



Coercive control, legislative reform and the Istanbul Convention: Ireland's Domestic Violence Act 2018

Judit Villena Rodó

University of Galway

Correspondence email: j.villenarodo1@universityofgalway.ie

ABSTRACT

Coercive control is a concept increasingly being used in legal and policy responses to intimate partner violence. This article examines this concept in light of Ireland's obligations under the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) to prevent and combat domestic violence, including psychological violence (arts 3 and 33). First, it analyses the interpretation of article 33 by the Council of Europe Group of Experts on Action against Violence Against Women and Domestic Violence (GREVIO) in country monitoring reports. Second, it examines Ireland's coercive control offence, comparing it to legislative developments in the United Kingdom (UK). Third, it examines potential theoretical and practical concerns arising from the application of the offence, drawing from literature on the criminalisation of coercive control in the UK. It argues that concerns regarding the practical application of the offence may be relevant to Ireland.

Keywords: coercive control; Istanbul Convention; violence against women; human rights law.

INTRODUCTION

Ireland's newest domestic violence legislation, the Domestic Violence Act 2018 (DVA 2018) strengthens the legal framework relating to domestic violence in Ireland through, *inter alia*, the introduction of additional civil law protection measures and the criminalisation of coercive control and forced marriage.¹ The introduction of the offence of coercive control in Ireland follows similar developments elsewhere. Since 2015, new offences of coercive control have been introduced in England & Wales, Scotland and Northern Ireland, as part of legislative and policy reforms to address domestic

1 Women's Aid and Monica Mazzone, *Unheard and Uncounted: Women, Domestic Abuse and the Irish Criminal Justice System* (Women's Aid 2019) 13; Domestic Violence Act 2018, ss 38, 39 (Ireland).

violence.² Coercive control refers to an often invisible form of harm, prevalent in patterns of domestic violence, that seeks to deprive the victim/survivor of her liberty and personhood through tactics such as intimidation, threats, isolation or control.³

This article analyses the enactment of the coercive control offence in Ireland and interrogates the substantive achievements, shortcomings and opportunities posed by the DVA 2018's offence in light of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), ratified by Ireland in 2019.⁴ It argues that, although the introduction of this new offence is a significant step towards justice for victims/survivors of coercive control, there is a need for further procedural guidance and training for the judiciary, An Garda Síochána (Ireland's police force) and for prosecutors to ensure its effective implementation and further cultural change. Thus, this article begins by briefly introducing the phenomenon of coercive control.⁵ The piece then examines the standards set out in the Istanbul Convention concerning the criminalisation of psychological violence, and state parties' obligations relating to access to justice for victims/survivors of such abuse. The article proceeds to present an account of the issues arising regarding the introduction of the offence of coercive control in the parliamentary debates on the DVA 2018. To conclude, it reflects on the normative achievements, the missed opportunities of the DVA 2018 in relation to coercive control, and the impact that the implementation of this new offence may have on victims/survivors' access to effective remedies.

A BRIEF INTRODUCTION TO THE CONCEPT OF COERCIVE CONTROL

Contemporary understandings of domestic violence identify coercive control as its central element. Evan Stark and others developing this

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- 2 Serious Crime Act 2015, s 76, as amended by Domestic Abuse Act 2021, s 68 (England & Wales); Domestic Abuse (Scotland) Act 2018, s 1; Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021, s 1. For an in-depth comparative analysis of the offences, see Vanessa Bettinson, 'A comparative evaluation of offences: criminalising abusive behaviour in England, Wales, Scotland, Ireland and Tasmania' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer 2019).
 - 3 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).
 - 4 Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (1 August 2014). Ireland signed the Convention in 2015 and ratified it in 2019.
 - 5 In line with the legislative reality in Ireland, this article discusses coercive control solely in the context of intimate partnerships.

argument have advocated for a turn away from a historical, social and legal conceptualisation of domestic violence as incidental, and assault and physical violence based.⁶ Stark, whose work underpins most of the legislative reform in Europe to date, has described this form of abuse as a course of domination achieved through a combination of coercion tactics, including violence and intimidation, ‘deployed to hurt and intimidate’; and control tactics, including isolation and attempts to regulate and confine victims/survivors.⁷ Generally, state intervention on domestic violence continues to overlook this underlying and invisible form of harm, often referred to by victims/survivors as ‘the worst part’, creating an inadequate response and routinely failing victims/survivors accessing justice.⁸

Coercive control is a cyclical form of abuse, generally exerted over long periods of time, with a ‘cumulative’ effect on its victims/survivors.⁹ It can cause severe physical and psychological harm, but primarily results in what Stark refers to as a ‘hostage-like condition of entrapment’.¹⁰ Thus, it directly impacts victims/survivors’ dignity and personhood and, in turn, affects their ‘autonomy, rights and liberties’.¹¹ A central aspect of the coercive control model, generally not reflected in the relevant legislation, is its gendered construction. Male perpetrators typically exploit gendered dynamics in designing the abuse, in which gender stereotypes are weaponised to harm the victim/survivor. Stark explains that this form of abuse commonly involves the regulation of conduct socially associated with femininity, such as care work (including cooking and cleaning).¹² He calls these ‘patriarchal-like controls in personal life’ and argues that, through the web of behaviours amounting to coercive

6 Stark (n 3 above); Paul McGorrrery and Marilyn McMahon, ‘Criminalising “the worst” part: operationalising the offence of coercive control in England and Wales’ (2019) 11 *Criminal Law Review* 957; Evan Stark, ‘Rethinking coercive control’ (2009) 15 *Violence Against Women* 1509; Emma Williamson, ‘Living in the world of the domestic violence perpetrator: negotiating the unreality of coercive control’ (2010) 16 *Violence Against Women* 1412; Evan Stark, ‘Looking beyond domestic violence: policing coercive control’ (2012) 12 *Journal of Police Crisis Negotiations* 199.

7 Evan Stark, ‘Re-presenting battered women: coercive control and the defense of liberty’ (*Violence Against Women: Complex Realities and New Issues in a Changing World*, Montreal 2012) 7, 8.

8 Charlotte Bishop, ‘Domestic violence: the limitations of a legal response’ in Sarah Hilder and Vanessa Bettinson (eds), *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan 2016) 66; McGorrrery and McMahon (n 6 above).

9 Stark, ‘Re-presenting battered women’ (n 7 above) 7.

10 Ibid.

11 Ibid 5, 7.

12 Stark, *Coercive Control* (n 3 above) 211.

control, male perpetrators control 'women's enactment of everyday life'.¹³ He further contends that the domination achieved over women at home reinforces their subordinate position in society, perpetuating patriarchy's constraint of their agency.¹⁴

Typically, the primary method by which victims/survivors are targeted and subjected to coercive control is through the commission of individualised acts of abuse. However, given that coercive control takes place in the context of structural systems of power, such as sexism and racism, both identity and structural factors play a key role. Kristin Anderson, in theorising the gendered nature of coercive control, notes that it is important to consider victims/survivors' and perpetrators' 'individual characteristics' but also cultural and social structural aspects of gender inequality in understanding differences between cases of coercive control.¹⁵

THE ISTANBUL CONVENTION: PSYCHOLOGICAL VIOLENCE UNDER ARTICLE 33

The legal significance of the Istanbul Convention, as the first human rights treaty to comprehensively address both gender-based violence (GBV) and domestic violence, is widely recognised.¹⁶ Indeed, Ireland's ratification of the Istanbul Convention served as one of the main drivers in improving the domestic legal framework against domestic violence. The Convention binds states parties to exercise due diligence regarding GBV.¹⁷ In fulfilling this standard, states must take legal and other measures to 'prevent, investigate, punish and provide reparation' for acts of GBV covered in the Convention. This obligation applies to acts committed by non-state actors, including individuals.¹⁸

While developed and built upon in the Istanbul Convention, this is an obligation that is rooted in the established United Nations

13 Ibid 171, 172.

14 Ibid 172.

15 Kristin L Anderson, 'Gendering coercive control' (2009) 15 *Violence Against Women* 1444, 1447.

16 Ronagh J A McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge Research in Human Rights Law 2019) 22. Other international and regional documents addressing GBV and domestic violence include: the African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (adopted 28 March 2003, entered into force 11 July 2003); and the Organisation of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention Belem Do Pará) (adopted 9 June 1994, entered into force 5 March 1995).

17 Council of Europe (n 4 above) art 5.

18 Ibid art 5.

(UN) framework against violence against women, including the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW 1979) and the UN Declaration on the Elimination of Violence Against Women (DEVAW 1993).¹⁹ Even though the CEDAW does not expressly refer to violence against women, the Convention has been interpreted by the CEDAW Committee in its General Recommendations No 19 (1992) and No 35 (2017) as encompassing violence against women, in both the private and public domains, as a form of gender discrimination and, as such, a violation of human rights and fundamental freedoms.²⁰

The Istanbul Convention takes a holistic approach and has been praised for providing a gendered, modern and comprehensive account of GBV, including domestic violence, as both a human rights violation in and of itself, as well as a component in wider discrimination against women.²¹ In a similar fashion to the CEDAW and DEVAW definition of violence against women and domestic violence, the Istanbul Convention adopts a broad definition of domestic violence, under article 3, as ‘all acts of physical, sexual, psychological or economic violence’ occurring ‘within the family or domestic unit or between former or current spouses or partners’ regardless of whether the perpetrator and victim/survivor share a dwelling or not. Specifically, on psychological violence,²² article 33 prescribes the obligation of state parties to take all ‘necessary legislative or other measures’ to ensure criminalisation of ‘intentional conduct ... seriously impairing a person’s psychological integrity through coercion or threats’.²³ This express call in the Convention to criminalise psychological violence

19 United Nations, Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) vol 1249; United Nations, Declaration on the Elimination of Violence Against Women (20 December 1993) A/RES/48/104.

20 UN CEDAW Committee, General Recommendation No 19: Violence Against Women (1992), para 19; UN CEDAW Committee, General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19 (14 July 2017).

21 Dubravka Šimonović, ‘Global and regional standards on violence against women: the evolution and synergy of the CEDAW and Istanbul Conventions’ (2014) 36 Human Rights Quarterly 590, 604–603.

22 There is a disagreement between scholars regarding the value of equating coercive control to psychological violence. For instance, Stark conceptually disagrees with coercive control being approached as psychological violence, as doing so may risk understanding the phenomenon in light of ‘mental processes’ in detriment of its structural nature. See further Stark, *Coercive Control* (n 3 above) 11.

23 Council of Europe (n 4 above) art 33.

is unprecedented within the human rights framework of protection against domestic violence.²⁴

Despite the prevalence of the language of coercive control in academic and civil society discourse at the time of Istanbul Convention's adoption,²⁵ references to this specific form of abuse are absent from the text of the Convention. However, it can be easily argued that the comprehensive definitions regarding domestic violence in the Convention confer due diligence obligations upon states to address coercive control, as analogous to psychological violence. The Convention's explanatory report supports this claim, as it submits that article 33 on psychological violence intends to capture an intentional course of conduct extending beyond discreet incidents or, in other words, 'an abusive pattern of behaviour occurring over time'.²⁶

It is essential to mention that the explanatory report does not clarify what the reference in article 33 to 'seriously impairing' someone's psychological integrity entails, nor does it specify which behaviour, threats or coercion may amount to violence. To some extent, the Council of Europe Group of Experts on Action against Violence Against Women and Domestic Violence (known as GREVIO), which monitors state compliance with the Istanbul Convention, has clarified the scope of article 33 and states' obligations arising therein.²⁷ GREVIO has insisted on the importance of visibilising psychological violence, highlighting its connection to other forms of violence, such as physical or economic, and naming its severity as a violation of 'the victim's psycho-social integrity'.²⁸ GREVIO has explained that the drafters' intention behind article 33 was that 'any act causing psychological duress', which, notably, 'can take various forms such as isolation, excessive control and intimidation', should be punished.²⁹

24 Paul McGorrery and Marilyn McMahon, 'Criminalising psychological violence in Europe: (non-)compliance with article 33 of the Istanbul Convention' (2021) 42 *European Law Review* 211, 215.

25 Stark, *Coercive Control* (n 3 above) and references therein.

26 Council of Europe, 'Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence' (11 May 2011) para 181.

27 Council of Europe 'About GREVIO – Group of Experts on Action against Violence Against Women and Domestic Violence' (nd). Under the Convention's art 66(2), its membership is composed of 10 to 15 members 'taking into account a gender and geographical balance, as well as multidisciplinary expertise'. The Group produces country monitoring reports, which evaluate the domestic measures taken to implement the Convention.

28 Council of Europe (n 26 above).

29 GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing Combating Violence against Women and Domestic Violence (Istanbul Convention) Monaco' (27 September 2017) 113.

GREVIO's reports have clarified various issues regarding the behaviours falling within the scope of article 33. These can include minor instances of intimidation, including those at the early stages of the violence, not necessarily amounting to severe violence or threats.³⁰ Building on the idea of violence as a continuum, as acknowledged in the explanatory report, GREVIO has reinforced the notion that article 33 does not refer to separate and distinct assaults but rather a pattern extending in time and beyond single incidents.³¹ Ongoing abuse, GREVIO has stated, is encompassed within article 33, even if the acts which constitute it do not 'necessarily reach the threshold of criminalisation'.³² Referring to these behaviours, GREVIO used the terminology of coercive control in 2018³³ and has continued using it in monitoring states' compliance with article 33.³⁴ This interpretation is a clear confirmation that states have obligations which go beyond a historical and stereotypical understanding of domestic violence, including coercive control. GREVIO has reinforced this assertion by

30 GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Austria' (27 September 2017) para 144; GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Denmark' (24 November 2017) para 162.

31 GREVIO, 'Monaco' (n 29 above) para 113.

32 GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Turkey' (15 October 2018) para 215.

33 Ibid.

34 See, for instance, GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Finland' (2 September 2019) para 157; GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Belgium' (21 September 2020) para 152; GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Malta' (nd) para 164; GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Poland' (16 September 2021) para 199; GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Slovenia' (12 October 2021) para 245.

stating that offences which require the use of force or a serious threat of violence are inadequate to cover psychological violence under the Convention.³⁵ Similarly, GREVIO has referred to the importance of this obligation in aiding the social understanding and recognition of psychological violence as a crime and its consequential impact in increasing reporting of domestic abuse.³⁶

Nonetheless, the obligation to criminalise psychological violence contained in the Convention is qualified, as article 33 is one of the six provisions into which states may enter reservations.³⁷ Article 78(2) of the Convention provides for the possibility of foregoing criminal sanctions against behaviours covered under article 33, if non-criminal sanctions are in place. Thus, where a state decides that criminalisation is not the appropriate route, it must provide effective remedies under civil law where it has failed to prevent the violence or protect the victim/survivor.³⁸

Ireland's obligations under the Istanbul Convention complement and strengthen its existing commitments under the CEDAW Convention, including obligations in relation to GBV outlined in CEDAW's General Recommendations Nos 19 and 35. Both Conventions are complementary, and this synergy reinforces human rights standards relevant to violence against women.³⁹ Crucial for the implementation of all obligations linked to women's right to live free from violence, Ireland has an obligation to condemn all forms of discrimination and protect women's rights, especially those relating to their protection, in a non-discriminatory manner.⁴⁰

IRELAND'S ENACTMENT OF THE DOMESTIC VIOLENCE ACT 2018

Ireland seems to have been particularly slow in providing legal remedies to victims/survivors of domestic violence. The enactment of new legislation protecting victims' rights, such as the Criminal Justice (Victims of Crime) Act 2017 and the DVA 2018, together with the ratification of the Istanbul Convention, appears to be a marked shift away from past shortcomings. This is a significant departure, albeit one rightly considered to be '100 years too late'.⁴¹ As Louise Crowley has pointed out, previously to the DVA 2018, victim protection against

35 GREVIO, 'Austria' (n 30 above) para 144.

36 Ibid.

37 Council of Europe (n 4 above) art 78 (2) (3).

38 Ibid art 29.

39 Šimonović (n 21 above).

40 Council of Europe (n 4 above) art 4.

41 Seanad Deb 1 March 2017, vol 250, no 8.

domestic violence used to be contingent on the victim's willingness to seek 'civil remedies in the form of a barring order or safety order'.⁴² This was due to the fact that, despite some elements of domestic violence being criminally sanctionable, for example, under the Non-Fatal Offences Against the Person Act 1997, state intervention did not prove to be 'sufficiently robust'.⁴³

The DVA 2018 Bill, as initially introduced in the Seanad, Ireland's upper house, by former Minister for Justice and Equality Frances Fitzgerald, enjoyed cross-party support, but did not contain a provision on coercive control.⁴⁴ In the words of Minister Fitzgerald, the Bill aimed to 'consolidate and reform the law on domestic violence to provide better protection for victims'.⁴⁵ Reform was pressing for two main reasons. First, the domestic legal framework in place to address intimate partner violence lacked an effective and comprehensive protective framework for victims/survivors.⁴⁶ The inadequacy of the legal framework can be attributed, as Crowley suggests, to the historical and widespread reticence of the Irish state to intervene in family matters. In the family context, when it came to state intervention, property and privacy rights habitually operated against the protection of victims/survivors of domestic violence.⁴⁷ Second, the framework in place was insufficient to meet the standards set by the Istanbul Convention, including the obligations outlined in article 33. In theory, psychological violence and abuse could have been (inadequately) criminally punished under the harassment provision of the Non-Fatal Offences Against the Person Act 1997. As Crowley states, the operationalisation of the harassment provision would have taken place in a dire context where the legal minimisation of domestic violence was normalised, evidenced by a 'reluctance to charge offenders for criminal acts in the domestic context'.⁴⁸

Despite the political will to legally consolidate and reform the state's domestic violence response, civil society submissions⁴⁹ and

42 Louise Crowley, 'Domestic violence law' in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (Bloomsbury 2019) 149.

43 Ibid.

44 Department of Justice, 'Domestic Violence Bill 2017 (as initiated)' (nd).

45 See n 41 above.

46 Crowley (n 42 above) 137.

47 Ibid.

48 Ibid 149.

49 See, not exhaustively, Women's Aid, 'Domestic Violence Bill 2017 Submission' (February 2017); Safe Ireland, 'Briefing for Members of the Oireachtas Legislative Amendments Recommended to: Domestic Violence Bill 2017' (April 2017); NWCI, 'Recommendations for Legislative Amendments: Domestic Violence Bill 2017' (February 2017).

parliamentary debates on the Bill evidence that introducing an offence of coercive control and determining the wording of such a provision were not straightforward tasks. It became immediately clear in parliamentary debates that there was a reticence by government officials to provide statutory definitions of domestic violence and coercive control. During the first Seanad debate, Minister Fitzgerald stated, 'given the complexity of relationships and the range of behaviours that could be considered coercive or controlling, it would be very problematic to define that in statute' and 'extremely difficult' to prove beyond reasonable doubt in a criminal law setting.⁵⁰ Similarly, Minister of State at the Department of Justice and Equality, David Stanton, showed sympathy to the possibility of defining coercive control in the statute, yet he also expressed his concerns. Similarly to Minister Fitzgerald, he displayed his hesitation in relation to challenges posed by enforceability of the offence and noted a potential risk of 'counterclaims being made by perpetrators to undermine the victim's case'.⁵¹ Minister Stanton also objected to the inclusion of a list of behaviours to guide judicial decision-making, in place of a definition, positing that it would run the risk of narrowing the courts' broad discretion to decide on domestic violence cases.⁵² This, he argued, would limit courts' independence and restrict their capacity to determine what is relevant in a case.⁵³

On the other hand, Senator Colette Kelleher highlighted at the outset of the first Seanad debate the need to include 'a clear and comprehensive definition of what constitutes domestic violence', encompassing non-physical forms of violence, to account for the prevalence of psychological abuse.⁵⁴ An implicit recognition was made that coercive control was being left without legal remedy, with reference to organisations' concerns that even getting civil protection orders for non-physical forms of violence was difficult.⁵⁵ Senator Alice-Mary Higgins stated that arguments against the introduction of an offence of coercive control went 'against the advice we have had from all of the NGOs working in this area'.⁵⁶ She suggested, instead, that the creation of such an offence would provide an additional layer of protection under the law, in the form of civil orders and criminal prosecution, prior to escalation in danger and (physical) violence. She stated, 'it simply provides another thread or strand, and is something that

50 See n 41 above.

51 Seanad Deb 4 July 2017, vol 252, no 11.

52 Ibid.

53 Seanad Deb 28 November 2017, vol 253, no 9.

54 See n 41 above.

55 Ibid; Women's Aid, 'Domestic Violence Bill 2017 Submission' (February 2017) 19.

56 See n 51 above.

moves beyond those individual instances to a pattern of behaviour'.⁵⁷ Senator Higgins recognised the need to 'move past' a perception that only physical abuse amounts to domestic violence, and to bring to the attention of practitioners the behaviours they should be looking for when assessing whether abuse occurs.⁵⁸

The inclusion of a definition of domestic violence was rightly perceived to be a central aspect in precipitating a cultural shift. The Law Society recommended its addition, citing the need to ensure the Bill's compliance with the recognition of domestic violence in law and practice, as defined by article 3 of the Istanbul Convention.⁵⁹ Senator Ivana Bacik further noted that the Law Society argued the definition was not only desirable but also 'required' under the Istanbul Convention.⁶⁰ A number of senators, including Senator David Norris and Senator Colette Kelleher pushed for the inclusion of this definition to include coercive control.⁶¹ It was argued that, instead of serving the victims/survivors, the current broad judicial discretion, facilitated by a lacuna with regards to a definition of domestic violence or guidelines, provided a fundamental issue of 'inconsistency and divergence of practice' in domestic violence cases.⁶² Bacik problematised this divergence, and highlighted that there seemed to be a misguided belief by some legal practitioners, including judges, that there was an unwritten threshold to be satisfied in practice for a civil law order to be made.⁶³ The suggestion that some legal practitioners were proceeding on the basis that this threshold existed speaks volumes in relation to the utmost need to adopt statutory guidance in relation to domestic violence, in order to avoid miscarriages of justice.

Eventually, during the Seanad session of 28 November 2017, Minister of State David Stanton announced that the Bill would include coercive control as an enumerated criminal offence. The reason for the Government's shift from an unwillingness to enact an offence of

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 See n 41 above.

62 See n 51 above.

63 Ibid. Senator Bacik, speaking of structured statutory guidelines stated: 'This is particularly important when we are talking about orders such as safety orders, protection orders and barring orders because we know there is a divergence in practice in this regard and that district judges and practitioners refer colloquially to applicants having to reach a bar or threshold before they will satisfy the judge that an order may be made. There is no such bar or threshold. I remember people talking about this when I was in practice. I understand this misleading expression is still being used now; yet judges do not have available to them any statutory criteria to guide them.'

coercive control during the July 2017 debate to tabling an amendment involving the addition of a coercive control offence before the following debate in November 2017 is not evident. It appears, however, to be a result of a joint effort by civil society organisations, a number of senators, and the office of the Minister of State with the Department and the Office of the Attorney General.⁶⁴ The important role played by the advocacy and lobbying of Irish women's rights organisations – including Safe Ireland, the National Women's Council of Ireland (NWCi) and Women's Aid – is discernible in their submissions made during the legislative amendments process.⁶⁵ For instance, NWCi had insisted that the criminal law approach to domestic violence did not 'reflect the true experience of long-term domestic abuse, including coercive control' and argued that a specific offence would improve access to justice and effective prosecution.⁶⁶ Similarly, Safe Ireland had recommended adding a new offence of controlling and coercive behaviour, potentially following the model of the England & Wales' provision.⁶⁷ Despite the coercive control addition, the DVA 2018 as enacted did not end up defining what constitutes domestic violence or what amounts to coercive control.

Undoubtedly, the DVA 2018 brought forward other significant legislative advancements in relation to women's protection and access to effective remedies, such as broadening the scope of legal protection to non-cohabiting partners and introducing emergency barring orders, from which coercive control survivors may benefit.⁶⁸ The parliamentary debates on the DVA 2018 evidenced the considerable reforms still needed in the justice system to effectively provide remedies to domestic violence survivors. Some concerns raised through the bill's various stages mirror issues present in other jurisdictions, such as the role that the judicial system plays in functioning as an extension of controlling behaviours by abusive partners or the current inadequacy of training for legal personnel and its practical negative ramifications for victims/survivors.

In the next section, I explore in more detail the merits and potential shortcomings of the coercive control offence in the DVA 2018 and questions which arise regarding its practical implementation.

64 See n 53 above.

65 Safe Ireland (n 49 above); NWCi (n 49 above); Women's Aid (n 49 above).

66 NWCi (n 49 above) 2.

67 Safe Ireland (n 49 above) 13.

68 See n 41 above.

THE CODIFICATION OF COERCIVE CONTROL IN IRELAND: ACHIEVEMENTS AND LIMITS

The offence of coercive control, as ultimately enacted in section 39 of the DVA 2018, reads as follows:

- (1) A person commits an offence where he or she knowingly and persistently engages in behaviour that— (a) is controlling or coercive, (b) has a serious effect on a relevant person, and (c) a reasonable person would consider likely to have a serious effect on a relevant person.
- (2) For the purposes of subsection (1), a person's behaviour has a serious effect on a relevant person if the behaviour causes the relevant person— (a) to fear that violence will be used against him or her, or (b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities.
- (3) A person who commits an offence under subsection (1) is liable— (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, and (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years, or both.
- (4) In this section, a person is a 'relevant person' in respect of another person if he or she— (a) is the spouse or civil partner of that other person, or (b) is not the spouse or civil partner of that other person and is not related to that other person within a prohibited degree of relationship but is or was in an intimate relationship with that other person.

Several key legal elements are noteworthy. The Act sets out the relevant *mens rea* requirement as that of 'knowingly and persistently' engaging in the impugned harmful behaviour. The second requirement of 'serious effect' defines the threshold of the offence against the impact it has on the victim/survivor: either provoking fear or leading to day-to-day activities being substantially impacted due to a serious alarm or distress provoked by the behaviour. A 'serious effect' must be considered *likely* to arise as a result of the perpetrator's behaviour by a *reasonable person*. The 'relevant person' requirement defines the application of the offence to partners and ex-partners, regardless of the legal status of their intimate relationship.

The enactment of the coercive control offence is in itself an achievement as regards implementing article 33 of the Istanbul Convention and providing victims/survivors of coercive control a clearer legal avenue for redress. The criminalisation of coercive control not only allows criminal prosecution but also provides a springboard for civil remedies such as barring orders. On paper, the normative context of the Irish offence fully complies with the state's obligation contained in article 33. The Convention drafters provided states with leeway to decide how to legally define 'intentional conduct', which in

section 39 of the DVA 2018 appears as the requirement of ‘knowingly’ and ‘persistently’ engaging in behaviour that is considered as coercive control. Similarly, the requirement to affect the victim/survivor substantially, so as to seriously impair and damage their psychological integrity (found in art 33 of the Convention) is reflected in the DVA 2018’s requirement that the behaviour has a ‘serious effect’ on the victim/survivor. This effect must be either fear of violence or serious alarm and distress affecting her on a day-to-day basis.

Despite the lack of definition, the listing under section 5 of the DVA 2018 of the factors and circumstances that judges must consider when determining applications for civil law orders can be seen as an achievement in relation to coercive control. The non-exhaustive list of contextual factors to be considered include: animal cruelty; a recent separation between the perpetrator and survivor; any deterioration in the survivor’s physical or emotional wellbeing; any economic dependency; previous history of violence; and convictions for an offence under the Criminal Justice (Theft and Fraud Offences Act) 2001, or for an offence involving violence or threat thereof against any person.⁶⁹ The statutory addition of these factors is a welcome clarification as to how judges and practitioners may expose the presence, as a matter of law, of coercive control within a relationship.

However, shortcomings in the normative content are also noteworthy. Ireland missed the opportunity to be the first jurisdiction to adopt a statutory provision that addressed the gender power dynamics present in coercive control. Stark has argued that legal recognition of coercive control as a form of harm should go beyond ‘adding new offensive behaviours to a series of (already unenforced) distinct offences’.⁷⁰ A gendered provision would highlight coercive control as a ‘singular malevolent intent to dominate’, which is ‘most prevalent and has its most devastating consequences in heterosexual relationships’, where the perpetrator’s gender and male privilege justifies its use to enforce female subordination in a patriarchal society.⁷¹ It is posited that the failure to do so is reflective of a lack of political will to be precise and clear in legally recognising the issue as a gendered one, unfortunately not unique to Ireland. All statutory offences criminalising coercive control in Europe, including England & Wales, Scotland, and Northern Ireland are gender-neutral even though they are backed by a governmental understanding of domestic

69 Domestic Violence Act 2018, s 5(2)(a)–(r).

70 Evan Stark, ‘The “coercive control framework”: making law work for women’ in McMahon Paul (n 2 above) 40.

71 Ibid.

violence as a gendered phenomenon.⁷² A codification of coercive control recognising its gendered power dynamics could have oriented the judiciary's implementation of coercive control in a gender-sensitive manner.⁷³

Moreover, Ireland decided to adopt almost identical wording to section 76 of the Serious Crime Act 2015, now amended in the Domestic Abuse Act 2021, which applies in England & Wales, foregoing the opportunity to align with an alternative construction, such as Scotland's, which is considered 'one of the most radical attempts yet to align the criminal justice response with a contemporary feminist conceptual understanding of domestic abuse as a form of coercive control'.⁷⁴ This may be understood in light of the timing, given that stages of the Scottish parliamentary debates took place slightly later than Ireland's, perhaps not providing very much space for cross-fertilisation.⁷⁵ The formulation used in England & Wales and Ireland places the onus on the victim/survivor to show that the coercive and controlling behaviour has had a particular effect on her, namely a serious one which impacts her usual day-to-day activities. Focusing on the perpetrator's intent to harm, as does section 1 of the Domestic Abuse (Scotland) Act 2018, rather than on the victim/survivor's reaction to such harm, would have been strongly preferable.

Although civil society organisations had lobbied for the inclusion of more stringent penalties, the legislation provides for a maximum of 12 months' incarceration on summary conviction and a maximum of five years on conviction on indictment.⁷⁶ This is worth noting, given that harassment charges under the Non-Fatal Offences Against the Person Act 1997 can carry a sentence of up to seven years in prison.⁷⁷

Among the normative shortcomings of the DVA 2018 in relation to coercive control, the lack of definition, paired with the absence of

72 Domestic Violence Act 2018, s 5(2)(a)–(r) (Ireland); Michele Burman and Oona Brooks-Hay, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' (2018) 18 *Criminology and Criminal Justice* 67; Dáil Deb 15 December 2017, vol 963, no 4; 'Domestic Abuse and Family Proceedings Bill, Explanatory and Financial Memorandum' (nd). Even though there is no explicit recognition that coercive control is a gendered phenomenon in the Northern Ireland Domestic Abuse and Family Proceedings Bill Explanatory and Financial Memorandum, it may be argued that the document implicitly recognises it by making reference to the Bill's compliance with the UK's obligations under the Istanbul Convention.

73 UN CEDAW Committee, General Recommendation No 33 on Women's Access to Justice (23 July 2015) para 14.

74 Evan Stark and Marianne Hester, 'Coercive control: update and review' (2019) 25 *Violence Against Women* 81, 85.

75 The Scottish Parliament, 'Domestic Abuse (Scotland Bill)' (nd).

76 See n 53 above.

77 Non-Fatal Offences Against the Person Act 1997 Number 26 of 1997 (Ireland).

policy guidelines, is the most significant missed opportunity. Domestic violence – and especially coercive control – is not a universally understood issue warranting no definition or guidance. Far from it, the absence of such will very likely contribute to an inconsistency in the implementation of the offence.⁷⁸ As a matter of fact, concerns surrounding divergence of understandings, or the misunderstanding of the offence, and the consequential legal implications of the same, have fuelled academic debate over whether the positives of criminalising coercive control can outweigh the potential negatives.⁷⁹ Thus, it is possible that the detailed statutory guidance of offences enshrined in neighbouring jurisdictions becomes a relevant tool as Irish legal practitioners seek clarification, especially given the extreme similarity of Ireland's provision with that of England & Wales.⁸⁰ Against the background of this crucial deficiency, I now turn to the consideration of the potential issues with the provision's implementation in Ireland.

THE QUESTION OF IMPLEMENTATION: THE GATEWAY TO EFFECTIVE REMEDIES

Any theoretical discussion about the Irish criminalisation of coercive control should be accompanied by a preliminary evaluation of its practical implementation and the factors that can impact survivors' access to effective remedies. As advanced above, under the DVA 2018, effective legal remedies for survivors might take the form of protection measures under civil law or prosecution of the perpetrator under criminal law.⁸¹ At the time of writing, there have been only a handful of successful prosecutions under the coercive control offence. Yet,

78 Women's Aid (n 49 above) 9.

79 Vanessa Bettinson and Charlotte Bishop, 'Is the creation of a discrete offence of coercive control necessary to combat domestic violence?' (2015) 66 *Northern Ireland Legal Quarterly* 179; Heather Douglas, 'Legal systems abuse and coercive control' (2018) 18 *Criminology and Criminal Justice* 84; Sandra Walklate et al, 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories' (2018) 18 *Criminology and Criminal Justice* 115; Sandra Walklate and Kate Fitz-Gibbon, 'The criminalisation of coercive control: the power of law?' (2019) 8 *International Journal for Crime, Justice and Social Democracy* 94.

80 Home Office, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework' (December 2015); *Domestic Abuse (Scotland) Act 2018*, s 2.

81 For more on effective remedies, see UN CEDAW Committee (n 73 above) para 19(b): 'remedies should include, as appropriate, restitution (reinstatement); compensation (whether provided in the form of money, goods or services); and rehabilitation (medical and psychological care and other social services). Remedies for civil damages and criminal sanctions should not be mutually exclusive'.

reporting of the crime continues to grow. In August 2022, 289 crimes had been reported, with charges having been brought in 53 cases.⁸²

In February 2020, just over a year after the DVA 2018 entered into force, the first conviction and sentencing under section 39 of the DVA 2018 were handed down in the Letterkenny Circuit Court.⁸³ The case in question involved a man who was sentenced to 21 months of prison after pleading guilty to an array of charges against his ex-girlfriend, including coercive control, harassment and threats to damage property.⁸⁴ Reports of the case recounted extreme harassment, with the perpetrator calling the victim/survivor close to six thousand times over four months, as well as using other controlling and threatening tactics.⁸⁵ In November 2020, exactly nine months after the first sentence was handed down, another man, who previous to the trial had pleaded not guilty, was convicted of coercive control and assault against his ex-partner in the Dublin Circuit Criminal Court. This was the first court case under the DVA 2018 judged by a jury. The perpetrator was sentenced to 10 years and six months in prison, a sentence length which reflects his charges for coercive control as well as for repeated physical attacks.⁸⁶ Since, coercive control sentences have followed in a few reported cases, including in June 2021, July 2022 and January 2023. The first case involved a pattern of coercive control, including threats, to which the perpetrator pleaded guilty and was sentenced to three years in prison.⁸⁷ In the second case, the perpetrator was charged with a sentence of three years and three months after pleading guilty to harassment, assault causing harm, criminal damage, threats to cause criminal damage, endangerment, theft and threats to kill.⁸⁸ The last case involved a perpetrator who was sentenced to five years in prison for two counts of assault causing harm and one count of coercive control. In imposing sentence, Judge Sheahan recognised that the survivor had

82 Connor Lally, 'Surge in coercive control cases reported to Garda last year' *Irish Times* (Dublin 1 August 2022).

83 An Garda Síochána, 'First conviction and sentencing for coercive control in Ireland' (11 February 2020).

84 Stephen Maguire, 'Man jailed for coercive control phoned woman 5757 times in four months' *Irish Times* (Dublin 11 February 2020)

85 Ibid.

86 Liz Dunphy and Brion Hoban, 'Landmark coercive control sentence a warning to all abusers – charity' *Irish Examiner* (Dublin 22 January 2021).

87 Ann Healy, 'Coercive control: conspiracy theorist's reign of terror over family' *Irish Examiner* (Dublin 8 June 2021).

88 Conor Gallagher, 'Garda jailed for coercive control of terminally ill partner over four-year period' *Irish Times* (Dublin 26 July 2022).

‘endured great upset and trauma from the assaults and psychological injury’.⁸⁹

At this time, it is still uncertain how adequately actors within the Irish justice system approach the coercive control offence. At the time of writing, almost three years after the entry into force of the DVA 2018, information on the practical implementation of the offence remains scarce or not in the public domain. It is reported that as of July 2022 there had been 53 charges of coercive control.⁹⁰ Yet, there is lack of precise data, for example in relation to the number of applications for civil protection orders and orders granted in relation to coercive control.⁹¹ This is consistent with the generally poor collection of criminal and civil justice statistics in Ireland. A recent response by the Minister for Justice to a parliamentary question regarding the number of domestic violence reports to police within a certain period is reflective of this. Minister McEntee asserted that attempting to establish unique persons who reported domestic violence in Ireland during the period between October 2020 to January 2021 ‘would require the expenditure of a disproportionate amount of staff time and resources in order to provide suitably accurate figures’.⁹² As published by the Central Statistics Office (CSO), recorded crime in Ireland is marked ‘under reservation’, highlighting that its quality does not meet CSO standards.⁹³ Data are not disaggregated by crime, gender or relationship, making it impossible to access the number of reported cases under the new offence. Without a doubt, improving data collection is a challenge which must be prioritised, as having a direct impact on further research and related policy developments.

Policing coercive control

For the effective implementation of the offence, the response of the police and its involvement is crucial, especially in the identification of victims/survivors.⁹⁴ An Garda Síochána, has a Divisional Protective Services Unit in all Garda divisions, which, as part of the Garda National Protective Services Bureau, specialises in investigating crimes such as

89 Eimear Dodd, ‘Man (21) jailed for coercive control and assault of ex-partner who “endured great upset and trauma”’ *Irish Times* (Dublin 20 January 2023).

90 *Dáil Éireann Debate* (5 July 2022).

91 Courts Service, *Annual Report 2021* (July 2022).

92 *Dáil Éireann Questions* (660, 661) (3 March 2021).

93 Central Statistics Office, ‘*Recorded Crime – Under Reservation*’ (nd).

94 Cassandra Wiener, ‘Seeing what is “invisible in plain sight”: policing coercive control’ (2017) 56 *Howard Journal of Crime and Justice* 500; Sian Dickson, ‘Court of Appeal: coercion, control and assault: the importance of proactive policing and judicial standards in s 76 prosecutions *R v Conlon* (Robert Joseph James)’ (2018) 82 *Journal of Criminal Law* 123, 125.

domestic violence.⁹⁵ Monitoring their role in responding to coercive control as a new statutory offence will be crucial to determine whether the concerns raised regarding policing and identifications in other jurisdictions are also relevant in Ireland.⁹⁶

Research conducted on the policing of coercive control in England & Wales reflects that the criminalisation of coercive control, seen as a cultural change, necessarily requires a cultural shift in the police force.⁹⁷ A cursory look at the information provided by An Garda on its website regarding coercive control is promising. The website provides detailed information on the signs of coercive control, both for victims/survivors and relatives, and explains the process of reporting coercive control to the police. It advertises that Gardaí *will* provide advice, seek the victim/survivor's statement, initiate an investigation, gather evidence and witness statements, and examine tech belongings, such as phones or computers, in order to submit a file to the Office of the Director of Public Prosecutions.⁹⁸

More detailed information on the policy guiding An Garda's intervention in domestic abuse cases can be found in its 2017 Domestic Abuse Intervention (DVI) policy, developed in consultation with statutory bodies such as the Office of the Director of Public Prosecutions and COSC (the National Office for the Prevention of Domestic, Sexual and Gender-based Violence).⁹⁹ The DVI pre-dates the DVA 2018 but nevertheless provides a reasonably comprehensive account of how intervention in domestic violence cases should be carried out. It helpfully includes a broad definition of domestic abuse and sets out good practice standards. The policy directs officers to, *inter alia*, take note of the history of abuse and current risk, note the physical and emotional condition of all parties, and use the power of arrest regardless of the victim/survivor's 'attitude' to it. It also takes into account Ireland's multicultural society and has a section that specifies cultural issues which may arise in the course of police intervention.

95 Department of Justice, 'Minister McEntee welcomes completion of rollout of Garda Divisional Protective Services Units' (29 September 2020).

96 See eg Charlotte Bishop and Vanessa Bettinson, 'Evidencing domestic violence, including behaviour that falls under the new offence of "controlling or coercive behaviour"' (2018) 22 *International Journal of Evidence and Proof* 3; Julia R Tolmie, 'Coercive control: to criminalize or not to criminalize?' (2018) 18 *Criminology and Criminal Justice* 50; Walklate et al (n 79 above); Charlotte Barlow et al, 'Putting coercive control into practice: problems and possibilities' (2019) 60 *British Journal of Criminology* 160.

97 Wiener (n 94 above) 503; Evan Stark, 'Looking beyond domestic violence: policing coercive control' (2012) 12 *Journal of Police Crisis Negotiations* 199, 213.

98 An Garda Síochána, 'Domestic abuse' (nd).

99 An Garda Síochána, 'Domestic Abuse Intervention Policy' (2017).

The DVI has been praised for its sensitivity regarding the ‘understanding of the complexities of the abusive relationship and the cycle of abuse that typically occurs’.¹⁰⁰ Nevertheless, in light of the DVA 2018, an update would be most welcome to more comprehensively and specifically address particular dynamics of coercive control and highlight good intervention and investigation practices. As Wiener describes, police officers interviewed in London explained that investigating coercive control required shifting their approach, usually geared towards investigating concrete events and physical violence only, to one which included looking into less visible forms of abuse.¹⁰¹ Thus, to appropriately identify coercive control when responding to a domestic violence call, police need to leave behind a stereotypical model that thinks of violence as equal to violent events.¹⁰²

A further look into the Irish policing practice shows that considerable weight is given to ‘incidents’ of violence, and, in particular, to their seriousness. For example, in the DVI, An Garda Síochána indicates that ‘the scale of abuse in previous incidents’ should be considered during their intervention. Such a focus on the scale of the abuse could lead to interventions that undermine survivors’ experiences, failing to recognise the continuums of abuse typical of the offence of coercive control. Whilst physical violence usually features very clearly delineated specific incidents with ‘a degree of specificity (in time and space)’, investigating coercive control requires a deeper look into relationship context and dynamics, which is ‘more complex and time-consuming’.¹⁰³ Thus, in investigating coercive control, which is a course of conduct rather than incidental, investigators must pay special attention to the context in which the abuse takes place. Contextualising the abuse provides meaning to behaviours that may not seem harmful in isolation and often unveils a power dynamic that may not be immediately apparent, but that is nevertheless central to recognising the existence of the harm.¹⁰⁴

It is true that the investigation of coercive control may bear similarities to the investigation of other offences which are not necessarily evidenced by visible external damage, for example, sexual assault or harassment. Generally, Tom O’Malley states in a recent report that training is required for all personnel coming into contact with victims under the European Union (EU) Directive on Victim’s

100 Crowley (n 42 above) 151.

101 Wiener (n 94 above) 505.

102 Ibid 503.

103 Ibid 511, 512.

104 Bishop and Bettinson (n 96 above) 8.

Rights.¹⁰⁵ However, specific and specialised coercive control training, and indeed cross-cutting GBV training, will also be key for adequately investigating and identifying this form of harm. Data in England & Wales regarding the implementation of its coercive control offence evidences that coercive control is often misidentified and incorrectly labelled.¹⁰⁶ Tolmie explains that coercive control may be formed of behaviours that are not ‘automatically unacceptable’, and, therefore, the acceptability of these may ‘depend on whether they are agreed to, and agreement can be the result of a matrix of factors’.¹⁰⁷ The literature provides many examples of this.¹⁰⁸ For instance, whereas at first glance asking one’s partner to call when she gets to a place to ensure that she has arrived safely may seem caring, an unwritten ritual that entails punishment where she fails to do so may only be revealed if one pays attention to the nature and context, as well as the power dynamics of the relationship.

An Garda Síochána Commissioner, Drew Harris, has pledged to address coercive control, undertaking in-depth and effective investigations to gather evidence to support prosecution and to ensure accountability.¹⁰⁹ Reports detail that members of the Irish police force have received specific training and awareness on coercive control and the DVA 2018 at the national and frontline levels.¹¹⁰ Moreover, An Garda Síochána announced in November 2021 a major review of its approach to domestic violence, including in light of international best practice.¹¹¹ Further training and a change of approach will be crucial in the implementation of coercive control as recent research suggests that cultural issues in policing domestic violence in Ireland remain, including ‘problematic views of DV and abuse such as victim blaming, minimisation and patriarchal attitudes toward women’, creating an ‘inconsistent’ response to domestic violence.¹¹²

105 Tom O’Malley, ‘Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences’ (2020) para 10.6.

106 McGorry and McMahon (n 6 above) 962.

107 Tolmie (n 96 above) 56.

108 Stark, *Coercive Control* (n 3 above).

109 Commissioner Drew Harris, ‘Keynote Address’ (Creating a Safer Ireland for Women: From Ratification to Implementation, Dublin, 6 December 2019).

110 *Dáil Éireann Questions* (795) (nd).

111 Conor Lally, ‘Major Review will assess how Garda tackles domestic violence’ *Irish Times* (Dublin 5 November 2021).

112 Stephanie Thompson et al, “A welcome change ... but early days”: Irish service provider perspectives on Domestic Abuse and the Domestic Violence Act 2018’ (2022) 1 *Criminology and Criminal Justice*.

Evidencing and prosecuting the offence

Bishop and Bettinson's work on evidencing coercive control highlights the unique difficulties arising in evidencing and prosecuting such offences.¹¹³ They argue that, in order to evidence coercive control, an in-depth understanding of the behaviours in context, including the application of a gendered analysis, is crucial in order to ascertain the presence of the harm and the several forms that it can adopt. GREVIO reports illustrate that there is a cross-cutting issue across state parties to the Istanbul Convention regarding a lack of prosecution of psychological violence due to poor understanding and recognition of this form of harm as legally punishable.¹¹⁴ Training, not only on evidence-gathering but also on the broader social context in which the harm takes place, is thus indispensable for all actors within the justice process.¹¹⁵ The Office of the Director of Public Prosecutions points to 'lack of evidence' as the 'most common reason for decisions not to prosecute'.¹¹⁶ In this line, it is promising that members of the police force are reportedly receiving training in investigative interviewing specifically geared towards victims/survivors of violence including psychological abuse and including relevant topics such as vulnerability and trauma narratives.¹¹⁷

Not only must evidence be available, but it must also be 'admissible, relevant, credible and reliable' and enough to prove the perpetrator's guilt beyond reasonable doubt.¹¹⁸ So far, only cases where it may have been relatively straightforward to evidence coercive control beyond a reasonable doubt have reached criminal convictions. As stated, the first case featured a man calling his partner over five thousand times in four months. The second subjected the victim/survivor to economic control, having absolute control over her finances, humiliating her in public and isolating her from friends and family. Arguably, these were

113 Bishop and Bettinson (n 96 above).

114 GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Albania' (27 November 2017); GREVIO, 'Belgium' (n 34 above); GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Serbia' (22 January 2020); GREVIO, 'Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing Combating Violence against Women and Domestic Violence (Istanbul Convention) Spain' (25 November 2020).

115 Walklate et al (n 79 above) 121.

116 Office of the Director of Public Prosecutions, 'Decision to Prosecute' (nd).

117 Dáil Éireann Questions (795) (n 110 above).

118 Director of Public Prosecutions, *Guidelines for Prosecutors* 5th edn (2019) 13.

not particularly challenging cases to identify nor evidence. It remains to be seen if and how more complex cases of coercive control will be identified and prosecuted.

Lack of guidance and victim/survivor's experience

As the victim/survivor's 'experience-based testimony'¹¹⁹ is crucial for the determination of coercive control,¹²⁰ both at the identification stage and throughout the criminal process, it is fundamental that legal professionals and the judiciary are aware of the dynamics and workings of coercive control to ensure non-revictimisation and accountability. Where a case presents unclear facts, or there is no apparent physical violence, it will be necessary to establish whether the survivor has suffered from fear of violence or serious alarm and distress that has a 'substantial adverse impact' on usual day-to-day activities.¹²¹

The important weight given to the victim/survivor's reaction to the harm, judged through a reasonable person test, could require that the victim/survivor had a *specific* and performative response to her abuse *and* that a reasonable person would have considered their reaction likely. Rightly, Burman and Brooks-Hay express their concern as follows:

[d]rawing lessons from sexual offence trials, the likelihood of the strategic use of evidence challenging victim credibility and character and suggesting 'motive to lie' in such circumstances is high, with attendant implications from shifting the trial focus from the accused's actions to those of the victim.¹²²

Legal practitioners must be very wary of allowing stereotypes to play a role in decision-making. Lack of knowledge or awareness of the impact of coercive control on victims/survivors creates the perfect scenario for stereotyping regarding who constitutes a victim/survivor, based on both individual and 'larger discriminatory structures'.¹²³ For example, complainants refusing to make statements or later retracting them are recognised scenarios as regards domestic violence and coercive control.¹²⁴ These behaviours can be explained through victims/survivors' fear or allegiance to the perpetrator.¹²⁵ Nevertheless, in the absence of an adequate understanding of the manifestations and consequences of the offence, as well as victims/survivors' reaction to

119 Stark and Hester (n 74 above) 87.

120 Walklate et al (n 79 above) 119.

121 Domestic Violence Act 2018, s 39(2)(b).

122 Burman and Brooks-Hay (n 72 above).

123 Stark and Hester (n 74 above) 241.

124 Dickson (n 94 above) 123.

125 Ibid 125.

it, it can be easy to discredit their experiences as false, unconvincing or undeserving of protection.

Hence, effective identification, recognition and responses to coercive control victims/survivors will require professionals to challenge their preconceived ideas of what amounts to domestic violence and how victims/survivors should react to it. This will require a gender-sensitive analysis that is both mindful of how socially normalised gender dynamics may be weaponised to constrain victims/survivors' agency and that understands victimhood and remedy-seeking beyond a victim/non-victim dichotomy. As Hanna explains, 'the law forces the question of illegal coercion into a yes or no answer', and 'you are either coerced or not'.¹²⁶ For an effective operationalisation of the offence, legal practitioners will have to be willing to approach the 'serious impact' requirement in light of victims/survivors' ongoing struggle between resistance and victimisation, and how structural barriers such as preconceived notions of gender, race and victimhood, including their intersections, serve to make victims/survivors' victimisation unique.¹²⁷

Structural issues

Some of the concerns relating to the implementation of coercive control legislation reflect issues with how the broader legal system interacts with victims/survivors of GBV. As introduced above, and focusing on domestic violence, Safe Ireland has submitted that fragmented, inconsistent responses to domestic violence victims/survivors continue and that 'research has highlighted systematic failings to implement current protections in legislation and policy'.¹²⁸ Even prior to the entry into force of the coercive control offence, women's rights organisations highlighted women's experience of abuse and the legal system, including women not being heard or being affected by stereotypes

126 Cheryl Hanna, 'The paradox of progress: translating Evan Stark's coercive control into legal doctrine for abused women' (2009) 15 *Violence Against Women* 1458, 1468.

127 Khatidja Chantler, 'Independence, dependency and interdependence: struggles and resistances of minoritized women within and on leaving violent relationships' (2006) 82 *Feminist Review* 27. See further Home Office, 'Review of the Controlling or Coercive Behaviour Offence' (March 2021). Citing Wiener (forthcoming): 'based on the qualitative research she conducted with judges, it penalises resilience in victims – the more able a victim is to withstand the controlling or coercive tactics of their partner, the lower the chances are that the requirement to prove adverse effect will be met'.

128 Safe Ireland, 'Changing Culture and Transforming the Response of Gender-Based Violence in Ireland. Submission to the National Women's Strategy 2017 – 2020' (January 2017); Safe Ireland, 'Department of Justice Criminal Justice Strategy. Submission from Safe Ireland' (10 August 2020).

based on ‘gender, ethnicity, perceived class or level of education’.¹²⁹ These concerns, pre-dating the DVA 2018, aggravate the uncertainties around the effective implementation of the coercive control offence.¹³⁰ Moreover, so far it is unclear how the Irish justice system will address the concern that perpetrators use the legal process as a way to extend the abuse and further control victims/survivors, or indeed if such risk can be sidestepped.¹³¹ Even though the weaponisation of the justice system by perpetrators is not a consequence of the DVA 2018, it is of particular relevance to victims/survivors of coercive control, as the justice system, which is lengthy and costly, has been recognised as a dangerous form of retaining coercion and control beyond separation.¹³²

Another issue that further aggravates victim/survivor’s negative experience with the justice system is the fragmentation between the criminal and civil legal systems.¹³³ A woman seeking a civil law order, or involved in child custody proceedings, will have to resort to the family system under civil law. In parallel, she may also have to attend criminal court as a witness where the perpetrator has breached a protective order or where the abuser is being prosecuted for their criminal behaviour. The disconnect between the two results in, *inter alia*, a lack of information-sharing between courts, excessively lengthy proceedings, or multiplicity of court proceedings.¹³⁴ The victims/survivors have to navigate through a complex system as it is, with an offence that – as it has been suggested – ‘may require a breadth of evidence and complexity of analysis that the ... system is not currently well equipped to provide’.¹³⁵ The impact and re-victimisation victims/survivors may suffer due to the structural issues present in the justice system, including steering through the two systems, undoubtedly requires further scrutiny.

129 Safe Ireland, ‘The Lawlessness of the Home – Women’s Experiences of Seeking Legal Remedies to Domestic Violence and Abuse in the Irish Legal System’ (2014) 53; Women’s Aid and Mazzone (n 1 above).

130 Criminal Justice (Victims of Crime) Act 2017 (Ireland). Transposing the EU Directive 2012/29/EU, the 2017 Act gives victims enhanced protection including the possibility of obtaining special protection measures to avoid repeat victimisation. It remains to be seen whether the Act has a significant impact on victims of coercive control as they interact with the justice system.

131 Douglas (n 79 above).

132 Ibid 86.

133 Safe Ireland, ‘The Lawlessness of the Home’ (n 129 above).

134 Women’s Aid and Mazzone (n 1 above).

135 Tolmie (n 96 above).

CONCLUSION

The criminalisation of coercive control in Ireland is to be commended, as it addresses the historical legal isolation of specific incidents of abuse and validates the victims/survivors' lived experiences of psychological abuse.¹³⁶ Legislative reform brought by the DVA 2018 also constitutes a step towards implementing the comprehensive human rights standards of the Istanbul Convention.

However, this article has raised a number of shortcomings in the substantive content of the law, as well as prevalent and new procedural issues, which may affect the implementation of the offence and impact victims/survivors in different, still unknown ways. Statutory guidance engaging with the procedural and structural challenges arising, and how to address them, will be essential to pave the way towards a fair, equal and effective implementation of the coercive control offence. As Conaghan has rightly argued, the operation of the law, enforced through people and institutions, is intimately linked to 'deeply engrained, often unconsciously held social attitudes'.¹³⁷

Cultural change in Ireland is required, as acknowledged in parliamentary debates, in light of Safe Ireland's recent research showing that archaic beliefs in terms of gender roles in society and victim-blaming culture are still widespread.¹³⁸ For the time being and in the absence of statutory guidance, if the coercive control offence is to have a positive impact on remedy-seeking for victims/survivors, it will have to be implemented in an intersectionally sensitive manner to account for victims/survivors' unique experiences, and in line with specialist guidance and training. This will require addressing, 'patriarchal attitudes and stereotypes, inequality in the family and the neglect or denial of women's civil, political, economic, social and cultural rights' and promoting women's empowerment.¹³⁹

136 Ibid 51; Department of Justice and Equality, 'Statement by Minister Flanagan on Domestic Violence' (11 December 2019).

137 Joanne Conaghan, 'Some reflections on law and gender in modern Ireland' (2019) 27 *Feminist Legal Studies* 333, 335.

138 Safe Ireland, 'Gender Matters: Summary Findings of Research on Public Attitudes to Gender Equality and Roles, Domestic Abuse and Coercive Control in Ireland' (2019).

139 UN CEDAW Committee, 'General Recommendation No 35' (n 20 above) 34; Similarly, the latest CEDAW Committee periodic review of Ireland in 2017 highlighted that 'discriminatory stereotypes concerning the roles and responsibilities of women and men in the family and in society persist'. CEDAW, 'Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland' (9 March 2017) para 24(a).