravated battery was punishable by a compulsory work term of up to 360 hours, corrective labour for a term of up to one year, a restriction of liberty for a term of up to two years, compulsory labour for a term of up to two years by an arrest for a term of up to six months, or by deprivation of liberty for a term of up to two years.

In contrast to England and Wales where the focus has been on creating new statutory offences to protect victims of domestic abuse, in Russia a bill was introduced by the Supreme Court of the Russian Federation in 2015 to decriminalise non-aggravated battery. The drafters of the Bill claimed this was part of efforts to 'humanise and liberalise' Russian criminal law on the basis that imprisoning men who had just been 'mildly abusive' could leave households without breadwinners and destroy families.<sup>64</sup> It was estimated that decriminalising this offence (together with the Article 119 offence of threatening murder or serious bodily harm and the Article 157 offence of maliciously evading the payment of funds for the maintenance of children or disabled parents) would lead to 200,000 fewer criminal prosecutions annually.<sup>65</sup> Initially, the amendment did not distinguish between offences committed under Article 116 by strangers or by family members. This prompted outrage by conservative forces who felt that this was discriminatory and permitted further intervention into family matters.<sup>66</sup> Subsequently, the bill was amended to state that 'battery between close persons' would remain a criminal offence.

In January 2017, a further amendment was passed (by an overwhelming majority of 383:3) which removed battery *of close persons* that resulted in physical pain but did not inflict substantial bodily harm or other consequences under Article 116 as a criminal offence. The new law removed offences of battery against a family member which does not result in significant bodily injury and instead made it an administrative offence which attracts a 30,000 ruble (approximately £340) fine, a period of up to 15 days' administrative arrest or up to 120 hours of community service. Repeated assaults against family members, defined as more than one offence per year, and assaults which result in serious bodily harm, remain a criminal offence under Article 116. It has been reported that a spokesperson for the Russian President said that

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<sup>64</sup> Decision of the Plenary Meeting of the Supreme Court of the Russian Federation No. 37 of July 31, 2015. Available at: [http://www.supcourt.ru/Show\\_pdf.php?Id=10240](http://www.supcourt.ru/Show_pdf.php?Id=10240) (accessed 05 January 2019).

<sup>65</sup> See The Law Library of Congress, above n. 19.

<sup>66</sup> Ibid.

it would not be appropriate 'to identify domestic violence with some insignificant manifestations of abuse'.<sup>67</sup> As a result of these amendments, the potential for criminal convictions for domestic abuse offences has been considerably curtailed.

Assuming an offence falls within these restricted provisions, the next difficulty survivors experience is the lack of support from the police and the state to pursue convictions. It is reported that Russian police often rely on the right to privacy enshrined in the Russian Constitution to justify their inaction if the abuser refuses entry into the family property where the offence has been perpetrated.<sup>68</sup> According to statistics compiled by the ANNA Centre for the Prevention of Violence, 72% of female victims who sought assistance from a helpline for survivors of abuse did not then go on to report the violence to the police.<sup>69</sup> 80% of those women who had reported the incident, were unsatisfied with the police response.<sup>70</sup> The Human Rights Watch note that in a typical case, victims can report abusive behaviours for months or even years without the police speaking to an abuser, making a formal record of the complaint or initiating a case.<sup>71</sup> As this article will go on to consider, this can be contrasted with the position in England and Wales where police officers receive specialist training on domestic abuse offences.

It is also reported that many perpetrators successfully allege provocation or self-defence to policy in order to justify their behaviours. Johnson's research, for example, found that provocation can encompass a wide variety of behaviours including 'earning too much money, wearing the wrong clothes, being unfaithful, taunting the abuser, nagging and complaining about bad behaviour'.<sup>72</sup> The Human Rights Watch reported one occasion where a police officer told the victim 'it is no accident he is beating you, you must be so hard to live with'.<sup>73</sup> As a result, many offences do not result in criminal sanctions being pursued. In contrast, in England and Wales provocation only exists as a defence to domestic abuse offences in very limited circumstance and can rarely be argued in mitigation.

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<sup>67</sup> Ibid.

<sup>68</sup> See Johnson, above n. 12.

<sup>69</sup> See ANNA – Centre for the Prevention of Violence, above n. 13.

<sup>70</sup> Ibid.

<sup>71</sup> See Johnson, above n. 12.

<sup>72</sup> Ibid.

<sup>73</sup> Editorial, 'Russia: Bill to Decriminalize Domestic Violence: Parliament Should Reject Measure that Harms Families' *Human Rights Watch* (23 January 2017). Available at: <https://www.hrw.org/news/2017/01/23/russia-bill-decriminalize-domestic-violence> (accessed 05 January 2018).

Under article 20 of the Criminal Procedural Code, if the parties reconcile (either voluntarily or through coercion by the perpetrator or wider family/community members) the Criminal Code requires any criminal charges to be dropped.<sup>74</sup> This is the position for all domestic abuse cases, with the exception of rape and cases which involve 'violent acts of sexual character'.<sup>75</sup> It has been reported that police have been known to encourage victims to reconcile with their attackers to save time and effort in conducting investigations.<sup>76</sup> Inevitably, at the prospect of a conviction some perpetrators may display remorse and seek forgiveness from the victim. Women who feel guilty and believe that violence was an isolated incident which will not happen again may withdraw the complaint and agree to reconciliation. As such, this provision can be manipulated to allow perpetrators to commit further acts of emotional abuse whilst simultaneously creating a culture of impunity for offenders. It has been reported that some women are forced by their abusers to pay the fines awarded to them as a punishment for reporting the offence, or that unpaid fines are taken from shared bank accounts.<sup>77</sup> In England and Wales, whilst reconciliation does not automatically lead to cases being dropped, it can increase the likelihood of victims deciding not to give statements which in turn may make a prosecution more difficult to pursue, depending on the availability of other evidence.

In respect of charges under Article 115 or Article 116, prosecutions are usually dealt with as private prosecutions rather than state-directed prosecutions. The Criminal Procedural Code states that crimes under article 115 and 116 'are . . . cases of private prosecution, [and] are initiated only upon application from the victim or . . . his legal representative.' This means that the onus is on the victim to start the proceedings, gather the evidence and present the case without any knowledge of the legal process, evidential requirements or support from a publicly-funded legal adviser as there is no legal aid available in relation to domestic abuse cases. Of course, it is open to a victim who is willing and able to do so, to incur the cost of paying for an investigator and prosecutor. This is likely to come at a considerable expense and, as this article will go on to consider, there are few legal practitioners specialising in domestic abuse cases.

The criminal justice response is particularly important in Russia because there is next to no civil response. Unlike in England and Wales, there is no injunctive protection available to victims through the family courts nor is there any public funding to support a victim in receiving advice about the options available to them to leave the relationship or to prevent the perpetrator from contacting them or returning to the family home. As such, it is commonplace for victims and

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<sup>74</sup> See article 20 of the Criminal Procedural Code which states that "cases . . . are subject to termination in connection with . . . reconciliation".

<sup>75</sup> See Mahserjian, above n. 23.

<sup>76</sup> See B. Chamusco, above n. 17.

<sup>77</sup> See Johnson, above n. 12.

perpetrators to continue living together following an incident of violence. Victims who live in state-owned accommodation who wish to see their abusers removed from the home are required to apply under housing law for an order of eviction.<sup>78</sup> No official court statistics exist regarding the utility of this court application however it is understood that courts grant this remedy sparingly.<sup>79</sup> There is no direct provision to evict a tenant who privately rents accommodation however Article 25 of the Constitutional provision on housing may be used in cases where a tenant has used violence against other residents.<sup>80</sup>

Similarly to the position in England and Wales, there is scope for women to secure compensation from their partners for under Article 151 of the Civil Code. This provides that victims can request compensation where the perpetrator has inflicted 'moral harm' on the victim. In deciding what level of compensation to award, the courts will take into account 'the abuser's culpability, the extent of the harm suffered and other circumstances worthy of attention'. Of course, it also remains open to the victim to seek a divorce and apply for the division of financial assets through the family courts. In relation to housing, family and civil claims however, women are expected to navigate an unfamiliar legal process without support from a publicly funded lawyer or a judiciary which is sympathetic to their experiences.

As these access to justice barriers attest, the policy framework in relation to domestic abuse in Russia is much less interventionist and comprehensive than in England and Wales with few funded agencies or services to support an effective response to domestic abuse. The Committee on the Elimination of Discrimination against Women reported in 2015 that women face too many barriers when they seek justice, including social stigma and negative stereotypes, lack of awareness of their rights and a failure on the part of law enforcement officials to strictly apply international legislation prohibiting gender-based discrimination against women.<sup>81</sup>

### ***Effectiveness of the approaches to domestic abuse***

The next section considers the effectiveness of the approaches adopted in England and Wales and Russia in ensuring compliance with international obligations, deterring violence and ensuring access to justice for the victim.

#### ***(a) Compliance with international obligations***

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<sup>78</sup> See, for example, an order for 'eviction without the granting of alternative accommodation' under Articles 53 and 98 of the Housing Code.

<sup>79</sup> See Human Rights Watch, above n. 73. See also Johnson, above n. 12.

<sup>80</sup> See Johnson, above n. 12.

<sup>81</sup> See CEDAW, above n. 15.

This section will consider England's and Russia's compliance with key Conventions in the area of domestic abuse; the Convention on the Elimination of All Forms of Discrimination against Women and the European Convention on Human Rights. Compliance with the Istanbul Convention is also considered although it is noted that Russia is not a signatory to this Convention. The authors argue that Russia's passive approach to domestic abuse arguably creates a condition which allows domestic crimes to continue unrelentingly. This is inconsistent with the requirements of the Conventions to which it is a signatory. In contrast, whilst England and Wales are prima facie compliant with their international obligations, there are steps they can take to improve their international standing in this important area. The authors argue that this will require England to implement the Istanbul Convention and improve public funding to support access to justice for victims.

Both Russia and England are signatories to a range of international instruments which seek to deter domestic abuse, provide protection for survivors and punish perpetrators. Unlike England and Wales, which requires international legislation to be formally ratified by parliament and incorporated domestically through implementing legislation in order to become binding, Article 17 of the Russian Constitution provides that all persons shall have 'all rights and freedoms in accordance with generally respected principles and norms of international law'. In cases of conflict between domestic and international provisions, international law takes precedence. In Russia, there is therefore no need for implementing legislation.

(i) The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The first instrument to which both Russia and England are signatories is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which together with its Optional Protocol was ratified by Russia in 1981 and the UK in 1986. CEDAW imposes affirmative obligations on signatory states, including the requirement to promote equality of men and women in legal systems, abolish all discriminatory laws and adopt appropriate laws prohibiting discrimination against women; establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and ensure elimination of all acts of discrimination against women by persons, organisations or enterprises.<sup>82</sup> Compliance with these requirements is achieved through the "due diligence" standard, which requires

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<sup>82</sup> See the full text of the Convention available at: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (accessed 05 January 2019).

governments to take positive action and ensures they can be held account for tacitly condoning violence where they make little or no effort to prevent it. The due diligence requirement emerged from the case of *Velasquez Rodriguez v. Honduras*<sup>83</sup> which found that an illegal act 'which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it'.<sup>84</sup>

Violence against women is not directly referred to in the text of the original Convention, General Recommendation No. 19 which was adopted in 1992, states that the definition of discrimination in Article I includes 'violence directed against a woman because she is a woman or that affects women disproportionately'.<sup>85</sup> As the statistics examined above demonstrated, in both England and Russia, domestic abuse is disproportionately perpetrated against women by men and would therefore fall under the scope of CEDAW.

There is some recognition of the need for equality and freedom from discrimination within Russian domestic law. This is contained in the Constitution of the Russian Federation which guarantees equal protection for the sexes under the law. Article 19 of the Constitution states that 'man and woman shall enjoy rights and freedoms and have equal possibilities to exercise them'. As has been considered above, however, the reality is that this provision is often frustrated by the criminal justice response to domestic abuse which is fraught with difficulties, making convictions hard to secure and access to justice for victims a near impossibility.

The failure to implement effective enforcement responses, adequate measures of protection and to prosecute perpetrators in Russia arguably allows domestic abuse to continue unabated. A specific example of failure to carry out due diligence is in relation to training law enforcement officers regarding domestic abuse cases and ensuring they actively investigate cases. To comply with their obligations, the police should respond to every request for assistance, assign equal protection to calls concerning abuse by family members as to calls regarding abuse perpetrated by strangers, provide

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<sup>83</sup> *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

<sup>84</sup> *Ibid.* at [172].

<sup>85</sup> CEDAW, General Recommendation No. 19 (11th Session, 1992). Available at:

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 06 January 2019).

protection to victims of violence and arrange for the perpetrator to be removed from the home if the threat of further violence remains.<sup>86</sup> The evidence considered in this article so far, suggests that the law enforcement response in Russia falls short at every stage. In contrast, in England and Wales, many police constabularies have specialist domestic abuse officers and there is clear police guidance in place setting out the approach that officers should take in domestic abuse cases.<sup>87</sup> Further, in England and Wales multiple options are available to secure the immediate protection of the victim including DVPOs/DVPNs and Police Information Notices. Although, as addressed above, their inclination to exercise any of these options may be impacted by workload and resources issues.

The difficulties that domestic abuse victims face in securing access to justice in Russia have been recognised by the CEDAW Committee in their 2015 review. The review acknowledged the high prevalence of domestic and sexual violence against women and criticised the absence of legislation to prevent and address violence against women, including domestic abuse and the state services to provide assistance to victims.<sup>88</sup> The Committee recognised that there was insufficient knowledge within the judiciary and the general public about the rights conferred under CEDAW and the concept of substantive equality of women and men. The Committee made a series of recommendations to the Russian government, including:

- (a) Efforts should be made to ensure that the Convention, the Optional Protocol and the Committee's general recommendations are understood and applied by the government, including the judiciary, as a framework for laws, court decisions and policies on gender equality and the advancement of women;
- (b) Enhance women's awareness of their rights and the remedies available to them under the Convention and national legislation;
- (c) Ensure the strict application by law enforcement officials of legislation prohibiting gender-based discrimination, including through systematic training of judges, prosecutors and lawyers;

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<sup>86</sup> L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence and International Legal Minimums of Protection' (2010) 8(2) *Northwestern Journal of International Human Rights*, Article 3.

<sup>87</sup> Authorised Professional Practice (APP) on Domestic Abuse. Available at: <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/> (accessed 05 January 2019).

<sup>88</sup> See CEDAW, above n. 15.

- (d) Collect statistics in relation to gender and abuse which are disaggregated by age, nationality and relationship between the victim and the perpetrator;
- (e) Adopt comprehensive legislation to prevent and address violence against women, including domestic violence and ensure that women and girls who are victims of violence have access to immediate means of redress and protection and that perpetrators are prosecuted and adequately punished; and
- (f) Provide adequate assistance and protection to women who are victims of violence, by establishing shelters in both urban and rural areas and enhancing cooperation with non-governmental organisations providing assistance to victims.<sup>89</sup>

As Mahserjian notes, the United Nations Universal Human Rights Index have made repeated recommendations to the Russian government to provide a statutory definition of domestic violence and more consistently prosecute abusers.<sup>90</sup> However, as the analysis of the current position in Russia attests, there is no evidence that Russia have acknowledged any of these recommendations and to date, there have been no proposals to implement a definition of domestic violence or recognise it as a discrete offence. In contrast, the amendments to Article 116 mean that victims have fewer legal remedies than ever before. The Secretary General of the Council of Europe acknowledged that reducing battery within the family from a criminal to an administrative offence, with weaker sanctions for offenders, would be a 'clear sign of regression' and would 'strike a blow to global efforts to eradicate domestic violence'.<sup>91</sup> Similarly, the Human Rights Watch described the amendment as 'dangerous and incompatible with Russia's international human rights obligations'.<sup>92</sup> Russia's unwillingness to implement any recommendations may result from the fact that to date there have been no legal consequences for their failure to comply with the recommendations or their overall violations of CEDAW. Instead, violating CEDAW merely opens up Russia to liability for individuals or other States to report them.<sup>93</sup>

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<sup>89</sup> Ibid.

<sup>90</sup> See Mahserjian, above n. 23.

<sup>91</sup> As reported in Human Rights Watch, Rebecca Hendin, "I could kill you and no one would stop me" weak state response to Domestic Violence in Russia' *Human Rights Watch* (25 October 2018). Available at: <https://www.hrw.org/report/2018/10/25/i-could-kill-you-and-no-one-would-stop-me/weak-state-response-domestic-violence> (accessed 05 January 2019).

<sup>92</sup> Editorial, 'Russia: Bill to Decriminalize Domestic Violence: Parliament Should Reject Measure that Harms Families' *Human Rights Watch* (23 January 2017). Available at: <https://www.hrw.org/news/2017/01/23/russia-bill-decriminalize-domestic-violence> (accessed 05 January 2018).

<sup>93</sup> See Mahserjian, above n. 23.

The UK is not exempt from criticism in relation to compliance with its obligations under CEDAW regarding its approach to domestic abuse. In 2013, the CEDAW Committee expressed concern that the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO),<sup>94</sup> and in particular the requirement to provide gateway evidence to demonstrate that the applicant has been a victim of domestic violence, would 'unduly restrict' women's access to family legal aid. There was a concern that this could push women towards informal arbitration systems, including faith-based tribunals, which do not comply with CEDAW requirements.<sup>95</sup> The Committee therefore recommended that the UK take steps to ensure survivors of violence could access courts and tribunals effectively. The UK have since taken steps to broaden the scope of acceptable gateway evidence, however it is arguable that such changes were not affected directly as a result of the Committee recommendations. Rather this was the result of Rights of Women bringing a successful claim against The Lord Chancellor and the Secretary of State for Justice on the basis that the prescribed forms of evidence did not cater for victims of financial abuse. In that case it was also determined that the requirement for some forms of evidence to be dated within the 24 month period before any application for legal aid was invalid.<sup>96</sup>

Victims of domestic abuse are still in theory eligible for legal aid if they are able to secure the necessary gateway evidence. In practice however, the financial position of many victims means that they do not satisfy the strict means test but are still unable to afford to pay a solicitor privately. This leaves victims vulnerable to representing themselves in court proceedings and potentially being cross-examined by an abuser. Although steps have been taken to ensure this cannot take place in criminal courts, there is currently no provision preventing this in the family courts and this can act as a further opportunity for perpetrators to exercise control over their victims.

The case of *JY v RY* demonstrates the difficulties this can cause.<sup>97</sup> The case concerned a father's (JY) application for contact with his eleven year-old daughter. It was heard at the Family Court at Middlesbrough before District Judge Simon Read. Ten serious

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<sup>94</sup> For an overview of LASPO 2012 and its effect on family matters, see K. Richardson & A. Speed, 'Restrictions on legal aid in family law cases in England and Wales: creating a necessary barrier to public funding or simply increasing the burden on the family courts?' (2019) *Journal of Social Welfare and Family Law* (in press).

<sup>95</sup> Equality and Human Rights Commission, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: understanding what governments need to do to advance women's rights in Great Britain' (2014). Available at: [https://www.equalityhumanrights.com/sites/default/files/cedaw\\_concluding\\_observations\\_251114\\_1.pdf](https://www.equalityhumanrights.com/sites/default/files/cedaw_concluding_observations_251114_1.pdf) (accessed 05 January 2019).

<sup>96</sup> *R (Rights of Women) v The Lord Chancellor and the Secretary of State for Justice* [2016] EWCA Civ 91.

<sup>97</sup> [2018] EWFC B16.

allegations had been raised by the child's mother (RY) as to why contact should be restricted, including allegations of physical, verbal and sexual assault. Some of the allegations were proved following a fact-find hearing however RY felt unable to be cross-examined in relation to the sexual abuse. As such, she asked the judge to form his judgment based on the evidence he had heard so far. At the end of the fact-find hearing the judge made a series of critical observations about the difficulties caused by the parties appearing in person. These are set out in full at paragraph 35 of the judgment, however some of the more poignant observations for the purposes of this article are listed below:

- a) *Neither parent could afford a lawyer and neither was eligible for Legal Aid. I found this surprising in the mother's case in particular, given that I was told that she was dependent entirely on state benefits and yet failed the means test, despite the nature of the case.*
- b) *Having professional representation and advice will tend to support and help an alleged victim of domestic abuse in a moral and practical way that goes far beyond what a voluntary support agency can or should offer. It can fortify a witness before questions are asked, be a reassuring presence during that process, and debrief them afterwards. It can reassure them as to outcomes, and act as a safeguard during what may be a hugely bewildering and scary experience. Its presence is the mark of a civilised society and a mature and balanced legal system... No English or Welsh criminal court would proceed as this court had to, in the absence of representation for parties dealing with such grave allegations.*
- c) *As is his right, the father was not prepared to make any admissions. Yet upon hearing the evidence I later found him manifestly to be lying on the first 2 allegations.... In this case, pre-trial negotiation between advocates might have obviated the need for a fact-finding evidential hearing entirely, had sufficient admissions been made upon legal advice.*
- d) *I therefore think there is a very strong likelihood that the outcome of the fact finding would have been different, and most probably a truer reflection of what really happened, had the parents been represented. It would surely have concluded sooner, more fairly, and at far less expense to the public purse than ultimately was the case, with two wasted days at Court. It may also have been less painful for the participants.*

Despite amendments to the acceptable gateway evidence, the position remains that many survivors of abuse in England experience discrimination based on the fact that they are unable to secure legal representation in domestic abuse proceedings. This is an improvement on the position in Russia, where legal aid is not available for domestic abuse cases at all, it is still a significant access to justice barrier. Following concerns about this being raised during the 2018 Legal Aid Review, the Legal Aid Agency have now pledged to review the legal aid means test by the summer of 2020.<sup>98</sup> The authors recommend that the stringent legal aid means test must be urgently revised to make it fit for purpose.<sup>99</sup>

A resolution to the issue of direct cross-examination in England and Wales has been recommended under clause 50 of the draft Domestic Abuse Bill, which proposes that a new Part 4B be inserted into the Matrimonial and Family Proceedings Act 1984. Those draft provisions, if implemented, will prohibit direct cross-examination by a party to proceedings who has been convicted, given a caution for or charged with an offence perpetrated against the other party to the proceedings. It will also prohibit direct cross-examination where there is an on notice injunction in place protecting one party to proceedings against the other. In all other cases the court retains discretion to make a direction prohibiting cross-examination. Both parties' Article 6 rights are protected under the proposals through clause 31V. This clause directs that:

*(5) The court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.*

*(6) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.*

Provisions about the payment of costs for that 'qualified legal representative' will need to be dealt with by statutory instrument and the funding position therefore remains uncertain.

The Committee were also concerned about the prevalence of violence against black and minority ethnic women, including honour violence and FGM.<sup>100</sup> The report noted that

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<sup>98</sup> Ministry of Justice, 'Legal Support: The Way Ahead' (2019). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777036/legal-support-the-way-ahead.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf)

<sup>99</sup> See Richardson & Speed, above n. 91.

<sup>100</sup> See Equality and Human Rights Commission, above n. 95, para 35 and para 37

FGM is practised in communities in the UK but there have still been no convictions under Female Genital Mutilation Act 2003 (FGMA 2003). The Committee recommended that the UK government take steps to ensure existing laws against FGM are put into practice and provide the CPS with the necessary support to prosecute perpetrators of FGM. Following the recommendations, there have been considerable legislative developments in relation to FGM. These include introducing FGM protection orders to provide civil injunctive protection to potential victims.<sup>101</sup> Since FGM protection orders came into force in July 2015, there have been 256 applications and 248 orders granted.<sup>102</sup> The SCA 2015 has attempted to increase the prospects of a conviction by broadening the scope of the offences and providing support in place to increase the likelihood of disclosures. Under the 2003 Act it is an offence for any person in England, Wales or Northern Ireland (regardless of their nationality or residence status) to perform FGM, or to assist a girl to carry out FGM on herself. It is also an offence to assist (from England, Wales or Northern Ireland) a non-UK national or resident to carry out FGM outside the UK on a UK national or permanent UK resident. Section 4 extends sections 1 to 3 to extra-territorial acts.<sup>103</sup> To support potential prosecutions, victims of FGM offences are also granted lifelong anonymity.<sup>104</sup> A new mandatory reporting duty has also been implemented requiring specified regulated professionals in England and Wales to make a report to the police. The duty applies where, in the course of their professional duties, a professional discovers that FGM appears to have been carried out on a girl aged under 18.<sup>105</sup> Despite these efforts, however, there has only been one successful criminal prosecution for an FGM offence.

In relation to other forms of honour violence, the CEDAW Committee recommended that the UK government criminalise forced marriage and take steps to ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (more commonly referred to as the Istanbul Convention), which the

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<sup>101</sup> See Schedule 2 of the Female Genital Mutilation Act 2003.

<sup>102</sup> Ministry of Justice and National Statistics, 'Family Court Statistics Quarterly, England and Wales, April to June 2018' (2018). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/752737/FSQ\\_April\\_to\\_June\\_2018\\_-\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752737/FSQ_April_to_June_2018_-_FINAL.pdf) (accessed 06 January 2019).

<sup>103</sup> See sections 1- 4 of the Female Genital Mutilation Act 2003. In addition, section 72 of the 2015 Act inserts new section 3A into the 2003 Act; this creates a new offence of failing to protect a girl from FGM. This will mean that if an offence of FGM is committed against a girl under the age of 16, each person who is responsible for the girl at the time of FGM occurred will be liable under this new offence.

<sup>104</sup> See section 71 of the Serious Crime Act 2015 inserts a new section x into the Female Genital Mutilation Act 2003. This prohibits the publication of any information that would be likely to lead to the identification of a person against whom an FGM offence is alleged to have been committed.

<sup>105</sup> Section 74 inserts new section 5B into the 2003 Act.

UK signed in June 2012.<sup>106</sup> The steps that the UK have taken to prevent forced marriage and implement the first recommendation of the CEDAW committee were outlined earlier in this article. These include criminalisation and the introduction of protective orders. These provisions have been met with some success in tackling violence against women. Over the last year, 247 forced marriage protection orders have been granted (in all cases the applicants were women)<sup>107</sup> and two convictions for forced marriage have taken place.<sup>108</sup> The delays in ratifying the Istanbul Convention are examined further below.

## (ii) The Istanbul Convention

The delays to ratifying the Istanbul Convention appear to be largely caused by a failure of the devolved administrations to take the required steps to enable ratification. In February 2015, the Joint Committee on Human Rights published a report on the UK's progress towards ratification of the Convention. The report called on the government 'to prioritise ratification of the Istanbul Convention by putting the final legislative changes required before this Parliament'.<sup>109</sup> The report stated:

*We are concerned that the delay in ratifying the Istanbul Convention could harm the UK's international reputation as a world leader in combating violence against women and girls. We acknowledge that, if the devolved administrations need to take further legislative steps, there may be a delay in ratifying the Istanbul Convention. We recommend, however, that the Government bring*

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<sup>106</sup> The Convention can be accessed in full at <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>. The three key themes of the Convention are prevention, protection and prosecution. In relation to protection, signatories are obliged to ensure victims are able to access clear and accessible information about support available to them. Member states are also obliged to ensure free of charge 24/7 helplines to offer immediate expert advice and specialised support services. Regarding prevention, signatories must promote awareness through awareness raising campaigns and education at all levels to ensure that the general public are informed of the various forms of violence that women experience on a regular basis as well as of the different manifestations of domestic violence. Finally, states must ensure systems are in place to ensure perpetrators are prosecuted for crimes committed. This requires states to give power to the police, ensure effective and timely prosecutions and immediate protection for victims.

<sup>107</sup> Ministry of Justice and National Statistics 'Family Court Statistics Quarterly: Annual 2017 including October to December 2017' (2018). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/695363/family-court-stats-oct-dec-2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695363/family-court-stats-oct-dec-2017.pdf) (accessed 06 January 2019).

<sup>108</sup> Editorial, 'Second forced marriage conviction within a week' *Family Law Week* (29 May 2018). Available at: <http://www.familylawweek.co.uk/site.aspx?i=ed190141> (accessed 06 January 2018).

<sup>109</sup> House of Commons' Briefing Paper Number 7829 'UK Policy on Ratifying the Istanbul Convention on Preventing Violence against Women (House of Commons Library 21 February 2017) Available at: <http://researchbriefings.files.parliament.uk/documents/CBP-7829/CBP-7829.pdf> (accessed 06 January 2019).

*forward the necessary primary legislation regarding jurisdiction before the end of this Parliament, and that the devolved administrations also bring forward any legislative measures that they consider to be necessary, so that the goal of ratifying the Istanbul Convention can be given the priority it deserves.*

In its March 2015 response, the then Government said it was 'committed to ratifying' the Convention<sup>110</sup> Subsequently, the Government has proposed the Domestic Abuse Bill, which together with the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017 should ratify the Istanbul Convention into domestic law. At present, however, the preoccupation with Brexit means that it is not clear when the Domestic Abuse Bill will become law.

Notwithstanding this delay, the Government has taken steps to ensure its compliance with the Convention. As outlined above, at a domestic level, there has been growing recognition of the different forms that domestic abuse takes. This is evidenced through the introduction of the Modern Slavery Act 2015 which seeks to protect victims of human trafficking and the SCA 2015 which criminalised coercive and controlling behaviour<sup>111</sup>. In order to ensure that domestic abuse is properly understood, there have also been proposals for a statutory definition of domestic abuse, in line with the requirements of the Convention, as explored above.<sup>112</sup>

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<sup>110</sup> The response stated "The UK has some of the most robust laws in the world against violence towards women and girls and as the Committee has acknowledged, we already comply with the vast majority of the articles in the Convention. The Government takes its international commitments very seriously and will only commit to such ratification when we are absolutely satisfied that we comply with all articles. As the Committee has recognised, the Convention applies to the whole of the UK and the devolved administrations are responsible for implementing the positive obligations of the Convention in their territories. The Government has liaised with the devolved administrations about ratification of the Istanbul Convention, including the further legislative steps necessary on extraterritorial jurisdiction, and will continue to do so through consultation and the Inter-Ministerial Group, of which the devolved administrations are members".

<sup>111</sup> S. Edwards 'Coercion and Compulsion – re-imagining crimes and defences' (2016) *Criminal Law Review* (12) 876-899s

<sup>112</sup> See HM Government, above n. 4: The consultation defines domestic violence as 'any incident or pattern of incidents 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, emotional, controlling behaviour (controlling behaviour is 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) or coercive behaviour (coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim).

The overarching message is therefore that, whilst the UK appear amenable to making recommendations to comply with its international obligations, Russia have to date ignored requests to do the same. It is also noteworthy that Russia is among four out of forty-seven Member States who has not signed the Istanbul Convention, arguably because they are not willing to undergo the legislative reform or financial investment that would be required to adhere to the Convention.

(iii) European Convention on Human Rights (ECHR)

Russia and the UK are also parties to the European Convention on Human Rights (ECHR). The ECHR guarantees the right to life,<sup>113</sup> the right not to be subject to torture or cruel, inhumane or degrading treatment<sup>114</sup> and the right to be free from discrimination.<sup>115</sup> Domestic abuse threatens each of these fundamental freedoms. Similar to CEDAW, as well as giving negative rights to individuals (i.e. the rights that governments must refrain from interfering with) the ECHR imposes positive obligations on States to ensure compliance with the rights protected in the ECHR through a due diligence requirement.<sup>116</sup>

In *Osman v. United Kingdom* the European Court of Human Rights acknowledged that a state's obligation 'extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offenses against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'.<sup>117</sup> The court noted that for there to be a violation of the obligation to protect life, it must be shown that the authorities knew, or ought to have known at the time, of the existence of a 'real and immediate risk' and that they failed to 'take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.<sup>118</sup> This includes the provision of public education, treatment and assistance for victims, intervention for the perpetrators and interim measures to prohibit the perpetrator from

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<sup>113</sup> European Convention of Human Rights (1950), Article 2 provides that 'everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

<sup>114</sup> Ibid. Article 3 states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

<sup>115</sup> Ibid. Article 14 provides that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

<sup>116</sup> See Hasselbacher, above n. 83.

<sup>117</sup> *Osman v UK* ECHR 1998-VIII 3124 at [115].

<sup>118</sup> Ibid.

'contacting, communicating with or approaching the victim [or] residing in or entering certain defined areas'.<sup>119</sup>

The issue of how this works in practice has been considered by the European Court of Human Rights. The case of *Bevacqua and S. v Bulgaria* concerned a man who physically assaulted his ex-wife.<sup>120</sup> She argued firstly that Bulgarian government officials had violated her right to respect for private and family life (secured by Article 8) by failing to provide an adequate legal framework that would protect her and her son from abuse from her ex-husband. Secondly, she argued that it was a breach of her ECHR rights that Bulgarian domestic legislation specified that when 'medium bodily harm' or 'light bodily harm' was inflicted by a family member, criminal proceedings had to be initiated by the victim as a private prosecution rather than by a public prosecutor. However, where the same harm had been caused by a stranger, the public prosecutor could initiate proceedings. In upholding the applicant's first claim, the court found that the minimum for compliance with the due diligence standard would require a state to allow for emergency protection measures such as an order to remove the abuser from the home and prohibiting contact.

In relation to the requirement for victims to pursue private prosecutions, the European Court stated that:

*Member states should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutors, encourage prosecutors to regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest, ensure where necessary that measures are taken to protect victims effectively against threats and possible acts of revenge and take specific measures to ensure that children's rights are protected during proceedings.*<sup>121</sup>

The European Court disagreed that the requirement for a victim to act as private prosecutor was a violation of ECHR rights under Article 8 and held that states have a

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<sup>119</sup> Council of Europe Comm. of Ministers, Recommendation Rec (2002)5 on the Protection of Women against Violence, 794th Sess., (Apr. 30, 2002). Available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e2612](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612) (accessed 06 January 2019).

<sup>120</sup> *Bevacqua and S. v. Bulgaria* App no 71127/01 (ECtHR, 12 June 2008). The judgment can be accessed at: <http://hrlibrary.umn.edu/research/bulgaria/BEVACQUA.pdf> (accessed 06 January 2019).

<sup>121</sup> *Ibid.* para 50.

'margin of appreciation' in meeting the ECHR requirements using domestic policies. The court stated that 'the choice of a means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation'.<sup>122</sup> The court therefore refused to accept that the applicant's ECHR rights could be secured only through a public prosecution and that such a prosecution was required in all cases of domestic violence.<sup>123</sup> A relevant factor in this case, however, was that Bulgarian law permitted state prosecutions in "exceptional" circumstances and therefore it was not a blanket refusal to bring a public prosecution.

In contrast, the case of *Opuz v Turkey* concerned a daughter (Nahide) and her mother who had experienced decades of abuse from Nahide's husband, who eventually killed her mother. Despite repeated complaints to the police, little action had been taken to ensure Nahide and her mother's security. Nahide subsequently brought a case that the Turkish authorities had violated her mother's right to life under Article 2 and her own right to be free from torture and ill-treatment under Article 3. She also argued that the inadequate response by law enforcement was a result of gender-based discrimination and therefore a violation of Article 14. At the time, Turkish legislation required official complaints by victims to pursue criminal investigations when criminal acts did not result in sickness or unfitness for work for ten days. In this case, Nahide and her mother repeatedly withdrew their claims out of fear and therefore criminal prosecutions were not pursued. The Turkish government argued that interfering with their wishes not to prosecute would have been a violation of the victim's rights under Article 8. However, the Court found that the legislation 'fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims'.<sup>124</sup> The Court noted that the more serious the offence or the greater the risk of future offending, the more likely it is that the prosecution should continue by the State, notwithstanding that the victim has withdrawn their complaint. In light of their failure to do so, Turkish authorities 'could not be considered to have displayed due diligence'.<sup>125</sup> Accordingly, breaches of Articles 2, 3 and 14 were established.

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<sup>122</sup> Ibid. para 82.

<sup>123</sup> See Hasselbacher, above n. 83.

<sup>124</sup> *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) at [145]. The judgment can be accessed at: <http://www.bailii.org/eu/cases/ECHR/2009/870.html> (accessed 07 January 2019).

<sup>125</sup> Ibid. at [149].

When these cases are applied to the present situation in Russia, it paints a bleak picture of the country's compliance with the ECHR. Firstly, as has been examined, statistics indicate that domestic abuse is prevalent in Russia and that it is a gendered offence. As such, the general passivity caused by the government's failure to implement a comprehensive criminal and civil framework to protect victims may mean that Russia would struggle to defend claims based on the right to life, under Osman. This is particularly relevant following the decision to decriminalise assault and Russia's unwillingness to introduce protection orders, despite recommendations from the CEDAW Committee who have identified weaknesses with the current approach. Following *Bevacqua*, Russia's lack of civil protective measures akin to non-molestation or occupation orders would be a failure to meet the minimum due diligence standard. Finally, the requirement for private prosecutions in respect of offences under Article 115 and 116 of the Russian Criminal Code may, depending on the situation, also be considered a failure to provide adequate protection for victims. The Russian government have attempted to justify using private prosecutions on the basis that, given the personal nature of the offence, it is appropriate for victims to decide whether a prosecution is in their best interests. This is similar to the argument that was raised by the Turkish authorities in *Opuz*. Following the Judgments above, a blanket ban on public prosecutions is unlikely to fall within a state's 'margin of appreciation' and suggests that Russia must in appropriate cases pursue state prosecutions where the victim feels unable to do so themselves. At present, there is no evidence this is taking place.

(b) *Deterring domestic abuse*

This section considers the extent to which the law surrounding domestic abuse in England and Russia is a force for regulating people's behaviour. Preventing unwanted behaviours is an often-cited measure of policy success<sup>126</sup>. The authors argue that one of the most effective methods of deterring domestic abuse and socialising the wider public regarding different forms of abusive behaviours is through education. The authors highlight different programs which have been adopted in England and Russia, with varying levels of success.

In relation to domestic abuse, the law in the UK has been relied on both to control the behaviour of perpetrators and to underpin and establish values that domestic abuse in all forms is

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<sup>126</sup> S. Graca, 'Domestic violence policy and legislation in the UK: a discussion of immigrant women's vulnerabilities' (2017) 23(1) *European Journal of Current Legal Issues*. Available at: <http://webjcli.org/article/view/531/715> (accessed 06 January 2019).

unacceptable. Education is one means by which the UK attempts to secure compliance with its international obligations, whilst also aiming to deter future violence. Article 12 of the Istanbul Convention, for example, obliges states to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and other practices which are based on the inferiority of women. It is expected this will be achieved through Article 13 which requires signatories to 'promote or conduct on a regular basis awareness raising campaigns or programmes... to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the Convention, their consequences on children and the need to prevent such violence'. As Russia is not a signatory to the Istanbul Convention it is not under any such obligations to promote education.

In England, deterrence through education has been a key feature of the government consultation 'transforming the response to domestic abuse', where one of the four themes was 'promoting public and professional awareness' of domestic abuse.<sup>127</sup> Efforts have included proposing a statutory definition of domestic abuse as part of the draft Domestic Abuse Bill<sup>128</sup> to ensure the range of offences are properly understood and providing funding for all schools to deliver Relationships Education, Relationships and Sex Education and Personal, Social, Health and Economic Education so that young adults leave school with an understanding of domestic abuse.<sup>129</sup> The need for such education recognises that whilst legal reform can challenge socio-cultural perspectives which view women as subordinate to men, laws by themselves cannot create equality.<sup>130</sup>

Similarly, in the consultation that preceded the introduction of the coercive control offence, the Law Commission for England and Wales placed an emphasis on the educative value of the offence.<sup>131</sup> The hope was that educating the public about the nature of non-violent domestic abuse and the potential consequences of this behaviour would highlight behaviour that may not previously have been recognised as problematic. This societal acceptance of certain types of abusive behaviour has been emphasised by media reports, such as those surrounding the murder of Richard Challen by his wife Sally Challen, in which witnesses described the controlling

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<sup>127</sup> See HM Government, above n. 4.

<sup>128</sup> See HM Government, above n.62

<sup>129</sup> Ibid.

<sup>130</sup> A. Gill and S. Anitha, 'The Illusion of Protection: an analysis of forced marriage legislation and policy in the UK' (2009) 31(3) *Journal of Social Welfare and Family Law*, 257 – 269.

<sup>131</sup> See Law Commission, above n. 11

relationship she experienced as “old-fashioned”.<sup>132</sup> The aim was that the introduction of a new domestic abuse offence would change this view of a controlling relationship simply being old-fashioned or traditional to an acknowledgment that this behaviour is abusive and psychologically damaging. This was recognised in the Judgment in which permission was granted for Sally Challen to appeal her conviction on the basis that the new offence of coercive and controlling behaviour amounted to fresh evidence. Lady Justice Rafferty stated;

It should be plainly understood that the application made today is but one step in what, it is hoped by counsel, those who instruct her and many others concerned in this case, will be a full detailed exploration of the position, based on scholarship, learning and clinical expertise, which should prevail now . . . A jury, it is argued, should, with the benefit of that learning, be enabled to reach a clear settled conclusion on the basis of an understanding which, it is said, was not available to the jury in 2011<sup>133</sup>.

Sally Challen has now won her appeal against her conviction and a retrial has been directed.<sup>134</sup> However, she has arguably only been able to challenge her conviction because of advancements in understanding controlling and coercive behaviour and the impact that this behaviour can have on a victim, that have been gained through the introduction of the new offence. Arguments raised before the Court of Appeal at the permission hearing drew parallels with other societal advancements such as DNA testing, which can result in the safety of a conviction being challenged<sup>135</sup>. Bettinson notes that the impact of the new offence is therefore significant in that it may lead to a new partial defence to murder convictions where a coerced and controlled victim kills their abuser<sup>136</sup>

By educating the public in this way, perpetrators may acknowledge their own behaviour as wrong and seek to make changes. Alternatively, there is more scope for those close to a victim to recognise the behaviour and encourage them to seek support. Public campaigns by Women’s Aid and alternative forms of education such as the Rattle Snake theatre production (commissioned by Durham PCC) have been designed to assist with this public education aim.

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<sup>132</sup> Anna Moore, “I miss him so much”: why did a devoted wife kill the man she loved?’ *The Guardian* (29 September 2018). Available at: <https://www.theguardian.com/uk-news/2018/sep/29/devoted-wife-who-killed-husband-with-hammer-sally-challen> (accessed 06 January 2019).

<sup>133</sup> Cited in V. Bettinson ‘Aligning Partial Defences to Murder with the Offence of Coercive and Controlling Behaviour’ (2019) 83(1) *The Journal of Criminal Law* 71-86

<sup>134</sup> *R v Challen* [2018] EWCA Crim 471

<sup>135</sup> Cited in V. Bettinson ‘Aligning Partial Defences to Murder with the Offence of Coercive and Controlling Behaviour’ (2019) 83(1) *The Journal of Criminal Law* 71-86

<sup>136</sup> *Ibid.*

This process of public education is more difficult in countries like Russia where traditional views tend to dominate. However, some collectives have achieved success in educating members of the public. The Russian Orthodox Church, for example, has promoted a 'zero-tolerance' attitude towards familial violence through working with domestic abuse organisations to develop training for priests and establishing religious support services for women.<sup>137</sup> Similarly, 'Papa-groups' have attempted to promote gender equality and encourage men to take on a more egalitarian approach to parental roles.<sup>138</sup> Unlike in England, however, there is no formal education regarding domestic violence or preventing violence against women.

This poses the question: is the purpose of domestic abuse offences, or criminalisation more broadly, to send out a message and educate the public about different types of abusive behaviour or is it to act as a deterrent against future offending? Ideally, they can achieve both. Ashworth, for example, considers that educational policies may have a greater preventative effect than simply criminalising behaviours, despite the fact that prevention is a legitimate aim in criminalisation.<sup>139</sup> Similarly, Crofts *et al* note that criminal law plays an important role in preventing unwanted behaviours 'not just through the specific and general deterrent effect... but also through its educative, moralising and habituating functions'.<sup>140</sup>

Inevitably, it is not possible to capture the number of offences that may have taken place but for the introduction of criminal offences in relation to domestic abuse. However, when we look at the statistics set out above about the number of non-molestation orders being granted in England and Wales, compared to the number of convictions for breaches, it could be argued that the prospect of a criminal conviction is a sufficient deterrent for perpetrators of domestic abuse. This argument relies on the proposition that the only reason for the smaller number of convictions is that orders are not breached. However, this may be a simplistic view that ignores the fact that many breaches will go unreported by victims who, notwithstanding the abuse they have suffered, may not wish to see their ex-partner face a prison sentence. It also ignores the difference in the standard of proof in the civil/family courts, compared to the criminal courts. The standard of proof in the civil and family courts is 'on the balance of probabilities'. This means that non-molestation orders will often be granted based on the written and oral evidence of the applicant alone. In the criminal court, the standard of proof is much higher, 'beyond reasonable doubt'. It is therefore entirely conceivable that an individual may obtain a non-molestation order but then have insufficient evidence of any breaches to prove to a criminal standard that the breach has actually occurred. This can lead to the CPS refusing to take a

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<sup>137</sup> See ANNA – Centre for the Prevention of Violence, above n. 13.

<sup>138</sup> *Ibid.*

<sup>139</sup> A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 226.

<sup>140</sup> T Crofts and T Kichengast 'A Ladder Approach to Criminalising Revenge Pornography' (2019) 83(1) *The Journal of Criminal Law* 87-103.

case forward. In turn, this reduces not only the effectiveness of the protection for the victim but the deterrent effect it may have on the perpetrator.

There are difficulties with the position in England. However, the failure of the Russian government to recognise or criminalise many forms of domestic abuse provides a culture of impunity for perpetrators and perpetuates beliefs such as "I could kill you and no one would stop me"<sup>141</sup>. This, combined with the requirement for private prosecutions and for a criminal case to be dropped if the parties reconcile, a general unwillingness of the police to investigate domestic violence offences and of the judiciary to properly understand domestic abuse as a criminal matter, means that there are very few deterrents to perpetrating abuse in Russia. It is recognised that prisons in Russia are notoriously tough places compared to prisons in England, but in all but the most severe cases, a custodial sentence is unlikely to be imposed.<sup>142</sup>

*(c) Protecting victims of domestic abuse and promoting access to justice*

This section will consider the ways in which domestic abuse laws in England and Russia can empower or disempower victims. The analysis will focus on victim autonomy and participation in proceedings, the role of private and public prosecutions and the availability of support services. The analysis reveals that once again there are stark differences between the two jurisdictions. Whilst England favours a multi-agency approach to supporting victims which often takes control of the process away from victim, in Russia there are limited organisations willing or able to support victims. This leads to victims assuming responsibility for the process.

It is arguable that victims of domestic abuse in England and Wales have many more opportunities to obtain protection from domestic abuse because of the wide range of actions available to them both through civil remedies and through the different criminal sanctions. Giving the victim the option of applying for protection under civil/family law or supporting the police in a criminal prosecution is potentially a very powerful tool and puts the control back in the hands of the victim. It enables victims to make applications to ensure that the perpetrator is not able to return to the home or contact them, thereby giving them breathing room to consider their next steps. Victims may find this choice empowering. It could therefore be suggested that providing victims with as many options as possible is a positive move.

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<sup>141</sup> See Human Rights Watch, above at n. 91

<sup>142</sup> This has been recognised in a Storyville documentary: 'Russia's Toughest Prison: The Condemned' which is available on BBC iPlayer.

The notion of empowering victims with choices ignores the fact that control is quite often out of the victim's hands when it comes to criminal prosecution. It is not the victim's choice at all whether to pursue a conviction, rather it is the decision of the CPS. Hitchings et al have argued against prosecutions being pursued without victim's support, stating that this could remove the power from them once more and lead to increased trauma.<sup>143</sup> Hirschel et al agreed with this and went as far as to say that the victim is best placed to assess their own situation and whether a prosecution is the appropriate way forward<sup>144</sup>. To do this they would need an understanding of the different processes available and, as explained above, legal advice may not be easily accessible due to the cuts in legal aid. Instead, many victims rely on charitable organisations such as Victims First to support them through the process. Even where victims are in a position to afford legal advice, solicitors tend to specialise in only one area (family, criminal or civil) and are therefore unlikely to be in a position to provide survivors of domestic abuse with holistic advice about which process or combination of processes would best suit their needs.

This issue is compounded by the range of options available, some of which were set out earlier in this article. In addition to the specific offence, the Home Office statutory guidance on controlling and coercive behaviour sets out 64 other criminal offences that may apply in a domestic abuse case<sup>145</sup>. Providing such a wide range of options risks confusing not only victims but also professionals involved in this area. The police will need to consider which offence to bring a charge under, if any, and legal practitioners will need to advise their clients as to whether they should simply be relying on the CPS to pursue a criminal action or whether they should be seeking their own private action through the civil and family courts. Each action will have its own disadvantages and advantages, cost implications and timescales.

This was acknowledged by the UK government in their 2018 consultation and yet they are still proposing the introduction of another type of order. As addressed earlier in this article, the newly proposed DAPO will share similarities with non-molestation orders, causing the authors to question why such an order is required. The only obvious difference will be that DAPO will be pursued by the police rather than by the victim themselves. This has an advantage in cases where a victim is ineligible for legal aid to pursue a family court order but has the disadvantage of relying on police resources and a willingness on the part of the police to take a case forward.

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<sup>143</sup> E. Hitchings, 'A Consequence of Blurring the Boundaries Less Choice for the Victims of Domestic Violence?' (2006) 5(1) 91-101; J. Herman, 'Trauma and Recovery: From Domestic Abuse to Political Terror' (New York: Basic Books 1992)

<sup>144</sup> D. Hirschel and I. Hutchinson, 'The Voices of Domestic Violence Victims: Predictors of Victim Preference for Arrest and the Relationship Between Preference for Arrest and Revictimization' (2003) 49(2) Journal of Crime and Delinquency, 313-336.

<sup>145</sup> See Home Office, above n. 9 at 17.

The argument that we should empower victims to make a choice also ignores the coercive and controlling nature of domestic abuse. Criminalisation (with or without victim support) is potentially helpful in control and coercion cases where the perpetrator may continue to try and exert control over the victim to persuade them not to seek protection under the civil law/drop their applications. As explained above, this is something that campaigners were particularly concerned about with the criminalisation of forced marriage.

Indeed, some victims may not even self-identify as being in an abusive or controlling relationship. For example, in “gaslighting” cases a victim may be convinced because of the psychological abuse that they have suffered, that they are to blame for the perpetrator’s actions. This particular type of psychological abuse is something that Prime Minister Theresa May has indicated she is committed to tackling as part of the draft domestic abuse bill.<sup>146</sup> In those cases, and following the ruling in *Opuz*, taking the responsibility for progressing an action away from the victim may be a positive step. Implementing the ruling in *Opuz* in the domestic framework in England and Wales relies on the CPS being able to successfully pursue a case without the victim’s involvement. The idea was that this would be possible under the coercive control legislation and that evidence such as 999 tapes and police bodycams could assist with this.<sup>147</sup> Video evidence is only useful if the correct questions are asked when the police attend an incident to speak to the victim. Further police training may therefore be required if prosecutions are to be progressed without victim support. The Home Office guidance on the use of body worn devices also indicates that cameras should not be used where any allegations of serious sexual offences are made, unless the victim gives their explicit consent.<sup>148</sup> Given that 45% of female victims of rape or assault by penetration reported the offender to be a partner or ex-partner, this somewhat restricts their use.<sup>149</sup>

The reality is that the majority of domestic abuse incidents will take place in the privacy of a victim’s home and there may not be any witnesses or outside involvement at all. Even with the 2015 offence, to pursue a conviction the CPS will need to be able to demonstrate what effect

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<sup>146</sup> Anna Mikhailova, ‘Theresa May pledges to tighten the law on “gaslighting” abuse’ *The Telegraph* (23 May 2018). Available at: <https://www.telegraph.co.uk/politics/2018/05/23/theresa-may-pledges-tighten-law-gaslighting-abuse/> (accessed 06 January 2019).

<sup>147</sup> See Home Office, above at n. 9

<sup>148</sup> Home Office, ‘Guidance for the Police use of Body-worn Video Devices’ (2007). Available at: <http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf> (accessed 06 January 2019).

<sup>149</sup> Office for National Statistics, ‘Sexual offences in England and Wales: year ending March 2017’ (2018).

Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017/previous/v1> (accessed 06 January 2019).

the behaviour had on a victim. This is very difficult without a direct statement. Williamson gives the example of specific gestures or phrases that may cause a victim fear harm but may not be understood by a police officer attending an incident.<sup>150</sup> Certainly, the most recent statistics (ending March 2018) indicate that, despite the admissibility of hearsay evidence in the form of body cam footage, CCTV evidence or 999 calls, nearly half (48.8%) of domestic abuse-related offences are still not progressed due to evidential difficulties arising from the victim not supporting further action.<sup>151</sup>

Bishop *et al* summarise the literature in this area and the most common factors affecting the victim's decision not to support a conviction as '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'.<sup>152</sup> Dissatisfaction with the court process could be a major issue for victims disengaging with criminal cases and, with a court system which is bulging at the seams, this does not look to be an issue that will be improved any time soon. Cases are taking longer to be listed, too many cases are listed in a day leading to adjournments, and other cases need to be adjourned because of evidential problems that should have been resolved pre-trial. Bishop *et al* argue that the way to combat this is to increase confidence in the criminal justice system and point out that this is necessary because 'a victim-centred approach is at the heart of the National Strategy to End Violence Against Women and Girls'.<sup>153</sup> Bishop *et al* also indicate that there is a need for 'increased training for legal professionals' more generally on the effect of trauma on witness evidence.<sup>154</sup> At a Justice for Women event in November 2018,<sup>155</sup> when discussing the approach of lawyers to coercive and controlling behaviour cases, Wistrich<sup>156</sup> suggested that lawyers acting in domestic abuse cases should have to participate in training and obtain accreditation in the same way that Children Panel solicitors do in care proceeding cases. In an already stretched system where the number of legal aid solicitors are already lacking, additional burdens to instructing a solicitor are unlikely to be welcomed. However, as stated above, lawyers practising in this area need to, as a minimum, develop an understanding of the different options available to victims in the civil, family and criminal courts. If the

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<sup>150</sup> See Williamson, above n. 57.

<sup>151</sup> See Office for National Statistics, above n. 4.

<sup>152</sup> C. Bishop and V. Bettinson, 'Evidencing domestic violence, including behaviour that falls under the new offence of 'controlling or coercive behaviour' (2018) 22(1) *The International Journal of Evidence & Proof* 3, 6. See also V. Bettinson 'Is the creation of a discrete offence of coercive control necessary to combat domestic violence?' (2016) 66(2) *Northern Ireland Legal Quarterly*, 179-97 and S. Hilder and V. Bettinson 'Domestic violence: interdisciplinary perspectives on protection, prevention and intervention' (2016) Basingstoke: Palgrave Macmillan.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.* 3 – 29.

<sup>155</sup> See Justice for Women conference, above n. 35.

<sup>156</sup> Solicitor and co-founder of Justice for Women

government continue with their plans to introduce more legislation on this subject, a knowledge of one of those practice areas alone will no longer suffice and victims will require increasingly holistic advice about all their available options.

The limitations of victim participation in criminal proceedings can be seen in the case of Russia where, under Article 115 and Article 116, prosecutions are usually dealt with privately. This means that unlike in England, the onus is on the victim to start the proceedings, gather the evidence and present the case. Victims are expected to do so without any knowledge of the legal process, the evidential requirements to secure a successful prosecution or support from a publicly-funded legal adviser (unless, of course, they are willing and able to incur the costs in paying for an investigator and prosecutor). The victim is expected to take this action at a time when she is likely to be emotionally and physically vulnerable and may be facing further abuse from the perpetrator. They could potentially even still be living with him, because there are no available family law injunctions which would be available to remove the perpetrator from the home, prohibit him from contacting her and provide the victim with important breathing space.

As explained above, the Russian government have justified using private prosecutions on the basis that, given the 'personal nature' of the offence, it is appropriate for the victim to decide whether a prosecution is in their best interests. This may seem admirable in theory, however the reality is that many victims may not be aware of what is in their best interests and this is exaggerated further when no public funding or support services are available to advise a victim about their options. It also reinforces the message that domestic abuse is a private matter which does not require state involvement. Even when a victim pursues a prosecution, they are left with virtually no state protection to support them in the conduct of proceedings. There are concerns that when victims do pay privately for representation, lawyers have not received the necessary training to effectively advocate for domestic abuse survivors.<sup>157</sup> Likewise, a lack of training in the judiciary often leads judges to readily accept provocation as a defence and take such conduct into account in determining sentencing. Judges can and do consider the 'the conduct of the victim that led to the crime'.<sup>158</sup> Research by Danilenko et al also suggests that the judiciary mitigate defendants' punishments if they try to get 'help' for the victim, they are in a 'difficult situation' or if they show 'compassion for the victim'.<sup>159</sup>

Arguably, a more effective compromise may be similar to the approach taken in Germany where complainants in criminal proceedings play a more active role as a 'subsidiary prosecutor',

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<sup>157</sup> See Johnson, above n. 12.

<sup>158</sup> (Criminal Code of the Russian Federation Article 16[2]h).

<sup>159</sup> See Johnson, above n. 12.

rather than either a prosecution witness or the prosecutor themselves. Doak describes that under this system the victim is entitled to participatory rights, including:

The right to be present at all stages of the process; to put additional questions to witnesses; to provide additional evidence / make a statement; or to present a claim for compensation... the procedure thereby recognises the status of the complainant as the alleged victim of the criminal offence, whilst acknowledging at the same time the normative role of the state in prosecuting crime.<sup>160</sup>

Importantly, however, the public prosecutor is ultimately responsible for preparing and presenting the prosecution and therefore the victim does not bear this burden. Such an approach would have clear benefits for victims in both England and Russia.

It is not just about focusing on changes to the legal process, it is about ensuring that the services are available for survivors to access those processes and support them throughout. This has been recognised by academics who have argued that 'the most important part of any legislation is how decision-makers put the provisions of the statutes into practice - unfortunately, once legislation is passed, it is mistakenly credited with solving the problem'.<sup>161</sup> The impact of the cuts to legal aid and the lack of legal advice in England and Wales have already been addressed. However, there have also been cuts to other support services as well. For example, whilst it is undeniable that there are more refuges available in England and Wales than there are in Russia, this is still not sufficient for the demand. Women's Aid reported that in 2016/17 60% of referrals to their refuges were refused simply because of lack of bed spaces.<sup>162</sup> The nature of coercive and controlling behaviour means that many survivors will have been isolated from friends and families. Therefore, without a refuge space available they may feel no choice but to return to their abusive relationships. There may be additional complicating factors, which may mean that they are unable to find a refuge space. Some refuges have restrictions on survivors bringing pets or male teenage children with them which may leave a survivor with the choice of leaving them behind with the perpetrator or staying themselves.

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<sup>160</sup> J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society*, 294 – 316.

<sup>161</sup> E. Stanko, 'Intimate Intrusions (Routledge Revivals): Women's Experience of Male Violence' (Routledge 2013) 165.

<sup>162</sup> Women's Aid, 'Refuges send out SOS in response to government's proposed supported housing funding plans' (2017) Available at: <https://www.womensaid.org.uk/refuges-send-sos-response-governments-proposed-supported-housing-funding-plans/> (accessed 27 November 2018).

Similar difficulties exist in Russia, where there is a lack of funding dedicated to establishing support services for survivors. It is understood that there are approximately 42 refuges in Russia (a country which is approximately 70 times bigger than England).<sup>163</sup> Many refuges impose residency requirements, meaning that if a victim does not live in the region where the refuge is based, they are unable to access support, whilst others exist to support particularly marginalised or vulnerable groups only such as teenage mothers. This is particularly difficult for women who live outside the large cities of St. Petersburg and Moscow.<sup>164</sup> The majority of refuges receive nominal government funding and therefore rely on financial sponsorship from private companies and non-government organisations. Obtaining funding can be difficult because of the societal perceptions of domestic abuse as a private matter. Likewise, there is a scarcity of organisations dedicated to victim rehabilitation and the burden for providing support falls on women's charities.<sup>165</sup> It has been reported that psychologists and social workers employed by the state to work with survivors often perpetuate the same perceptions of domestic abuse as the criminal justice system, including a focus on reconciliation at all costs and a belief that victims provoke battery and therefore require counselling to ensure that when they return to their abusers they do not repeat their mistakes.<sup>166</sup> There have, however, been a number of women's rights movements which have sought to advocate change through lobbying for legislative change.<sup>167</sup> In turn, many of these organisations have become domestic abuse specialists, able to provide practical support to women navigating unfamiliar court process.

A final key difference in the approaches adopted by the two jurisdictions which affects the ability of victims to secure access to justice is in the agencies which engage in the provision of support. The position in England is underpinned by the recognition that victims' needs are complex and that domestic abuse creates a range of problems that are unlikely to be effectively addressed by a single agency.<sup>168</sup> As such, England favours a multi-agency approach. This is evidenced through the introduction of Specialist Domestic Violence Courts, Multi-Agency Risk Assessment Conferences (where information is shared on the highest risk domestic abuse cases between representatives of local police, health, child protection, housing practitioners and specialists from the statutory and voluntary sectors) and Independent Domestic Violence Advisors (whose role it is to address the safety of victims at high risk of harm from family members and secure their safety). An example of a multi-agency project is the Home Office

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<sup>163</sup> See ANNA – Centre for the Prevention of Violence, above n. 13.

<sup>164</sup> See Mahserjian, above n. 23.

<sup>165</sup> See Johnson, above n. 12.

<sup>166</sup> Ibid.

<sup>167</sup> See, for example ANNA Centre for the Prevention of Violence.

<sup>168</sup> See Graca, above at n. 122.

funded project entitled 'The Whole System Approach'<sup>169</sup> which is seeking to integrate support services into both the criminal justice response and the family court process. The project has introduced domestic abuse cars in West Yorkshire, which will follow the frontline officers to a domestic abuse incident.<sup>170</sup> A police officer and a specialist IDVA will be present in the second car to provide support to the victim once a perpetrator has been removed from the property. In her research into the role of IDVAs, Taylor-Dunn found that victims supported by an IDVA were 'more likely to continue with the criminal justice process.'<sup>171</sup> Therefore, the involvement of IDVAs at this very early stage could be a positive step towards better victim engagement.

Acknowledging that there will still be many victims who do not want to engage with the criminal justice process, but who do want to seek protection through the family courts, the project has also introduced Family Court Liaison Workers (FCLWs).<sup>172</sup> The FCLWs are present in courts in the Northumbria, Cleveland and Durham areas of England and provide support and assistance to unrepresented victims of domestic abuse throughout the family court process. IDVAs and FCLWs cannot provide legal advice or representation, but they can provide much needed support for victims who, because of the nature of the abuse they have suffered, may have become isolated from the rest of society.

Graca highlights that whilst a multiagency approach is favoured by the Istanbul Convention, it is not without difficulties.<sup>173</sup> The key concerns are that multi-agency initiatives work as a 'mere forum for discussion with few practical results', or as a 'smokescreen' for local government to draw attention away from ineffective practices, and a way to show good will and engagement in finding solutions for domestic violence'.<sup>174</sup> It is recognised that they can also be a way for the police and local authorities to 'divert accountability for their actions' to other organisations.<sup>175</sup> Despite these difficulties, however, the presence of multiagency working suggests that there are many organisations with an ostensible interest in supporting victims. The same does not appear to be true of Russia where no government department or state-funded organisation seem willing or competent in assuming accountability for securing access to justice for victims.

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<sup>169</sup> <http://dawsa.org.uk> (accessed 06 January 2019).

<sup>170</sup> Available at: [https://www.westyorkshire-pcc.gov.uk/media/135339/amber\\_rudd\\_221217.pdf](https://www.westyorkshire-pcc.gov.uk/media/135339/amber_rudd_221217.pdf) (accessed 06 January 2019).

<sup>171</sup> H. Taylor-Dunn, 'The impact of victim advocacy on the prosecution of domestic violence offences: Lessons from a realistic evaluation' (2016) 16(12) *Criminology and Criminal Justice*, 21 – 27.

<sup>172</sup> <http://dawsa.org.uk/partnership-work-with-civil-and-family-courts/> (accessed 06 January 2019).

<sup>173</sup> See Graca, above at n. 122.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

## **Conclusion**

It is acknowledged that although there is no single model that will lead to the eradication of domestic violence in all societies, it is recognised by the authors that there are several key elements which any effective policy will incorporate to ensure access to justice for victims, the punishment of offenders and compliance with international obligations. These include efficient responses from law enforcement and judicial officers who investigate, prosecute, and punish perpetrators; the empowerment of women through education and legal literacy; appropriate legislative frameworks, policing systems and judicial procedures to provide adequate protection; and support services such as shelters and public funding.<sup>176</sup>

As has been considered throughout this article, whilst domestic abuse has been at the forefront of legal policy changes in both Russia and England in recent years, their approaches have contrasted greatly. At a very basic level, the two jurisdictions have different theoretical understandings of domestic abuse. This has impacted on the types of protections that are made available to victims (or the lack thereof) and the countries' willingness to invest in support services and give effect to international instruments. On the one hand, in England there are an ever-expanding range of options available to victims under the criminal, civil and family law justice systems. However, the quantity of opportunities can lead to a confusing system for both victims, the police and practitioners. These difficulties are compounded by a lack of public funding and specialists who have a holistic understanding of the options. In contrast, in Russia there is a lack of statutory protection under the criminal law and these options have reduced in recent years. There are next to no civil remedies available to victims. There has been little, if any, investment in infrastructure to change attitudes towards domestic abuse or provide training for law enforcement or the judiciary.

There are a number of steps that could improve the approach to domestic abuse in Russia. Firstly, the authors would suggest establishing a statutory definition of domestic abuse which recognises the broad range of behaviours that can fall within its remit, similar to that proposed under the draft Domestic Abuse Bill in England and Wales. A statutory definition would assist in improving public understanding of domestic abuse as a gendered offence and a human rights infringement. In conjunction with this, the government should begin collecting statistics on domestic abuse, so they are able to effectively allocate resources to domestic abuse prevention/perpetration programmes similar to those operating in England and Wales. Such programmes have met with some success in encouraging perpetrators to think about their abusive behaviour, consider the impact this had on their partners and children and provide

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<sup>176</sup> See Hasselbacher, n. 83 above.

them with tools and techniques to tackle abusive behaviours.<sup>177</sup> This could also fit within a broader policy regarding the prevention of violence against women to send a clear message about the State's disapproval of domestic abuse and which would address many of the CEDAW Committees' concerns.

The authors would also suggest that crimes committed by family members should be excluded from the category of private prosecution and should be pursued publicly, with the assistance of the state. This would ensure that the sole responsibility for bringing a prosecution would not be left with the victim who is likely to have no knowledge of the legal process or evidential requirements. In turn, this may increase the number of successful prosecutions.

Finally, returning to the theme of education, there would be benefits of including formal training about gender and domestic abuse at all stages of education and particularly for those employed by the state, including social services, police, judges, prosecutors and public administrations.<sup>178</sup> Of course, all of this would require a commitment to ending domestic violence and heavy financial investment, which seems at odds with the Russian government's current passivity towards these issues.

Clearly, both jurisdictions must take action to ensure that their policies are better equipped to prevent domestic violence, protect victims and prosecute perpetrators. A possible solution for both countries to meet these objectives would be a streamlined system where both victim-led civil and state-led criminal options are facilitated in expanded specialist domestic abuse courts, with funded IDVAs present and special measures facilities established.

It is acknowledged that specialist domestic abuse courts (SDACs) have previously been piloted in England and Wales. However, these were criminal courts and therefore only dealt with one aspect of a victim's case. As addressed earlier in this article, domestic abuse cases can rarely be dealt with by one set of proceedings and often there will be inter-related issues to be considered such as child arrangements and divorce/judicial separation. The previous format of the SDAC ignored this and meant that victims would also need to commence separate sets of proceedings in non-specialist family courts, with limited special measures facilities and a lack of court based IDVAs. The authors suggest that a similar approach could be taken to that

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<sup>177</sup> E. Williamson and M. Hester, 'Evaluation of the South Tyneside Domestic Abuse Perpetrator Programme (STDAPP) 2006-2008' (2009) University of Bristol School for Policy Studies. Available at: <http://www.bristol.ac.uk/media-library/sites/sps/migrated/documents/finalreport1.pdf> (accessed 06 January 2019). See also N. Stanley, N. Graham-Kevan, R. Borthwick, 'Fathers and Domestic Violence: Building Motivation through Perpetrator Programmes' (2012) 21(4) *Child Abuse Review*, 264-274.

<sup>178</sup> See ANNA – Centre for the Prevention of Violence, above n. 13.

adopted in the Family Drug and Alcohol Courts (FDACs). In the FDACs a holistic approach is taken to cases, with a specialist team from a range of professions (including medical professionals, child and family social workers, substance misuse teams and domestic abuse specialists) supporting the Judge in the process. The specialist team draw up an intervention plan and encourages parties to engage with specialist services. In a domestic abuse case, this could be encouraging a victim to engage with an IDVA or specialist support service and for the perpetrator it could be encouraging them to participate in a perpetrator programme.

The use of specialist court facilities, designed with special measures in mind and with allocated IDVAs, could potentially allow victims to take a more active role in proceedings. This could be in a similar way to 'subsidiary prosecutors' in Germany, should they so wish, but in a supportive environment, where their safety is prioritised. The inclusion of non-lawyer specialists may also mean that there is scope to work with perpetrators during the proceedings to address their behaviour and prevent the same offences being committed in their future relationships.

Arguably, society has moved on since the initial SDAC pilot and the understanding of domestic abuse has now developed, as demonstrated by the Sally Challen case. With the renewed Government commitment to tackling domestic abuse and in particular the financial commitments set out in Annex C of the consultation response<sup>179</sup>, perhaps now is the time to reconsider the potential benefits of rolling out specialist courts across England and Wales?

These recommendations would all require significant financial investment by both countries but would likewise ensure that international obligations are met and, more importantly, victims are supported in accessing justice at a time when they are most vulnerable.

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<sup>179</sup> See HM Government, above at n. 62, Annex C.