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Legislation

### **The Domestic Abuse Act 2021**

The Domestic Abuse Act 2021 was finally enacted after more than three years of consultation and debate and is intended to transform the response to domestic abuse. At the initial consultation process there was little emphasis on criminal law reforms, however, as women rights organisations, academics and legal professionals campaigning gathered momentum this position changed. There are therefore a number of criminal law provisions introduced by the Act including new offences and a statutory abolition of the defence of consent for offences causing serious harm caused in circumstances of sexual gratification.

*Coercive or controlling behaviour by an intimate partner of family member.*

#### **S. 68 Domestic Abuse Act 2021** amends s. 76(6) Serious Crime Act 2015

The offence of coercive or controlling behaviour will be extended to include behaviour by ex-partners who are not living together when this provision is enacted. The offence is currently limited to partners or ex-partners that live together on the basis that stalking offences under the Protection From Harassment Act 1997 can be used for former partners. Campaigners' successfully persuaded the government that this was an unnecessary restriction as coercive and controlling behaviours often continue once a relationship ends. A common form include economic abuse and child contact arrangements can provide opportunities for the perpetrator to continue with psychological tactics that have an adverse effect on the victim's day to day activities.

#### **S. 69 Domestic Abuse Act 2021** - threats to disclose private sexual photographs or films

This provision creates a new offence of threatening to disclose private sexual photographs or films with the intention to cause distress from 29 June 2021. The provision will amend the existing s. 33 Criminal Justice and Courts Act 2015 (CJCA 2015) which currently covers actual disclosures. Disclosing or threats to disclose private sexual images, which may have been taken with or without the victim's consent feature in domestic abuse cases as a means of coercing, controlling or harassing the victim. Alternatively, it is used by aggrieved ex-partners, hence the informal term 'revenge porn.' Adding threats to disclose private sexual photographs or films to s. 33 CJCA 2015 means the provision is a closer reflection of the Scottish counterpart in s. 2 Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

Section 69(5) Domestic Abuse Act 2021 inserts a new section 33(2A) CJCA 2015 that assists the prosecution by not requiring proof that the film or photograph existed or where it does exist, that it amounts to a private image.

There may be future legal reform in this area as the Law Commission is currently consulting on the law relating to the taking, making and sharing of images without consent. They have suggested a wider provision where a threat to disclose an intimate image is made.

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**S. 70 Domestic Abuse Act 2021** inserts a new s. 75A into the Serious Crime Act 2015

S. 70 introduces a new offence of non-fatal strangulation, although it has not yet entered in force. A defendant will commit the offence where they either a) intentionally strangle the victim or b) do any other act that affects the victim's ability to breathe and it constitutes a battery. It seeks to address the low prosecution and conviction rate for non-fatal strangulation that occurs within a domestic abuse relationship. This situation has been deemed dangerous as it prevents this behaviour being accurately recorded and yet non-fatal strangulation is a risk indicator of further incidents and of domestic homicide. Whether the new offence will be successfully employed in the way it is intended is questionable as consent is a defence specifically contained in s. 75A(3) Serious Crime Act 2015. Once consent is raised the elements of the offence are more complicated requiring the prosecution to disprove beyond reasonable doubt that the victim did suffer serious harm and that the defendant either intended or was reckless as to causing serious harm.

Serious harm is defined as harm falling within sections 47, 18 or 20 of the Offences Against the Person Act 1861. The mens rea requirement where consent is raised makes the offence more difficult to prosecute than a s. 47 Offence Against the Person Act 1861. There is a need to prove an intention or reckless in respect of the serious harm, as opposed to applying unlawful force to the person as is the case for the s. 47 offence. This is unfortunate, as prosecutions under s. 47 have traditionally been low where strangulation is used for the reason it is difficult to prove the injury. The new offence not only requires proof of serious harm, where consent is raised, but also mens rea for that injury.

**S. 71 Domestic Abuse Act 2021**

*Abolition of consent as a defence to serious harm caused for sexual gratification*

This provision came into force on the 29<sup>th</sup> April. The common law position is that consent is not a defence to harm amounting to actual bodily harm or more serious, unless there is a public policy exemption for the context in which it occurred following the case of *R v Brown* [1993] 1 AC 212. However, there has been an increase in its use particularly in murder cases of female victims by male defendants and with it colloquially becoming the 'rough sex' defence.

Sexual gratification was not a common law exception to the consent defence, although cases such as *R v Meachen* 2006) EWCA Crim 2414 and *R v Emmett* 18 June 1999 did allow consent in cases involving sexual activity unless there was a risk of serious harm involved and it was an unreasonable risk to run. Whilst cases involving sexual activity and non-fatal offences are described as sado-masochistic conduct, there is little evidence presented in these cases that indicate that the victim did actually consent to the activity. Herring has suggested that they would be more accurately termed as cases of domestic abuse (J. Herring, 'Criminal Law: Text, Cases and Materials' (8<sup>th</sup> ed) 2018 at p.383).

This new statutory provision should remind courts that *Brown* does apply to sado-masochistic cases whether there is an existing relationship or a casual one-off occasion. One

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anomaly, however, is that the defence is excluded from the non-fatal offences, s. 47, 18 and 20 of the Offences Against the Person Act 1861 but not the new offence of non-fatal strangulation introduced by s. 70 Domestic Abuse Act 2021, inserting a new s. 75A to the Serious Crime Act 2015. This is surprising given that strangulation is one of the most common methods used by male partners to kill their female partners ([Femicide Census, 'UK Femicides 2009-2018' \(2019\)](#)).