Domestic Homicide Sentencing Review

Independent Review
Clare Wade KC

March 2023

CP 814

Domestic Homicide Sentencing Review

Presented to Parliament
by the Lord Chancellor
and Secretary of State for Justice
by Command of His Majesty

March 2023

CP 814

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ISBN 978-1-5286-3935-4

E02868937 03/23

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of the Controller of His Majesty’s Stationery Office

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Acknowledgements

I would like to thank Naila Hadid for all of her work and her invaluable assistance on this review. I am grateful to Jonathan Bild and Julian Roberts of the Sentencing Academy for their helpful comments on an earlier draft of this report and would also like to thank Louise Bullivant for her support and comments on a very early draft. I would also like to thank the many people who gave their time and shared their expertise, insight and knowledge in focus groups and in semi structured interviews.

1. Introduction

1.1 Background

1.1.1 This Review of sentencing in cases of domestic homicide was initiated as a response to an open letter (“the letter”) sent on International Women’s Day 2021 from the Victims’ Commissioner and the Domestic Abuse Commissioner to the previous Lord Chancellor the Right Honourable Robert Buckland MP.

1.1.2 The letter highlighted systemic misogyny within the criminal justice system and also identified those aspects of the criminal justice process where it was thought female victims were being routinely let down. It coincided with an ongoing campaign by the families of two women who were murdered by their male partners. Ellie Gould was aged 17 at the time of her murder by Thomas Griffith and Poppy Devey Waterhouse was 24 years old when she was murdered by Joe Atkinson. That campaign also formed part of the impetus for

the Domestic Homicide Sentencing Review ("the Review").

1.1.3 Both victims were murdered in their own homes where weapons in the form of knives had been readily available to the offender who could therefore not be said to have taken a knife or other weapon to the scene. As we explain in detail at paragraphs 2.3 2.4, if an offender who is aged 18 or over has taken a knife or other weapon to the scene of an offence intending to (a) commit any offence, or (b) have it available to use as a weapon, and (c) used that knife or other weapon when committing the murder, the starting point for the minimum term that the offender must serve in custody as part of a mandatory life sentence is much higher than it would be (all other things being equal) if the offender has not taken a knife or other weapon to the scene. There is a disparity of ten years between the respective starting points.

1.1.4 Our terms of reference specifically task us with considering whether the issue of taking a knife or other weapon to the scene of a

murder with the ulterior intent (which is described above) and then using it to commit the murder, is something which should be given particular consideration within the context of domestic murders.

1.1.5 Thomas Griffith (17 years old at the time of the offence) and Joe Atkinson (25 years old at the time of the offence) were sentenced to detention for life and life imprisonment with minimum terms of 12 years 6 months and 16 years respectively. Legally, there is nothing wrong with either of the sentences imposed in these cases. Both offenders pleaded guilty, and the sentences imposed can neither be said to be "manifestly excessive"[1] nor "unduly lenient"[2] but questions have arisen as to whether sentencing guidelines in cases of domestic homicide reflect our growing

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1 Pursuant to s 9, 11 Criminal Appeal Act 1968.

2 S. 36 of the Criminal Justice Act 1988 empowers the Law Officers to apply to the Court of Appeal for leave to refer any sentence for review which was passed in respect of an offence in proceedings in the Crown Court and which appears to be unduly lenient.

understanding of the causes, characteristics and harms of fatal domestic abuse.

1.1.6 Underlying these questions are broader issues such as: do the sentences imposed in the killings of intimate partners reflect the seriousness of the killings or not? Is there a need for a more specialist approach to these sentences with more account being taken of the specific nature of the offences? Is there a need for higher starting points within the context of the present sentencing framework? Finally, is it possible to address these issues short of detailed consideration of domestic homicides generally?

1.1.7 Women comprise the majority of victims in domestic killings. Their voices are silenced not just in virtue of their killing but because at present, there is insufficient recognition in law of the harms which their killings involve. Not only are these women wronged by a breach of trust which is an integral part of domestic abuse, but the harms to them often extend to further harm to secondary victims in the form of the families (many of whom are children)

and friends of the victims. There is then the harm to society in general which, to date, may not have been sufficiently considered. Where do domestic murders fit with other murders of women where the murder is clearly motivated by misogyny, but the victim and the offender are not and never have been in an intimate relationship? What inferences as to wider harms do we draw in circumstances where there is no domestic history to contextualise the killing?

1.1.8 As far as sentencing for murder is concerned, there is a tension, which is often not acknowledged by proponents of the call for higher starting points or longer sentences. This tension lies in the fact that women, who are victims of domestic abuse and coercive control, sometimes kill their abusive partners. Such women are victims as well as being perpetrators. It would not be in the interests of justice for these women to receive longer minimum terms. Even allowing for judicial discretion, longer minimum terms would be a concomitant of simply increasing starting points for minimum terms.

1.1.9 At the outset, it is necessary to remember the purpose of sentencing which is described in the Sentencing Act 2020.[3] In cases of murder, the protection of the public is afforded by the life sentence, which includes a minimum term which must be served in full before the offender becomes eligible for parole. After release, he or she is on licence for life. However, the punishment of offenders requires us to identify the conduct and fault to which culpability can be ascribed. This assists with the reduction of crime (of which deterrence is only one part) because identification of the levels of culpability together with the relevant circumstances in which it is formed, means that it is possible to

[3] The Sentencing Act 2020, s.57 The court must have regard to the following purposes of sentencing —
(a) the punishment of offenders,
(b) the reduction of crime (including its reduction by deterrence),
(c) the reform and rehabilitation of offenders,
(d) the protection of the public, and
(e) the making of reparation by offenders to persons affected by their offences.

identify and quantify risk. Once risk is appreciated, then we can begin to prevent domestic homicide.

1.2 Terms of Reference

1.2.1 Our Terms of Reference are set out in full at **Appendix A**.

1.2.2 In addition to covering the question of those issues which arise from the disparity in starting points in minimum terms of life sentences when a knife or other weapon is ‘taken to the scene’, our terms of reference cover the question of whether the current sentencing framework for murder provides an adequate template for sentences in domestic murders.

1.2.3 Further, we were asked to analyse whether a history of domestic abuse between perpetrator and victim or vice versa makes a significant difference in the sentences that are imposed. We were asked to analyse and review the use of minimum terms and aggravating/mitigating factors in cases of domestic murder where an offender has

murdered an intimate partner or former partner.

1.2.4 In addition, we have been asked to review sentencing in cases of manslaughter and to analyse the results in terms of gender and to look at any issues arising from sentences imposed where a perpetrator or a survivor of domestic abuse has killed an intimate partner.

1.2.5 We have also been asked to look at the current defences to murder and to make any recommendation for change which we think is necessary

1.3 Terminology

1.3.1 We are aware that domestic homicides are not limited to relationships between intimate partners. We recognise that domestic homicide also includes other family dynamics. For example, In the Home Office Homicide Index, homicides are recorded as ‘domestic’ when the relationship between a victim aged 16 years and over and the perpetrator falls into one of the following categories: (which include) son, daughter, parent (including step

and adopted relationships [and] other relatives.[4] However, our Terms of Reference define "**domestic**" as being between present or previous intimate partners. This accords with the definition provided in s.2 (1) (a) – (f) of the Domestic Abuse Act 2021[5] ("the 2021

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4 When we have drawn on figures in the Home Office Homicide Index, for this analysis we have only included past or present intimate partners.

5 S.2(1) of the Domestic Abuse Act 2021: Definition of "personally connected"

(1) For the purposes of this Act, two people are "personally connected" to each other if any of the following applies —

(a) they are, or have been, married to each other.

(b) they are, or have been, civil partners of each other.

(c) they have agreed to marry one another (whether or not the agreement has been terminated);

(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);

(e) they are, or have been, in an intimate personal relationship with each other;

(f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2))

(g) they are relatives

Act”). It does not include “relatives” who, at s. 2(1) (g) of the 2021 Act also come within the definition of “personally connected”. We hope however that the recommendations we make are sufficiently broad so as to be considered (at some stage) relevant to other relationships within a domestic context. As we go on to explain in this report, we are aiming to achieve theoretical and legal consistency.

1.3.2 We also use the term domestic abuse within the meaning of the 2021 Act. S.1 of the Act defines domestic abuse as:

> (2) Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if —
>
> (a) A and B are each aged 16 or over and are personally connected to each other, and
>
> (b) the behaviour is abusive.
>
> (3) Behaviour is “abusive” if it consists of any of the following —
>
> (a) physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d) economic abuse (see subsection (4))[6];

(e) psychological, emotional or other abuse; and it does not matter whether the behaviour consists of a single incident or a course of conduct.

1.3.3 Accordingly, it incorporates controlling and coercive behaviour ('**coercive control'**) into the definition. We define coercive control in accordance with Professor Evan Stark's exposition of the clinical theory of coercive control,[7] albeit Stark's definition is not gender neutral.

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6 (4) "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to— (a) acquire, use or maintain money or other property, or (b) obtain goods or services.

7 Stark (Evan) *"Coercive Control How Men Entrap Women in Personal Life"* OUP 2007 p15.

> "Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources for personhood and citizenship (control). Nothing men experience in the normal course of their everyday lives resembles this conspicuous form of subjugation."

1.3.4 This definition underpins the description of the behaviours amounting to the conduct element of the offence of controlling or coercive behaviour provided by s.76 Serious Crime Act 2015. The behaviours envisaged by s.76 were outlined in a statutory guidance framework;[8]

[8] Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework by the Home Office produced pursuant to s.77 of Serious Crime Act December 2015 see page 3-4 paragraphs 10-13.

10. “Controlling or Coercive behaviour does not relate to a single incident. It is a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another.

11. This new offence focuses responsibility and accountability on the perpetrator who has chosen to carry out these behaviours.

12 The Cross Government definition of domestic violence and abuse[9] outlines controlling and coercive behaviour as follows.

- **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

[9] Which was not a legal definition and has now been superseded by the legal definition in the 2021 Act.

needed for independence, resistance and escape and regulating their behaviour.

- **Coercive behaviour is:** a continuing act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm punish or frighten the victim". It is noted that the cross-government definition of domestic violence and abuse was not a legal definition and includes so called 'honour' based violence, female genital mutilation (FGM) and forced marriage, and is clear that victims are not confined to one gender or ethnic group.

1.3.5 Our reasoning and our recommendations are based on controlling and coercive behaviour ('coercive control') because it underpins domestic abuse. We do not use the terms 'domestic abuse' and 'coercive control' interchangeably.

1.3.6 The reasons for this are: first, controlling and coercive behaviour is a criminal offence whereas domestic abuse is not. Second, there is a strong argument that the criminal law has so far failed to recognise the wrongs of domestic abuse *R v. Dhaliwal*[10] being the paradigm example. In that case the deceased wife had committed suicide after a campaign of psychological abuse which comprised some physical assaults by her husband (who was charged with her manslaughter) but it was held that, psychological injury which did not amount to psychiatric illness was not sufficient to amount to grievous or actual bodily harm and so there was no harm which could be said to be causative of her suicide in the immediate time before the event.[11]

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10 *R v. Dhaliwal [2006] EWCA Crim 113* where a wife killed herself after suffering a campaign of what today, would be labelled coercive control.

11 See “Domestic Abuse and Human Rights” Jonathan Herring Intersentia (2022 citing) M. Burton R v. Dhaliwal Commentary in R Hunter C McGlynn E Rackley (eds) *Feminist Judgments* Hart Publishing Oxford 2010.

1.3.7 The Crown appealed against a terminatory ruling but the trial judge's ruling was upheld. Interestingly, the trial judge, had taken the view "I do not see any reason in principle why the final assault which triggered the suicide should be looked at in isolation." However, the Crown did not pursue this and disavowed that position on appeal preferring to seek to persuade the court on the basis of a psychiatric illness which could not be made out because only one out of three experts could testify to it. The other two experts were of the view that there was a psychological impact on the victim which did not amount to a psychiatric illness, but which was consistent with domestic abuse.

1.3.8 In *R v. Challen*[12] the Court of Appeal held that a murder conviction was unsafe because evidence of controlling and coercive behaviour towards the appellant by the deceased had not been relied on at trial in the context of provocation and diminished responsibility. It was not until this decision that

[12] *R v. Challen [2019] EWCA Crim 916.*

the potential of the concept of controlling and coercive behaviour (as a means of reflecting the reality of the experience of women who are trapped in abusive relationships) was introduced more widely into the criminal law.

1.3.9 Third, coercive control is a particular form of abuse which not only thrives against a background of structural inequality, but it also perpetuates the inequalities which are the preserve of patriarchy, and which need to be addressed in law in a modern society.

1.3.10 Fourth, all of the other constituents of domestic abuse which are included in s.1 of the 2021 Act are potentially included in a pattern of controlling and coercive behaviour.

1.3.11 In paragraphs 5.2 - 5.4 of this review, we explain that although coercive control has become part of our legal discourse, it has not yet been fully understood. At the heart of our thinking is the proposition that coercive control is a heuristic tool which can be used across the criminal justice system to adopt a more forensic approach to domestic abuse.

1.3.12 Throughout the Review we refer to the term "**overkill**" which has been defined in the literature[13] as a killing involving "the use of excessive, gratuitous violence beyond that necessary to cause the victim's death". It is

[13] See Femicide Census: "*If I am not in Friday, I might have been dead"* Long (Julia), Wertans (Emily), Harper (Keshia), Brennan (Deirdre), Harvey (Heather), Allen (Rosie) and Elliott (Katie) with Ingala Smith (Karen) and O Callaghan (Clarissa). 2009-2018 at p40. See also *"Safety Planning, Danger and Lethality Assessment"* Campbell (Jacquelyn) and Glass (Nancy) in *Intimate Partner Violence: A health-based perspective* C Mitchell and D Anglin (Eds,) Oxford University Press "Overkill is another characteristic of intimate partner femicide that is not usually present where a female kills a male partner. Overkill was first described by Wolfgang in 1958 as two or more acts of shooting or stabbing or beating the victim to death. Several North American studies have found that the majority (46%-90%) of women in Intimate Partner Homicides are the victims of overkill compared to 12% or less of males" citing Campbell (JC) *"If I can't have you, no one can"*. Power and Control in homicide of female partners. In Russell (JR) Ed. *Femicide: The Politics of Women Killing*, New York: Twayne; 1992 99-113, and Wolfgang (ME) "*Patterns in Criminal Homicide. Philadelphia"*: University of Pennsylvania Press 1958.

not a legal term and when ascertained for the purpose of the Review, it was done by recording the use of the wording by the sentencing judge in the present statutory aggravating factor in Schedule 21 paragraph 9(c)[14] namely, “mental or physical suffering inflicted on the victim before death”[15] and /or the non-statutory aggravating factor of the conduct (leading to death) being in the form of a sustained attack or assault. This was in conjunction with consideration of the circumstances of the killing. Further, cases where there was no mention of these particular statutory and non-statutory aggravating factors, but that the circumstances showed far more violence was deployed than was needed to kill the victim were also counted as overkill cases.

1.3.13 Given our terms of reference, much of the discussion in this paper is focused on the general principles for considering seriousness

[14] The Sentencing Act 2020 Schedule 21 paragraph 9(c).

[15] Which is not consistent with those circumstances where death occurs, but the assault of the victim continues.

in the provisions of Schedule 21 to the Sentencing Act 2020 (a copy of which is attached at **Appendix C**).

1.3.14 As we explain below, Schedule 21 of the Sentencing Act 2020 sets out the current framework for sentencing where an offender has been convicted of murder. This replaced Schedule 21 to the Criminal Justice Act 2003. Except when detailing the historical legislative developments, we refer to the paragraph numbering in Schedule 21 to the Sentencing Act 2020.

1.3.15 The 120 sample of cases[16] on which this review is founded were separated into two categories based on the gender of the perpetrator. Where referred to individually, cases in our sample are referred to by the gender of the perpetrator and the number in the following format:

- **Male perpetrators: CM1 - CM99**
- **Female perpetrators: CF1 - CF21.**

[16] See paragraph 1.4.1.

1.4 Methodology

1.4.1 The first part of the Review involved taking a sample of 120 cases of domestic homicide between 2018 and 2020 where the victim was a partner or ex-partner of the offender. The cases were identified from data supplied by the Crown Prosecution Service/HMCTS, the Home Office Homicide Index and some ad hoc research (from news reports and other sources). The majority of the cases were concluded in the courts during the financial years 2018/2019 and 2019/2020. There has not been any guarantee that every relevant case from that period has been identified.

1.4.2 The sentencing comments were then analysed by Treasury Counsel. The aim was to ascertain whether and to what extent, there was any difference in the minimum terms imposed for murder and in particular, whether there could be said to be a difference in sentences where a knife or other weapon ‘had been taken to the scene’ as opposed to cases where a knife or other weapon had not been ‘taken to the scene.’ Further analysis of the

sentencing remarks was conducted to support this Review. Findings are detailed in relevant sections throughout the report and **Appendix D** provides a summary of the methodology and findings.

1.4.3 There were 89 murders and 31 manslaughters.[17] In all but one of the cases in the sample, the relationship between the perpetrator and the victim was heterosexual. Men were the perpetrators in the majority (83%) of all the cases analysed. They were the perpetrators in 91% of murders and 58% of manslaughters. Out of the 89 murders, the perpetrator was male in 81 cases and there were just 8 murder cases where the perpetrator was female. Average minimum terms between women and men were calculated as well as the use of weapons and the average minimum terms when a weapon was taken to the scene.

[17] Manslaughters were divided according to those which occurred before and after the bringing into force of the Sentencing Council Manslaughter Definitive Guidelines (November 2018).

1.4.4 The average minimum term out of the 89 murder cases was 20.5 years. Most of the murder cases which were in the sample were eligible for a 15 year starting point but the average minimum term length was higher at 18.7 years. There were 5 females who had a starting point of 15 years and as 2 of them received a lower tariff than this, the average tariff for the five women was 14.6 years compared to men with a 15 year starting point who, on average, received 19 years. These figures should be viewed with caution however given the very low numbers of females involved.

1.4.5 A weapon was recorded as being used in 72% of the cases analysed in the sample and in 73% of murder cases.

1.4.6 All of the female perpetrators who had killed a male partner used a knife or other weapon. In cases where no weapon was used, all but one of the perpetrators were male. The one female perpetrator who killed a female partner did not use a weapon.

1.4.7 The average minimum terms which were imposed were higher when a weapon was used and lower when there was no report in the sentencing remarks of a weapon being used.

1.4.8 For murder cases, where a weapon was taken to the scene there was an average difference of 6.5 years between such cases and those cases where a weapon was not classed as having been taken to the scene.

1.4.9 Thereafter, an analysis of the evidence uploaded to the Crown Court Digital Case System ('CCDCS') in the cases of Thomas Griffith and Joe Atkinson was conducted and, as a result, a number of other terms which are implicit within the coercive control model such as: whether the killing had occurred at or after the end of the relationship and evidence of jealousy were factored into our sample of 120 cases. Where we could not use the CCDCS, we used sentencing comments augmented by media reports.

1.4.10 We then conducted an analysis, which factored in '**overkill**'. As we have stated, this

is defined in the literature as “the use of excessive, gratuitous violence beyond that necessary to cause the victim’s death.” For the purpose of our case review analysis, we recorded the use of the wording by the sentencing judge in the present statutory aggravating factor in schedule 21 paragraph 9(c)[18] namely, “mental or physical suffering inflicted on the victim before death” and /or the non-statutory aggravating factor of the conduct (leading to death) being in the form of a sustained attack or assault. This was in conjunction with consideration of the circumstances of the killing; a subjective judgement was made based on the facts of the conduct in a particular case (for example if a victim was stabbed 59 times) to try to identify overkill. The lack of use of the aggravating factors of “sustained attack” or “physical and mental suffering” in these cases and the absence of reference to anything which would come within the definition of **‘overkill’** enabled us to see where this factor

[18] The Sentencing Act 2020 Schedule 21 paragraph 9 (c).

was not being given weight. The results were then analysed in terms of gender.

1.4.11 We went on to examine the role of strangulation in domestic homicide. This was done by taking the previous 'circumstances of the killing' analysis of the 120 case sample and identifying the presence of strangulation in the killing and whether there was any mention in the sentencing remarks of the method of killing being an aggravating factor and whether there was a prior history of strangulation in the relationship. The results were then analysed in terms of gender.

1.4.12 We also looked at the proportion of cases where coercive control was mentioned as an aggravating factor. For reasons which we explain in part 5.4 however, we are not confident that the presence or absence of any such reference in sentencing remarks alone is an accurate way of ascertaining the presence or absence of coercive control in the history of the killing. By way of example, even in the case of Joe Atkinson, a review of the case papers suggests that there were relevant

patterns going to controlling and coercive behaviour such as some surveillance, stalking, an incident of physical violence and a lack of individuation between the victim and the perpetrator and yet the investigation into the murder of Poppy Devey Waterhouse appeared not to note this or attribute weight to it.

1.4.13 We applied the same criteria to manslaughter within our sample of cases.

1.4.14 The above then, is with the caveat that sentencing does not exist in a vacuum and if it is to be analysed with a view to reform, it is necessary to look at the harms (including the wider harms) which it is intended to address in order to punish offenders and reduce crime. As stated above, these harms include the harm to secondary victims namely, the family and friends of the primary victim and tertiary victims in the form of society at large.

1.4.15 There is of course no substitute for the examination of the evidence in the individual cases. Where possible, we have looked more closely at the evidence uploaded onto the

CCDCS, but this has not been possible in all cases because we have not had the time or resources. Ideally, we would have done case studies in all of the cases from our sample. This is because it is difficult to analyse the relevant issues in isolation.

1.4.16 When this review was conceived, it was on the basis that the answers to the issues with which it is concerned would be contained in an analysis of sentencing remarks alone. Proceeding on the basis of sentencing remarks can involve a danger of under or over report. Sentencing remarks are, by their nature, a summary of how the sentence was reached and are not a full representation of the case. The limitations of focusing on sentencing remarks lie in the fact that it may well be wrong to conclude that a judge did not have a particular factor in mind just because it was not remarked specifically. This is particularly so if the judge has heard the evidence in a trial. Had we had further time and resources, it would have been helpful to

read the Domestic Homicide Reviews[19] in those cases where they have been completed. Although the purpose of a Domestic Homicide Review is to ascertain what lessons can be learned from the crime of murder or manslaughter,[20] many of the reviews provide an insight into the history of the factual matrix leading to the killing because the reviews place weight on the factual chronology. Since their introduction in 2011, it has become clear that many of the themes going to risk factors in partner killings are consistent.

1.4.17 In the cases where there were allegations of previous domestic violence by either the victim or the perpetrator, it would have been useful to look at the evidence closely. We acknowledge that there are challenges in relation to the existence of evidence in

[19] Domestic Homicide Reviews were introduced in England and Wales in 2011 pursuant to the Domestic Violence and Crime Victims Act 2004 as part of a strategy of identifying opportunities to prevent further homicides.

[20] Section 9 Domestic Violence, Crime and Victims Act 2004 ('the 2004 Act').

domestic abuse cases. Victims of domestic violence and coercive control do not always realise that they are victims. The nature of such abuse is that the victim is led to believe that the abuse is their fault. Victims do not report the abuse or keep a record of it and much abuse can happen by accretion. Victims of abuse often fail to disclose it during an investigation and therefore, this will have an impact on the existence of evidence. It is only through a comprehensive analysis of the history of the relationship that abuse can be discerned. Intersectionality means that there are victims who face further barriers to disclosure such as age, language and cultural pressure. These barriers can include those put up by immigration restrictions and lack of knowledge of rights. It is known that victims and in particular, women who are at risk of honour-based violence are too afraid to report their family members/partners to the authorities due to fear of repercussions from their community. The same fear also prevents such victims from disclosing any abuse (which they suffer in their intimate relationships) to

their own family members. Some of these victims are forced to marry their perpetrators by their family and this automatically alienates them from support networks. In cases where there are language barriers which require interpreters, it would have been useful to analyse the cases further to see whether the perpetrator (if she was a woman) had the relevant assistance during the proceedings such as access to an interpreter of her native language (there are different dialects in different languages which can have an impact on interpretation of the evidence). The same consideration applies to whether she had a legal representative who understood the cultural dynamic of the relationship and family.

1.4.18 Given our emphasis on secondary victims and of course, the fact that they are often best placed to tell the story that the deceased cannot tell, we would have liked to have been able to conduct structured interviews with them. However, we have been constrained by a combination of ethical considerations and not having sufficient resources to overcome

the barriers which the ethical considerations pose and so this has not been possible.

1.4.19 The results of the case sample analysis enabled us to discern a number of themes which were then qualitatively analysed with the use of academic and legal literature, consultation in Focus Groups with targeted stakeholders and evidence gathering through some further interviews with stakeholder lawyers, and criminologists.

1.4.20 Additionally, data on police recorded domestic homicides between April 2016 and March 2020 from the Home Office Homicide Index[21] was shared with the Ministry of Justice (see **Appendix E**). In line with the review's definition of 'domestic', only homicide cases where the perpetrator was an intimate partner and/or ex-partner were included.

[21] As of 15 December 2020. Figures are subject to revision as cases are dealt with by the police and by the courts, or as further information becomes available.

1.5 Structure of the Report and Summary of Recommendations

1.5.1 **In Paragraphs 2.1- 2.4** of this report we set out the current sentencing framework in cases of murder as provided by Schedule 21 to the Sentencing Act 2020.

1.5.2 **In Paragraphs 3.1- 3.3** we consider the legislative history of Schedule 21 and the fact that there has never been any particular attention (within the overall framework) paid to murders which are committed in a domestic context. We consider the impact of Schedule 21 prior to 2010 when Schedule 21 was amended to include a new category of seriousness based on an offender taking a knife or other weapon to the scene intending to (a) commit any offence, or (b) have it available to use as a weapon, and (c) used that knife or other weapon when committing the murder. This was by way of introducing paragraph 5A.[22] We consider the way in which

[22] Now paragraph 4(1), (2) of Schedule 21 to Sentencing Act 2020.

the courts have construed the relevant provisions and whether the definition of seriousness is consistent with the definitions of seriousness in the other categories of murders. We believe that it is not and that this is because it does not refer to the vulnerability of the victim as a means of ascribing a level of gravity. We conclude that the vulnerability of persons who are trapped in abusive relationships has not yet been considered in policy.

1.5.3 **In Paragraphs 4.1-4.3** we summarise the problematic nature of a category of seriousness based purely on the offender taking a knife or other weapon to the scene. We explain why the harms in domestic murders are different to the harms which were contemplated by Paragraph 5A[23] of Schedule 21 of the Criminal Justice Act 2003.

1.5.4 **In Paragraphs 5.1-5.1.18** we set out those factors, which distinguish domestic murders from other murders. We explain the

[23] Now paragraph 4(1), (2) of Schedule 21 to Sentencing Act 2020.

importance of the history of the relationship between the perpetrator and the victim and the importance of temporal sequencing in domestic murders. We explain that domestic abuse is a gendered crime and that this segues into domestic murder. We also explain that the gendered nature of domestic homicide is a developing jurisprudence and refer to some significant developments in our law which have been intended to introduce gender parity including the introduction of the concept of cumulative provocation and the partial defence of loss of control.

1.5.5 **In Paragraphs 5.2-5.2.9** we set out the advantages of the introduction of the concept of coercive control into criminal legal discourse. Namely, (i) a better reflection of the experiences of women in abusive relationships, (ii) the concept of entrapment as a more plausible explanation of why people stay in abusive relationships than those provided by outdated models such as Battered Woman Syndrome (iii) that if properly understood, it enables us to move away from the idea that domestic abuse is

about a relationship which has ‘gone wrong’ as opposed to being about a perpetrator’s pathological need to control a victim (iv) that it plays a central part in the sequencing and timeline leading to homicide. Finally, we explain why the concept of coercive control enables criminal justice practitioners to have a more comprehensive and forensic approach to domestic abuse.

1.5.6 **In Paragraphs 5.3-5.3.10** we address the question of offenders who are also victims because they are trapped in relationships in virtue of coercive control. We refer to the difficulty of achieving a gender-neutral provision for sentencing those offenders who are also victims which simultaneously encapsulates the very real harms inflicted on the majority of victims with which this review is concerned.

1.5.7 **We suggest** that the coercive control model[24] is one way of ascribing seriousness to a

[24] By which we mean the behaviours going to coercive control as opposed to the offence in s76 Serious Crime Act 2015.

murder. This is because it speaks to the motivation for killings. For example, many men kill their female partners at the end of a relationship or when she has indicated that she wishes to leave, and he perceives that he will no longer be able to control her.

1.5.8 **In Paragraphs 5.4-5.4.24** we look at the evidence from which we infer that coercive control is still poorly understood both by many frontline agencies and by criminal justice practitioners. We examine the bespoke nature of coercion by perpetrators and the way that this factors into intersectional abuse. We consider the way in which coercive control can make victims appear complicit in their own abuse and the impact that this can have on information gathering.

1.5.9 **We recommend** that there should be a separate specific system for the collection of all relevant data in relation to all domestic homicides, which is maintained by the Home Office or the Ministry of Justice in conjunction with the Office of the Domestic Abuse Commissioner. See paragraph 5.4.23 and recommendation 1 in the table in Part 10.

1.5.10 **We recommend** training for all lawyers and judges working within the criminal justice system on understanding and applying the concept of coercive control (this is with a view to achieving a more forensic approach to domestic abuse throughout the criminal justice system). See paragraph 5.4.24 and recommendation 2 in the table in Part 10.

1.5.11 **In Paragraphs 6.1- 6.7** we look at culpability in terms of the wider harms that attach to domestic murders namely, whether the murder takes place at the end of the relationship, overkill and jealousy. We applied these concepts to our sample of cases and looked at the proportion of cases where they converged. We then looked at the prevalence

and implications of strangulation. We explain that all of these factors are contiguous with coercive control.

1.5.12 **In Paragraphs 7.1-7.1.3** we consider whether, taking all of the above into account, there should be a category in Schedule 21 to the Sentencing Act 2020 based on coercive control which delineates a new starting point in the case of domestic murders. We explain why we do not think that there should be. Apart from anything else, this is because there would be a danger of creating anomalies between any new paragraph and paragraph 2 in cases where behaviour which is attributable to coercive control is extremely serious because it involves rape or sadistic assault.

1.5.13 **We recommend** that the starting point of 25 years which applies in circumstances where a knife or other weapon is ‘taken to the scene’ should be disapplied in cases of domestic murder because the 25 year starting point is one in which the vulnerability of the victim is not given any consideration. (The harms that paragraph 5A of Schedule 21 to the Criminal Justice Act 2003 was introduced to prevent in 2010 are very different from the sort of harms which occur in domestic murders). See recommendation 3 at paragraph 7.13 and in the table in the Part 10.

1.5.14 **We recommend** however, that domestic murders should be given specialist consideration within the present sentencing framework under Schedule 21. A level of seriousness should be determined by application of the coercive control model within the 15 year starting point. This is intended to ensure that gendered circumstances (such as killing at the end of a relationship and jealousy are used to ascribe seriousness to the murder and that wider legal harms are identified and reflected in the sentence). See recommendation 4 at paragraph 7.1.14 and table in Part 10.

1.5.15 We explain our view that this should be achieved by coercive control being incorporated into the statutory aggravating and mitigating factors in paragraphs 9 and 10 of Schedule 21 to the Sentencing Act 2020. If coercive control is used to measure seriousness, then it should follow that domestic murders will be aggravated or mitigated by the types of harm which obtain.

1.5.16 **We recommend** that where there is a history of coercive control of the victim of a murder by the perpetrator of that murder then this should be a statutory aggravating factor and that paragraph 9 of Schedule 21 to the Sentencing Act should be amended accordingly. See recommendation 5 at paragraph 7.1.15 and in the table in Part 10.

1.5.17 Conversely, **we recommend** that where there is a history of coercive control having been perpetrated by the victim of the murder against the offender, then this should be a statutory mitigating factor and that paragraph 10 of Schedule 21 of the Sentencing Act 2020 should be amended accordingly. Again, see recommendation 5 at paragraph 7.1.15 and in the table in Part 10.

1.5.18 **We recommend** that if a murder takes place at the end of a relationship or when the victim has expressed a desire to leave a relationship then this should be regarded as an aggravating factor and that paragraph 9 of Schedule 21 should be amended accordingly. See recommendation 6 at paragraph 7.1.16 of this report and in the table in Part 10.

1.5.19 **We recommend** consistency between law and policy specifically, that present mitigating factors should be consistent with the policy underlying section 55(5)(c) Coroners and Justice Act 2009. As we go on to explain, the legislative intention underpinning the introduction of the partial defence of loss of control was to make it clear that sexual infidelity could not excuse or justify killing. Aggravating and mitigating factors in (what were) paragraphs 10 and 11 of schedule 21 to the Criminal Justice Act 2003 were not amended when provocation was abolished. As the law stands sexual infidelity could still amount to provocation (not amounting to the defence) in the few cases where the court is considering the old law of provocation. See recommendation 7 at paragraph 7.1.17 of this report and in the table in Part 10.

1.5.20 **We recommend** that overkill should be defined in law as a specific legal harm and that it should be an aggravating factor in murder. Paragraph 9 of Schedule 21 should be amended accordingly. See recommendation 8 at paragraph 7.1.18 of this report and in table in Part 10.

1.5.21 **We recommend** that in the event of murder by strangulation or in a murder where strangulation has occurred, then this method of killing should be a statutory aggravating factor and that paragraph 9 of Schedule 21 to the Sentencing Act 2020 should be amended accordingly. This is because strangulation includes additional suffering and greater harm. See paragraph 7.1.19 of this report and recommendation 9 in the table in Part 10.

1.5.22 **We recommend** that the use of a weapon should not necessarily be seen as an aggravating factor in domestic murder. See paragraph 7.1.20 of this report and recommendation 10 in the table in Part 10.

1.5.23 Our reasons for concluding that the use of a weapon does not always aggravate an offence of domestic of domestic murder or manslaughter are to do with gender. Women are rarely (if at all) able to kill men without the use of a weapon whereas this is not the same for men who often kill by means of manual strangulation.

1.5.24 **In Paragraphs 8.1- 8.3** while acknowledging that sentencing guidelines are a matter for the independent Sentencing Council, we consider the evidence of the case review in relation to voluntary manslaughter in terms of the partial defences of diminished responsibility and loss of control.

1.5.25 **We recommend** that in cases of manslaughter by way of diminished responsibility, consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor increasing seriousness. See recommendation 11 at paragraph 8.1.23 of this report and in the table in part 10.

1.5.26 In order to maintain consistency, **we recommend** that in case of manslaughter by way of loss of control, consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor increasing seriousness. See recommendation 12 at paragraph 8.2.3 of this report and in the table at part 10.

1.5.27 **We recommend** that in cases of manslaughter, consideration should be given to sentencing guidelines being amended to make “coercive control” on the part of the perpetrator of the killing toward the victim a factor which increases seriousness. Conversely, that consideration should be given to making “coercive control” on the part of the victim of the killing a mitigating factor reducing seriousness. See recommendation 13 at paragraph 8.1.25 and in the table in part 10.

1.5.28 **We recommend** that consideration be given to whether the Definitive Guideline on Domestic Abuse be amended to denote that assaults committed by non-fatal strangulation are an aggravating factor. See recommendation 14 at paragraph 8.1.26 of this report and in the table in part 10.

1.5.29 **We recommend** that in cases of domestic manslaughter consideration should be given to sentencing guidelines being amended to indicate that the use of a weapon is not necessarily an aggravating factor See recommendation 15 at paragraph 8.2.10 in this report and in the table in part 10.

1.5.30 We further looked at involuntary manslaughter in **paragraphs 8.2 - 8.3** in the form of unlawful act manslaughter and gross-negligence manslaughter where this has involved consensual violence in the course of sex. Our analysis of the relevant cases and the sentencing guidelines have led us to **recommend that** where death has been caused in these circumstances, culpability should be categorised as high in the relevant sentencing guidelines because of the high risk and danger (as opposed to the obvious risk) of death in circumstances involving the type of assaults which tend to be perpetrated. Further, killings which occur in these circumstances can either be a result of or mirror the structural inequalities which perpetuate patriarchy and therefore factor into the wider harm with which we are concerned in this review. See paragraph 8.3.29 and recommendation 16 in the table in Part 10.

1.5.31 **At paragraphs 8.1.13-8.1.16** we consider the proposition by some stakeholders that where an offender in a domestic killing has been

convicted of manslaughter by way of diminished responsibility, they should be subject to further psychiatric examination with a view to assessing risk before they are released on licence. We outline why we do not think this is necessary in light of the Manslaughter Definitive Guidelines on sentence which are effective from 2018 and various other statutory changes to the law on sentencing.

1.5.32 **In paragraphs 9.1- 9.7** we highlight some of the issues surrounding present full and partial defences to murder. We identify aspects of defences which are problematic in terms of the trials of women who kill their coercively controlling male partners. We highlight the emergence of the ‘rough sex' defence and suggest that the issues which this has raised should be further considered in policy.

1.5.33 **We recommend** a comprehensive review of defences to murder in the form of a full public consultation involving all stakeholders including the higher courts judiciary. This should involve post-legislative scrutiny of the partial defence of loss of control, consideration of the defence of self-defence and consideration of what commentators have called ‘the rough sex defence.’ See paragraph 9.7.6 and recommendation in the table in Part 10.

2. Sentencing in Murder

2.1 By way of introduction, sentencing in cases of murder is governed by the framework of Schedule 21 to the Sentencing Act 2020. Schedule 21 presently sets out the following four “starting points” for the determination of the minimum term.[25] First, a whole life term (see paragraph 2(1)) in a case of “exceptionally high seriousness”, The seriousness of an offence falling in paragraph 2 includes the killing of two or more people where the method of the killing involves either (i) a substantial degree of pre-meditation or planning (ii) the abduction of the victim or (iii) sexual or sadistic conduct. Paragraph 2 also includes particular classes of victim; namely a child who has been abducted or a victim in relation to whom the murder is sexually or

[25] The term that the offender must serve before he or she is eligible to apply to the Parole Board for release on licence. Anyone who is convicted of murder and sentenced to imprisonment for life is subject to life licence.

sadistically motivated, a police or prison officer acting in the execution of their duty, it includes cases where the motive of the murder is for the purpose of advancing a political, religious, racial or ideological cause, and finally, where the offender has previously been convicted of murder then this is also a factor denoting seriousness.

2.2 Second, a 30 year starting point applies (see paragraph 3(1)) - in a case of “particularly high seriousness.” Paragraph 3 provides for murders which are sufficiently serious to merit a higher than average starting point and the examples set out in paragraph 3(2) are the murder of a police officer or prison officer in the course of his or her duty if the offence is committed before 13th April 2015, a murder involving the use of a firearm or explosive, a murder done for gain, a murder intended to obstruct or interfere with the course of justice, a murder involving sexual or sadistic conduct, the murder of two or more persons, murders which are aggravated because they are related to hostility towards protected

characteristics in hate crime legislation (racial hostility, religious hostility or hostility related to sexual orientation, disability or transgender identity).[26] Paragraph 3 also encapsulates a murder committed by an offender under the age of 21 when the offence was committed which would otherwise fall within paragraph 2.[27]

2.3 Third, a 25 year starting point applies (see paragraph 4(1)) in cases where a knife or other weapon is taken to the scene with the specified intent and then used in the course of the murder. Paragraph 4 provides that if the offence does not fall within paragraphs 2(1) or paragraph 3(1) and that if the offence falls within sub-paragraph (2), the offender is aged

[26] A murder is so aggravated if section 66 Sentencing Act 2020 requires the court to treat the fact that it is so aggravated as an aggravating factor.

[27] A concession to age and lack of maturity.

18 or over[28] when the offence was committed, the offence was committed after the enactment of the Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010[29] then the offence is normally to be regarded as sufficiently

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[28] There are now new provisions in section 126 and 127 of Police Crime Sentencing and Courts Act 2022. The provisions in s.127 will amend Schedule 21 paragraph 6 to increase the starting points depending on the age of the offender (whether 17, 16, 15 or 14 at the time of the commission of the offence and subject to the paragraphs in Schedule 21 to which the offence applies i.e. if the offender is 17 at the time of the commission of the offence and the offence is in paragraph 2 then there will be a starting point of 27 years. If the offence comes within paragraph 3 then for an offender of this age there will be a starting point of 23 years and if the offence comes within paragraph 4, a starting point of 14 years. Starting points are adjusted downwards for offenders who come within different (younger) age brackets at the time of the offence.

[29] Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010/197 introduced s5A into Schedule 21 to Criminal Justice Act 2003.

serious for the appropriate starting point in determining the minimum term to be 25 years.

2.4 In cases, which do not normally come within any of the above paragraphs, the starting point for an offender aged 18 or over at the time of the offence is 15 years.[30] As explained below, most domestic murders fall into this category.

[30] See Schedule 21 paragraph 5.

3. Schedule 21 of Sentencing Act 2020

3.1 The Legislative History of Schedule 21

3.1.1 We set this out in detail for two reasons. First, to demonstrate that domestic murders have never been considered as a specific category within either the previous or the current Schedule 21 framework. Second, to show the legislative impetus for an additional category intended to address the situation where an offender has taken a knife or other weapon to the scene of a murder and then gone on to use that weapon in the course of committing the murder. It is clear that the rationale underlying what was first introduced in 2010 as paragraph 5A of Schedule 21 of the Criminal Justice Act 2003 (and is now paragraph 4 of Schedule 21 to the Sentencing Act 2020) has no connection with the factors which pertain to domestic murders.

3.1.2 Prior to the enactment of the Criminal Justice Act 2003, the Home Secretary had the responsibility for determining the length of the minimum term. The trial judge would give advice on the length of the term privately together with the Lord Chief Justice. Although this was generally accepted, it did not bind the Home Secretary.

3.1.3 On 10th February 1997, Lord Bingham CJ provided guidance[31] to trial judges which was intended to achieve consistency. It was recommended to judges that a minimum term of 14 years was to be served for the "average", "normal" or "unexceptional" murder and a minimum term of 30 years in rare cases. Some cases would merit a whole life term. Lord Bingham CJ did not explain what he meant by "average" "normal" or "unexceptional."

3.1.4 Guidance on matters capable of amounting to mitigation was also given as well as guidance on factors which would aggravate the offence.

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[31] The guidance is set out in *R v. Sullivan [2005] 1 Cr. App. R. 3 at [28]-[29].*

Many of these factors would come to provide the basis for the statutory framework, which was to become Schedule 21 of the Criminal Justice Act 2003.

3.1.5 On 15th March 2002 the then Sentencing Advisory Panel gave guidance to the Court of Appeal on the length of minimum terms.[32] The advice noted that the minimum terms recommended, varied widely both above and below the 14 years suggested by Lord Bingham CJ for a "normal" murder and it therefore suggested that there should be a higher, middle and lower starting point. The higher figure was 15-16 years, the middle figure was 12 years and the lower figure was 8/9 years. The middle figure was intended to be a starting point for a case, which "arises from a quarrel or loss of temper between two people known to each other".[33] The lower figure was for "cases where the offender's culpability is significantly reduced. Such cases

32 *Minimum Terms in Murder Cases: The Panel's Advice to the Court of Appeal April 2002*

33 *Ibid* paragraph 17

which in any event come close to the borderline between murder and manslaughter, includes…."[34] The advice of the Panel was accepted by the then Lord Chief Justice, Lord Woolf and it was incorporated into Practice Statement *(Crime Life Sentences) [2002] 1 WLR 1789* and then confirmed in Practice Direction *(Criminal Proceedings: Consolidation [2002] 1 WLR 2870, 2906-2910.*[35]

3.1.6 In *R. (Anderson v Secretary of State for the Home Department)*[36] the House of Lords made it clear that the involvement of the Home Secretary in setting the tariff was a breach of Article 6 of the European

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34 *Ibid* paragraph 18.

35 See paragraphs 49.10-20. The higher figure of 15/16 years applied if the victim was a child or otherwise vulnerable. Many of the examples at 49.13 of the Practice Direction (*Criminal Proceedings: Consolidation [2002] 1 WLR are now in the 30 year starting point in Schedule 21).*

36 *R. (Anderson) v Secretary of State for the Home Department [2003] 1 A.C. 837.*

Convention of Human Rights and was unacceptable.[37]

3.1.7 The enactment of the Criminal Justice Act 2003 transferred the responsibility of setting the minimum term to the trial judge through s.269 (5).[38] Schedule 21 sought to define murders in levels of seriousness ranging from a whole life term to starting points of a 30 year term and a 15 year term. Broadly speaking, a sentencing judge complied with the section if he or she had "regard" to the "general principles" set out in Schedule 21.

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37 Setting a minimum term is indistinguishable from sentence and is therefore the task of the judiciary exclusively.

38 S.269 (5) "In considering under subsection (3) or (4) the seriousness of the offence (or the combination of an offence and one or more offences associated with it), the court must have regard to

(a) the general principles set out in Schedule 21 and

(b) any guideline relating to offences in general which are relevant to the case and are not Incompatible with the provisions of Schedule 21".

3.1.8 In *R v Sullivan & others*[39] the Court of Appeal considered the wording of s.269 and Schedule 21 in the context of transitional provisions in Schedule 22. It was held that the wording of s.269(3) of the 2003 Act namely;

> (3) The part of his sentence is to be such as the court considers appropriate taking into account —
>
> a) the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it, and
>
> b) ……

meant that notwithstanding the statutory guidance, "the decision [as to length of the minimum term] remains one for the judge."

> "The Schedule sets out a well-established approach to sentencing. It makes clear (in paragraph 9) that despite the starting points, the judge

[39] *R v. Sullivan & others [2005] 1 Cr. App. R. 3,[2004] EWCA Crim 1762 [11]*

> still has a discretion to determine any term of any length as being appropriate because of the particular aggravating and mitigating circumstances that exist in that case. This discretion must, however, be exercised lawfully and this requires the judge to have regard to the guidance set out in Schedule 21, though he is free not to follow the guidance if in his opinion this will not result in an appropriate term for reasons he identifies. His decision is subject to appeal either by the offender or on Attorney General's Reference in accordance with s.270 and 271."[40]

3.1.9 The Court made it clear that the word "include" in paragraphs 10 and 11 (aggravating and mitigating factors respectively) meant that the lists were not intended to be exhaustive.

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[40] *R v Sullivan & others [2005] 1 Cr. App. R. 3 [2004] EWCA Crim 1762 [16]*

3.1.10 Importantly, the Court held that judicial discretion would operate to reduce the differences in starting points adopted in the non-statutory and statutory guidance see [35]-[37]. See in particular, at [35]:

> "[t]he judge would also have to be on his guard against determining a higher figure merely because the starting figure that is taken [under Schedule 21] is greater. This is particularly true where the 15 year figure is the starting point selected. In our judgment it would be wrong to assume that Parliament had intended to raise minimum terms over those recommended by the expert Sentencing Advisory Panel by merely applying the 15 year starting point to all murders other than those whose seriousness is exceptionally or particularly high."

3.1.11 Further guidance was issued by Woolf CJ in May 2004 see Practice Direction (Crime:

Mandatory Life Sentences) [2004] 1 WLR 1874.[41]

3.2 Absence of Wording in Schedule 21

3.2.1 There is an absence of wording in Schedule 21 going specifically to the issues in our terms of reference and this has been the case since the inception of the statutory framework.

3.2.2 By 18th May 2004 when Lord Woolf CJ issued his guidance, there was no specific wording in Schedule 21 to the Criminal Justice Act 2003 to which the seriousness of murders committed in a domestic context could be ascribed. These murders were deemed to fall either side of the 15 year starting point. Concerning weapons, statutory aggravating factors (although not exhaustive) in paragraph 10 did not include the use of a weapon. The

[41] Making it clear that the determination of the minimum term involved the following approach (i) determining the starting point (ii) adjustments made for non-exhaustive aggravating and mitigating factors within Schedule 21 (10), (11) and credit given for time on remand.

use of a firearm was a specific factor, which would lead to a starting point of 30 years.[42]

3.3 The Impact of Schedule 21 Prior to 2010

3.3.1 Criticism that Schedule 21 could lead to anomalous results in terms of sentence was allayed by the Court of Appeal's emphasis on not adopting a mechanistic approach. For example, in *R v Height and Anderson*[43] the appellant, Anderson ("**A**"), pleaded guilty to murder and Height ("**H**") was convicted of murder. The circumstances were that **A** (who had been having an affair) discussed with **H** the possibility of having his wife murdered. He hit her over the head with a saucepan in an attempt to render her unconscious. She suffered serious (but not life threatening) injuries. **A** then drove his wife over to **H's** van. **H** was to dispose of her but as she was still conscious, **H** gave **A** a hammer and a knife

[42] Schedule 21 paragraph 5(2)(a) now paragraph 3(2)(b) Schedule 21 Sentencing Act 2020.

[43] *R v Height and Anderson [2009] 1 Cr App R (S) 117.*

with which to kill the victim. She was struck repeatedly to the point where she was unconscious. **H** took her in his van but later called **A** to say that she was still alive. They drove in convoy to a bank where they rolled the victim down the bank with **A** then repeatedly stabbing her and then cutting her throat. They were subsequently arrested. **A** made a full confession and gave evidence against **H**. He was sentenced to life with a minimum term of 22 years. **H's** minimum term was 24 years.

3.3.2 The Crown had argued that **H** committed the murder for gain[44] (whereas **A** had simply wanted 'to get rid' of his wife). **H** appealed on the basis that the sentencing judge had described the starting points in Schedule 21 as "arbitrary" and that their nature was "widely spread" and that the sentencing judge had applied them too rigidly. The Court held at [31] that the sentencing judge had fallen into error by focusing too loyally on the explicit criteria in

[44] And therefore, attracted a 30 year starting point under paragraph 3(2)(c).

the Schedule. There was a flexibility based on circumstances and culpability. Both defendants should be given the same starting point and **H's** sentence would be reduced to 22 years thereby achieving parity with **A** who was the more culpable of the two but who had pleaded guilty.

3.3.3 That the explicit starting points in the Schedule were not to be applied mechanistically is a principle, which has been reiterated in a number of decisions. See *R v M, AM and Kika*[45] where the court said that the provisions of the Schedule were not intended to be applied inflexibly. At [5]-[6] the court discussed the implications of the absence of any reference to the use of a knife in Schedule 21. First, there was nothing to say that a murder with the use of a knife could not be treated in the same way as a murder with the use of a firearm or explosive. Second, accepting that the starting point for the use of a knife would not normally be the same as that for the use of a gun or explosive, the use

45 *R v M, AM and Kika [2010] 2 Cr App R (S) 19 [117].*

of a knife and the precise circumstances in which it was used aggravate the seriousness. Paragraph 10[46] (aggravating factors) is "illustrative" or "inclusive" but not "exhaustive". Finally, it was always an aggravating feature that an offence had been caused by the use of a knife or other weapon.

[46] Which is now paragraph 9 in Schedule 21 to the Sentencing Act 2020.

4. The Introduction of a New Category of Seriousness in Paragraph 5A

4.1 Background to Paragraph 5A (Taking a Knife or Other Weapon to the Scene)

4.1.1 Following a high profile campaign in light of the murder of a teenager (Ben Kinsella) who was stabbed in the street by other teenagers, paragraph 5A was inserted[47] into Schedule 21 by statutory instrument *Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010/197*. The order imported a new starting point of 25 years for determining the minimum term for murder by an adult using a knife or other weapon taken to the scene with the intention of committing an offence or having it

[47] Under powers provided by s.269(6) (7) of the Criminal Justice Act 2003.

available for use as a weapon and using it in the offence.

4.1.2 The Explanatory Memorandum to the Statutory Instrument stated [at 4.3] “[t]he instrument is being made following a review of Schedule 21 in relation to the starting point for murder using a knife (announced in Parliament on 16 June 2009) which was prompted by public concerns that the current starting point of 15 years should be higher, particularly as the starting point for murder using a firearm is 30 years.”

4.1.3 The Explanatory Memorandum explains the policy background namely, that “[t]he change has been prompted by considerable concern that the starting point for this type of murder should be higher than the current 15 years, particularly as the starting point for murder using a firearm is 30 years.” It refers to the review which involved consultation with the senior judiciary and the Sentencing Guidelines Council ("SGC”). The response of the latter is summarised at 8.2 of the Explanatory Memorandum.

4.1.4 It is clear from the response of the (then) SGC that, at the time of the consultation, the focus was on knives exclusively as opposed to weapons generally. The SGC rightly pointed out that such an exclusive focus on a particular weapon would cause a risk of substantial differences in sentence which would "flow from legal niceties."

4.1.5 Significantly, (for present purposes) the SGC response included the following:

> "It is clear that the circumstances in which the knife is used vary widely, it can be picked up in the course of a domestic quarrel or can be taken to a place with a view to it being used- accordingly, the level of culpability will also vary widely."

4.1.6 The SGC response to the 2009 consultation contained the following observation about the wording of schedule 21:

> "With one exception, the factors listed [in paragraphs 4 and 5] relate to the circumstances in which the killing took place rather than the means by which

death was caused. They identify either a particular need to recognise the vulnerability of potential victims (police officer, prison officer, child or those killed because of their religion, race or sexual orientation) or the purpose for which the murder was committed, political, for gain, to obstruct or interfere with the course of justice….the single exception relates to situations where the murder involves the use of a firearm or explosive. In reality that is likely to have been pre-meditated."

4.1.7 The Statutory Instrument was affirmed by resolution of both houses without debate. It was debated in the Delegated Legislation Committee on 12th January 2010 where the following points of potential interest (to the review) were raised. The then Under-Secretary of State for Justice Claire Ward outlined the purpose of the legislation namely, to bridge the disparity between the 30 year and 15 year starting points and that there should be no difference in starting point if the weapon carried was something other than a knife such as a screw driver or baseball bat.

4.1.8 The problems which had been envisaged by the SGC in that aspect of the response cited at paragraph 21 above were touched on in debate. See for example, David Burrows MP:

> "It is more often [than in cases involving firearms] the case that a knife is carried and used without such premeditation and might be used in the act of self- protection or partial defence, or under provocation or panic. Will the minister give some assurance that those mitigating factors will be particularly applied in such cases which can be distinguished from cases of a gun or explosive?...Finally, the advent of the proposed additional prescribed starting point based primarily on the reasons [sic] by which death was caused rather than on the circumstances in which the killing took place, reminds me of the Court of Appeal's concerns, which should be noted by the Committee. Those are that the exercise of determining the minimum term should allow judges a proper discretion and provide a process which is not, in the

words of the Lord Chief Justice a mechanistic application."

4.1.9 By December 2010, Schedule 21 was being criticised by previous policy makers as "based on ill thought out and *overly prescriptive policy*. It seeks to analyse in extraordinary detail each and every type of murder.[48] The result is guidance that is incoherent and unnecessarily complex, and is badly in need of reform so that justice can be done"[49] (our emphasis). It is not clear from the Green Paper what the evidence for this proposition was said to be as *R v. Kelly*[50] was argued on May 12th 2011.

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48 We do not agree that it seeks to analyse each and every type of murder because it does not touch upon domestic murders, a matter with which the present review is concerned.

49 Ministry of Justice report: *Breaking the Cycle Effective Punishment, Rehabilitation and Sentencing of Offenders Dec 2010 p54.*

50 *R v. Kelly, R v. Bowers, R v. Singh and R v. Harding and [2012] 1 WLR 55*

4.1.10 In the appeals in R v Kelly, R v Bowers, R v Singh and R v Harding and others the Court of Appeal stated that Schedule 21 "did not create a stepped sentencing regime with fixed dividing lines between the specified categories"[51] and that it only identifies the appropriate starting point in relation to the categories it establishes. Such a starting point would normally, but not inevitably, apply.

4.1.11 In *Kelly* at [10] where the court was considering the wording of paragraph 5A as compared to the wording in paragraph 4(2) and 5(2) (which set starting points of whole life terms and 30 years imprisonment respectively) it was observed (consistently with what the SGC had said[52]) that "it is striking that unlike paragraphs 4 and 5 this new starting point does not describe the level of seriousness of the offence at all." The Court went on to say at [11] "it is not the legislative intention that every murder involving the use of a knife or other weapon to inflict fatal injury

51 *Ibid* at paragraph 9 of the judgment

52 See paragraph 4.1.6 above.

should normally fall within the 25 year starting point" and further, at [12] "a literal interpretation of paragraph 5A would produce a disparate result."

4.1.12 The wording of paragraph 5A(2) was the subject of criticism by academic commentators. The judgment in *Kelly* was described by Dr David Thomas as "perhaps best regarded as a further plea for the exercise of judicial discretion in fixing minimum terms in cases of murder."[53]

4.1.13 The potentially arbitrary nature of paragraph 5A[54] was apparent from the facts and hypothetical circumstances arising from consideration of the conjoined appeals "[i]t is difficult to square the logic of the [Court of Appeal's] decisions in these instances when it runs contrary to their concerns in the

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53 David Thomas Crim LR Crim.L.R. 2011, 10, 806-809.

54 Bild (Jonathan) *Kelly and the 25 year starting point* Arch .Rev.2011,8,7 2"By introducing this clumsy amendment to Schedule 21 all that Parliament has achieved is to create an arbitrary distinction between whether a weapon was or was not taken to the scene."

hypothetical case they posed."[55] "Is a front garden a different scene? How about paths and doorsteps? Could a defendant really be subjected to a two thirds increase in the starting point simply because an offence one foot one side of a door step rather than the other? There is little in Kelly to dispel this concern."[56]

4.1.14 In *R v Dillon*[57] the four scenarios in the cases of each of the appellants in *Kelly* were analysed and the following principles then set out at [32]:

> We consider that the following emerges from the cases cited to us:
>
> (a) A knife taken from a kitchen to another part of the same flat or house, including a balcony (Senechko), will not normally be regarded as having been taken

55 *Ibid.*

56 *Ibid*.

57 *R v Dillon [2015] EWCA Crim 3.*

to the scene, even if a door is forced open (Kelly);

(b) Conversely, if the knife is taken out of the house or flat into the street (Bowers), or into another part of the premises (Balraj Singh), or on to a landing outside a flat (Folley), it will normally be regarded as having been taken to the scene.

(c) However, a starting point is not the same thing as a finishing point. The judgment in Kelly and others emphasises the importance, in cases of similar culpability, of avoiding major differences in sentence based on fine distinctions. As the Lord Chief Justice observed by way of example in the passage cited above, to make a distinction of ten years in the minimum term between the case of a man who kills his partner with a knife from

the kitchen of their home and a man who kills his partner with a knife which he bought on the way home would not represent justice in anyone's assessment. If a case is only just within paragraph 5A, because a knife was taken from a kitchen and used to inflict a fatal wound a short distance outside the door of the flat or house, this principle may well lead to a minimum term of less than 25 years (Bowers, Balraj Singh).

4.1.15 Paragraph 4 of Schedule 21 of the Sentencing Act 2020 now replicates the wording of paragraph 5A of Schedule 21 of the Criminal Justice Act 2003 with the exception of the addition of the words in paragraph 4(1)(d).[58]

[58] "The offence was committed on or after 2 March 2010."

4.2 Issues with Wording in Paragraph 4 Schedule 21

4.2.1 As we observed at paragraphs 3.2.1 - 3.2.2 above, there is no specific wording in Schedule 21 which explicitly deals with domestic murders.

4.2.2 The wording of Schedule 21 followed or was, at least, generated by the non-statutory guidance given by Lord Bingham CJ in 1997 (see paragraph 3.1.3 above). The wording of Schedule 21 in relation to the original descriptions of seriousness (whole life term and 30 years together with aggravating and mitigating factors) shows that Schedule 21 (once enacted) was heavily reliant on the analysis which Lord Bingham CJ had provided in his non-statutory guidance. The factors which, in his view, were aggravating have gone to define the higher starting points which can now[59] be found in Schedule 21 paragraphs 2 and 3.

[59] Since the Sentencing Act 2020 was brought into force.

4.2.3 The early case law makes it clear that "normal" murders which did not come in to the higher categories (whole life terms, 30 year starting point) would attract minimum terms of between 12-16 years.

4.2.4 There was no specific reference in Lord Bingham's guidance to murders committed in a domestic context where either the perpetrator or the victim had a history of suffering or perpetrating domestic abuse. He merely made the following observation,

> "[t]he fact that a defendant was under the influence of drink or drugs at the time of the killing is so common that I am inclined to treat it as neutral. But in the not unfamiliar case in which a married couple, or two derelicts, or two homosexuals, inflamed by drink, indulge in a violent quarrel in which one dies, often against a background of longstanding drunken violence, I tend to recommend a term somewhat below the norm."

4.2.5 More broadly then, the vulnerability of victims who are trapped in abusive relationships has

not been considered within the wording of the statutory framework. This contrasts with the vulnerability of victims which go to define the seriousness of the starting points in paragraphs 2 and 3 of Schedule 21.

4.2.6 As we have noted at 2.2 above, Paragraph 3 of Schedule 21 defines seriousness partly by way of reference to vulnerability and in particular, to the killing of persons[60] with protected characteristics. Women (who comprise the majority of the victims in domestic murders) are not included in the wording of paragraph 3. Sex is not a protected characteristic under hate crime legislation. Whether sex should be a protected characteristic for the purpose of hate crime has recently been the basis of a consultation and subsequent report by the Law Commission.

[60] See paragraph 3(2) (g), (h) which refer to racial or religious hostility or hostility to sexual orientation and disability or transgender identity respectively.

4.2.7 For example, in their consultation paper on hate crime,[61] the Law Commission noted that "the possible use of hate crime laws to respond to violence and hostility against women has gained traction in recent years."[62] The Commission has further observed (in the context of considering gender/sex based hate crime aggravation and protection) that a consequence of aggravating hate crime offences against women would disrupt the understanding that all sexual and domestic abuse offences against women are inherently misogynistic.[63] In their final report,[64] the Law Commission have not recommended that sex should become one of the protected characteristics in Hate Crime Law. One of their reasons for this is that it would militate against the understanding that violence

61 Law Commission Consultation Hate Crime Laws CP 250.

62 Law Commission Consultation Hate Crime Laws CP 250 at 12.4.

63 *Ibid* 12.117-118...

64 Law Commission Hate Crime Law Final Report, Law Com No 402, December 2021.

against women and girls is motivated by misogyny and that it is better tackled in legislation elsewhere.[65]

4.2.8 We think that the above provides further support for the proposition that domestic murders should attract specific consideration within the context of factors, such as misogyny, which underlie much violence against women and girls.

4.2.9 There is, of course, nothing to prevent a domestic murder from being included in a higher starting point where the facts are consistent with those factors which go to define seriousness see *R v M, AM and Kika* (supra). If a man strangles his wife in the course of a sadistic rape and this is proved to the criminal standard then technically, the offence attracts a higher starting point. We found one case in our sample **(CM55)** where a sentence of 33 years was imposed where

[65] Law Commission Hate Crime Law Final Report, Law Com No 402, December 2021 at 5.382 “Our view is that hate crime legislation is not the way to approach the issue of violence against women and girls.”

the domestic violence appeared to have been classed as sadistic within the overall sentencing framework. The male perpetrator had used an iron and a coat hanger to assault the victim.[66] He had also seriously assaulted his wife some years earlier and been sentenced to a hospital order with a s.41[67] restriction order having subsequently been discharged. The victim in **CM55** was the perpetrator's second partner.

4.2.10 However, other cases which had attracted the 30 year starting point pursuant to paragraph 3 tended to be cases where there was no ambiguity about the starting point because the determination of the category did not involve any sort of value judgment on the part of the sentencer. For example, the murder was for gain **CM59**, or where more than one person was murdered as in **CM74** where the perpetrator murdered his wife and two children. In this regard, see also **CM88** in

66 With whom he was living but to whom he was not married.

67 Mental Health Act 1983 (as amended).

which the victim was stabbed many times, her mother was stabbed by the perpetrator who then returned to stabbing the victim. Other examples comprised cases where a firearm was used **(CM85** and **CM76)** or where a firearm was used to attack and kill more than one victim.

4.2.11 Societal understanding of domestic abuse has developed quite separately to sentencing law and policy in murder and, as we explain below, has greatly improved since 1997 when judicial guidance for sentences in murder was first promulgated.[68] This touches on a wider point which is that to a great extent, Schedule 21 remains a product of its time and frozen in 2003 since when it has been amended in a piecemeal fashion. Ironically, sentencers have more guidance on lesser offences. The Sentencing Council issues up-to-date guidance on the spectrum of criminal offences which is reviewed and designed to take account of societal changes. For example, in

[68] See reference to Lord Bingham CJ in the previous section.

January 2021 the Council issued new guidance on drugs in line with the increased misuse of certain psychedelic drugs under the Psychoactive Substances Act 2016 and which was intended to reflect modern offending. There is an argument that there should be a wholesale reform of Schedule 21 with guidance being issued by the Sentencing Council. However, this is not within our terms of reference which are limited to considering the implications of paragraph 4 and the operation of the Schedule within the context of domestic murder.

4.3 Taking a Knife or Other Weapon to the Scene as Prescribed in Schedule 21 Paragraph 4

4.3.1 The first part of our review suggests that the provision of what is now paragraph 4 (but was paragraph 5A) has caused problems. The problems can be distilled as follows. First, in construing the paragraph, the courts have had difficulty (except in the most obvious circumstances) in determining when a

weapon should be regarded as having been 'taken to the scene'. See the decision in *R v. Kelly* where it has been said that the potentially arbitrary nature of paragraph 5A[69] was apparent from the facts and hypothetical circumstances arising from consideration of the conjoined appeals.

4.3.2 Second, the first tranche of our research namely, the case sample analysis, suggests that in practice, there is a significant disparity of 6.5 years in the length of the average minimum term (which an offender must serve before an application for release on licence) between murder cases where a knife or other weapon has been taken to the scene and cases where a weapon was already at the scene. Treasury Counsel's analysis also showed that there were very few cases where the 25 year mark was reached by virtue of

69 Bild (Jonathan) *Kelly and the 25 year starting point Arch.Rev.2011,8,7 2* "By introducing this clumsy amendment to Schedule 21 all that Parliament has achieved is to create an arbitrary distinction between whether a weapon was or was not taken to the scene"

aggravating features after determination of a 15 year starting point.

4.3.3 In a case of domestic murder, the starting point for the minimum term will normally be one of 15 years unless the offence has a characteristic which brings it into paragraph 3 (for example, it can be proved that the murder was committed in the context of an offence of sexual violence or with a firearm). The disparity between the 15 year starting point and the 25 year starting point has led to calls for the 15- year starting point to be higher in the case of a domestic murder.

4.3.4 The arguments for this are, that in a domestic murder where a weapon is likely to be at hand (and therefore not taken to the scene) the offence cannot come within paragraph 4. It is surely wrong that, just because a victim has the misfortune to live with her or his assailant, and a weapon (usually a knife) will therefore be available in the home, the starting point in the event of a conviction is so much lower than that where an assailant and a victim are not known to each other or the offence is

committed outside the home and a weapon is taken to the scene. A victim is entitled to feel safe within the confines of her/his home and one of the most perfidious aspects of domestic abuse is that it takes place in the privacy of the home where there are often no witnesses. The discrepancy would be particularly apparent in a case where for example, two people had separated, and the murder took place whilst the victim was on her way to pick up her children from school. These were the circumstances in **CM30** where the youngest (three- year- old) child of the victim and perpetrator, was also present with the victim at the time of the murder. This happened at the end of the relationship. The sentencing remarks in that case also contained reference to coercive control. In our view, the culpability of the perpetrator who kills in the home is aggravated as is that of the perpetrator who kills outside the home and takes a weapon with him/her to do it. The degree of aggravation will depend on individual factors in each case. Culpability does not necessarily lie in the niceties of how

the perpetrator came to be armed but rather in the perpetrator's state of mind.

4.3.5 It is not therefore clear that the 'weapon issue' in Schedule 21 paragraph 4 is the problem. If it is not the problem (because it does not represent the essence of the perpetrator's culpability) then it is not logical for it to be determinative of the starting point. This proposition was supported by nearly all of the attendees in the focus group discussions.

4.3.6 One injustice which is often referred to as emanating from the distinction between the differences in starting points is the seeming absurdity of the following scenarios. An offender who has taken a knife or other weapon to the scene (and therefore potentially attracts a higher starting point) may cause death by stabbing their victim once. Conversely, an offender who does not take a knife (or other weapon) to the scene may cause death by stabbing their victim far more times than needed to cause death. This is what is otherwise described as **'overkill'**. If they are convicted of murder, then by

definition, the offence has not been mitigated to manslaughter by either diminished responsibility or by loss of control. The question arises as to how such an offender's culpability can morally be said to be less than that of a person who commits an offence coming within paragraph 4(2) for which there is obviously a higher starting point. We suggest that this anomaly is best addressed independently of consideration of Schedule 21 paragraph 4 and that the focus should be on the harms which pertain specifically to domestic murders.

4.3.7 This is for the reasons to which we refer at paragraphs 6.1-6.7 below. Namely, that the harms in domestic murders are very different to those which are contemplated by paragraph 4 of Schedule 21 (where the intention of the legislature was to stop young people from carrying and using knives on the streets). Comparing like with like has the effect of prioritising or privileging factors such as the carrying of a weapon at the expense of other factors which are attributable to domestic abuse, misogyny and not yet part of

the dominant forensic discourse because there has not been specific or sufficient consideration of the underlying issues by policy makers. It is necessary to look at domestic murders to explain what distinguishes them from other murders which would normally attract a 15 year starting point.

5. Domestic Murders

5.1 Domestic Homicide as a Developing Jurisprudence

5.1.1 The one thing which differentiates domestic murders (and manslaughters) from many other murders is that in domestic murders there is always a relevant history (notwithstanding that this may not have been explored at trial)[70] which provides a context and a potential explanation for the killing.

5.1.2 Attendees of Focus Groups agreed as to 'background' being one of the defining factors in domestic homicides:

> "I think the critical question is where you have a murder in a domestic context it's not like a stranger killing during a fight or

[70] Many trials focus on the immediate incident of the killing at the expense of looking at the background which led up to it. In part 8 we refer to a particular case (Brown) where the family of the deceased victim felt that this had happened.

something. The whole background context of the relationship is the critical issue in understanding what leads up to the killing." **Focus Group attendee.**

"When there is an ongoing intimate relationship of some sort, they need to then go back and back and consider all those dynamics…" "The evidence is history, coercive and controlling behaviour… dynamics … or there is an issue of very risky behaviour…" **Interview with lawyer.**

5.1.3 There have been miscarriages of justice because the facts of the killing have not been placed in the relevant context in the trial.[71]

5.1.4 The 'context' proposition is exemplified by the Intimate Partner Femicide Timeline which is at the centre of Professor Monckton-Smith's

[71] For example, *R v. Farieissia Surayah Shabirah Martin [2020] EWCA Crim 1790* where evidence of previous rapes by another and also by the deceased was not before the jury and so the context of the killing was underinclusive.

work.[72] The Femicide timeline is a product of the analysis of the history in a sample of detailed case studies of femicide. Broadly speaking, Professor Monckton-Smith works on the basis that "chronologies and temporal sequences are useful in understanding the dynamic nature of risk and how it can escalate." She identifies eight stages preceding homicide. These stages are categorised as pre-relationship, early relationship, relationship behaviours, trigger event, escalation, change in thinking, planning and homicide. Significantly, this research establishes that there are features common to many cases (although the pattern may change in that stages are repeated or extended) but there is prevalence of planning

[72] Monckton-Smith (Jane) *Intimate Partner Femicide: Using Foucauldian analysis to track an eight stage relationship progression to homicide.* Violence Against women 26 (11) pp 1267-1286, e-print URI http://.eprints.glous.ac.uk/id/eprint6896 see also, Professor Jane Monckton Smith *In Control: Dangerous Relationships and How They End in Murder*, Bloomsbury Publishing, 2021 (2021).

(which can last anything from a few hours to 12 months) where a man goes on to kill his present or previous intimate partner.

5.1.5 Domestic abuse is a gendered crime.[73] Women are disproportionately the victims. 27% of women have experienced domestic abuse since the age of 16.[74] Research by Women's Aid has noted that women are more

[73] The sex of complainants in CPS domestic abuse flagged prosecutions was recorded at 82.5 % being female in 2018-2019. See Crown Prosecution Service "*Violence Against Women and Girls*" Report 2018-2019 available at https://www.cps.gov..uk/sites/default/files/documents/publications/cps-vawg-report-2019 cited in Law Commission Consultation Hate Crime Laws CP 250 at 12.40 paragraph 5.179 Page 170

[74] https://www.gov.uk/government/publications/tackling-violence-against-women-and-girls-strategy/tackling-violence-against-women-and-girls-strategy Government Violence against women and girls strategy (July 2021) Domestic abuse prevalence and trends, England and Wales

likely to be seriously hurt in a context of domestic abuse than are men.[75]

5.1.6 The above trend extends to domestic homicide whether it is murder or manslaughter. In figures from the Home Office Homicide Index between April 2016 and March 2020 where the perpetrator of the homicide was an intimate partner and/or ex-partner, there were 350 homicides.[76] Males made up 87% (305) of the perpetrators and females made up 13% (45) of the perpetrators.

5.1.7 These figures are consistent with the results of other research projects. For example, the

[75] Women's Aid "Domestic Abuse is a gendered Crime" available at https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-genderedcrime/ cited in Law Commission Consultation Hate Crime Laws CP 250 at 12.42

[76] Appendix E

Femicide Census figures for 2018[77] revealed that 149 women were killed by men in the UK in 2018. The Femicide Census over a 10 year period between 2009- 2018, found that of the 1,425 women who had been killed by men in the UK 888 (62%) were killed by a partner and a history of previous abuse to the victim was evident in 611 (59%)[78] of these cases.

5.1.8 A research project by the Centre for Women's Justice and Justice for Women found that in the 10-year period (between April 2008-March 2018) 840 women were killed by partners or ex-partners and 108 men were killed by women with whom they had been in a relationship.[79] The Office of National Statistics figures for the year 2017 showed that women

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77 Femicide Census: "*If I am not in Friday, I might have been dead*" Long (Julia), Wertans (Emily), Harper (Keshia), Brennan (Deirdre), Harvey (Heather), Allen (Rosie) and Elliott (Katie) with Ingala Smith (Karen) and O Callaghan (Clarissa). 2009-2018 Page 62.

78 Femicide Census cited in by *Women who Kill: How the state criminalises women we might otherwise be burying* Feb 2021 at page 17. Howes (Sophie).

79 *Op* Cit at p22

were more likely than men to be killed by partners or ex-partners. In this regard, 33% of female victims of homicide compares to 1% of male victims of homicide. In 2017, 50% of female victims who were aged 16 and over were killed by a partner or ex-partner compared with 3% of male victims aged 16 and over whereas in the same year, men were more likely to be killed by acquaintances i.e. 32% of male victims aged 16 and over compared with 10% of female victims aged 16 and over.[80]

5.1.9 In our own sample of cases, there were 99 killings of women by men and 20 killings of men by women and one killing of a woman by another woman (**CF16**) over the two year period.

5.1.10 All the analyses referred to above show the gendered nature of domestic homicides. A

[80] ONS Homicide in England and Wales: Year ending March 2017 cited Law Com CP 250 at 12.43. Also available at: https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/homicideinenglandandwales/yearendingmarch2017.

further example of this is found in the use of weapons. In our sample, all women who killed their male partners used a weapon to do so. In this regard, see our findings at paragraph 1.4.6. Conversely, in murder cases where no weapon was used, the perpetrator was always male. As we point out in our part on manslaughter at paragraph 8.2 below, feminist scholars have long argued that the use of a weapon on the part of a female perpetrator who kills a male is an inevitable consequence of her having less bodily strength than a male perpetrator. Use of a weapon is not a statutory aggravating factor in cases of murder. Although the Court of Appeal have said that it is always an aggravating factor,[81] we do not think that it should always be viewed as an aggravating factor in domestic murder because to hold that it is so, is gendered.

5.1.11 We therefore consider that the use of a weapon should not be an aggravating factor. Participants in all of our focus groups agreed

81 *R v. M, AM and Kika [2010] 2 Cr App R (S) 19.*

with this proposal. See recommendation 10 in the table in Part 10.

5.1.12 The gendered nature of domestic homicide is the subject of a developing jurisprudence. What follows is no more than a summary of the main landmarks. The (now abolished)[82] partial defence to murder of provocation was thought by policy makers and the Law Commission of England and Wales to traditionally avail men (as opposed to women) of a partial defence because it placed an emphasis on a sudden and temporary loss of control. In doing so, it provided for a typically male anger which was often connected to jealousy. It was thought men killed in anger in the heat of the moment, but women (through lack of bodily strength) tended to deliberate and so obviate the immediacy. In this regard, see *R v. Duffy*[83] a case where an abused woman killed her husband by fetching an axe from the kitchen and then bludgeoning him in the head while he slept in bed. The Court of

82 Coroners and Justice Act 2009 s.56.

83 *R v. Duffy [1949] 1 All ER 932.*

Appeal upheld Devlin J's direction to the jury that the conduct of the killing had to be sudden with no time for deliberation in order to satisfy the, then, common law partial defence. Professor Susan Edwards describes the contemporaneity of the factual matrix leading up to the killing involving, as it did, physical abuse including non-fatal strangulation and sexual violence together with the matter-of-fact way in which the appellant said that she had killed her husband.[84] Professor Edwards' exposition of the facts of *Duffy* illustrates the way in which the law has consistently failed to harness the experiences of women who kill because they are trapped in abusive relationships.

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84 *"Justice Devlin's legacy: Duffy a battered woman caught in time"* Edwards (Susan) Crim L.R. 2009 12 851-869, where the writer claims that the law reports reporting of the case were of such a brevity that they reflected the seeming irrelevance of the factual background of domestic violence to the development of the law at the time and at 119 "it is most likely that if Rene Duffy were tried today she would again be convicted of murder and would serve a minimum of 15 years."

5.1.13 In *R v. Ahluwalia*[85] the appellant who had been subjected to a long history of domestic abuse by her husband, killed him by taking petrol to their house and throwing it into his room and then setting it alight. The Court of Appeal upheld a direction on provocation based on the requirement of a "sudden and temporary loss of control." The Court tempered this by indicating that a delay between the provocation and the loss of control would not necessarily negate the partial defence but held that the longer the delay between the provocation and the loss of control, the more likely it would be that the prosecution would be able to disprove the partial defence. The appeal was allowed on the basis of fresh evidence going to the issue of diminished responsibility.

5.1.14 In *R Humphreys*,[86] the Court of Appeal held that in the context of a history of abuse it was incumbent on a trial judge to draw together the strands of evidence which could be said to

85 *(1993) 96 Cr.App.R. 133.*

86 *R v. Humphreys [1995] 4 ALL ER 1008.*

go to the final provocation rather than to give a mere historical recital thereby introducing the concept of cumulative provocation into law. This change has now been put on a statutory footing. When provocation was abolished and loss of self-control introduced as a partial defence to murder pursuant to ss.54- 55 Coroners and Justice Act 2009, it was specifically provided at s.54 (2) that there was no requirement that the loss of control should be “sudden.”

5.1.15 The impetus for the legislative reforms to the partial defences to murder which were introduced by the Coroners and Justice Act 2009 was to enable women who kill their abusive male partners to use the law to defend themselves on a charge of murder. The reforms were intended to effect gender parity in terms of access to the partial defences. The relevant sections of the 2009 Act were largely based on the work of the Law

Commission[87] whose recommendations were devised without an understanding of coercive control and indeed, without any reference to the concept. A search of Hansard reveals that coercive control was not referred to during the Commons Committee stage of The Coroners and Justice Bill.[88] With one notable exception, the first mention of coercion and control (in terms of legislation) in Hansard appears to be in 2012.[89]

5.1.16 In our sample of cases, there were no cases where a male perpetrator had successfully relied on the partial defence of loss of control in order to secure a conviction of manslaughter as opposed to murder. The

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87 *Partial Defences to Murder* Law Com 290 6th August 2004, Murder Manslaughter and Infanticide LC 304 29th November 2006.

88 Which was to become the Coroners and Justice Act 2009.

89 This is with the exception of the fact that there was a memorandum submitted to the Select Committee on Home Affairs by Women's Aid in 2006 where the term was in fact used in reference to submissions on sentencing.

partial defence specifically disregards sexual infidelity as a trigger to any loss of control[90] because in so far as defences are concerned, the law cannot concede that jealousy should ever justify killing. Notwithstanding, this clear legislative intent, the statutory mitigating factors in paragraph 10 of schedule 21 have not been amended so as to be specifically aligned with the underlying policy and the wording in s.55(6)(c). Accordingly, sexual infidelity could still be regarded as mitigation in that it can be said to be provocation falling short of a defence. In paragraph 7.1.17, we recommend that this lacuna in the legislation should be filled.

5.1.17 Notwithstanding this growing jurisprudence, there has never been a comprehensive forensic approach to domestic abuse or to those murders which are the result of domestic abuse.

5.1.18 It is now understood that domestic abuse is underpinned by controlling and coercive

90 Coroners and Justice Act 2009 s.55(6)(c).

behaviour by the perpetrator of the abuse towards the victim.

5.2 The Role of Coercive Control and Coercive Control as a Tool for Forensic Analysis

5.2.1 2015 saw the enactment of a new offence of controlling and coercive behaviour which was introduced by s.76 of the Serious Crime Act 2015. The offence was based on the work of Evan Stark.[91] Professor Stark characterises coercive control as a crime against liberty in circumstances where a victim is systematically stripped of her autonomy.[92] Stark's definition is based on a clinical concept derived from the empirical evidence of his practice as a forensic social worker. S.76 converts the concept to something which

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91 *Coercive Control How men entrap women in personal life. Op cit.* See also Stark (Evan): "*Rethinking coercive control".* Violence Against Women 15(2): 1509–1525.

92 The offence provided for by s.76 is, however, gender neutral.

is actionable in law.[93] Here, we are not so much concerned with the offence itself but with the extent and nature of the harm that is caused by the conduct which the offence criminalises.

5.2.2 The introduction of the offence and of the concept of controlling and coercive behaviour ('coercive control') into criminal legal discourse has achieved a number of things. First, it has assisted the Government in continuing to meet its international obligations to tackle violence against women and girls.[94]

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93 Walklate (Sandra) Fitz-Gibbon (Kate) McCulloch (Jude) "*Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories"* Criminology and Criminal Justice 2018 Vol 19(1) 15-131 at pp17-18. Broadly speaking, the authors argue that translating a clinical concept into something which is actionable in law is problematic.

94 The UK signed the Council of Europe Convention on Preventing and combatting Violence against Women and Domestic Violence (the Istanbul Convention) on 8.6.12 but is yet to ratify the treaty. The Government has said that it will only ratify the treaty when it is satisfied that the UK has met all its obligations under the Convention.

5.2.3 Second, it has introduced a lexicon into criminal law which is capable of facilitating a narrative that better reflects the experience of women who suffer domestic abuse. This is because the theory of coercive control expounds the way in which behaviours of violence, intimidation, isolation and control are used to abuse women in domestic relationships. It thereby shifts the emphasis away from a calculus of individual physical harms to a pattern of control which endangers the victim's physical and psychological integrity and which isolates her, making her feel it is impossible to escape her situation because the emphasis is on the entrapment of the victim which is caused by coercion and the exercise of control by the perpetrator. As an offence against liberty, coercive control also focuses (or ought to focus) legal attention on the victim's constrained strategic choices for survival.

5.2.4 An incident-based approach to quantifying domestic abuse is under-inclusive and excludes things like 'isolation' and 'shame' which have not traditionally been recognised

as legal harms, but which are deeply damaging to victims of domestic abuse and which go to compound the perpetuation of domestic abuse because they operate to prevent women from reporting it. The offence of controlling and coercive behaviour has been described by feminist scholars as "entirely unprecedented" in that it has an external element which consists of conduct which, taken in isolation and outside the behavioural pattern, may not necessarily be unlawful.[95] It identifies the invidious and often intangible quality of much abuse. The shift in emphasis from an incident based approach means that the attack on a woman's autonomy is explicable in a way that has the potential to be more readily understood by police and other agencies.

5.2.5 Third, the concept of entrapment provides a more plausible explanation of why people[96] stay in abusive relationships than say,

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95 Edwards (Susan) *"Coercion and Compulsion re-imagining crimes and defences"* 2016 Crim LR 876.

96 Mostly women.

theories like ‘battered woman syndrome’ and diagnoses like Post-Traumatic Stress Disorder both of which place emphasis on individual acts/assaults and the consequent psychological status of the victim. This point is emphasised by the facts of *Dhaliwal*[97] and the decision in that case. Had the facts of that case been viewed through the lens of coercive control, then the outcome may have been different. Although the trial judge had indicated that it should be possible to view the various incidents as a continuum, the concept of coercive control was not appreciated at the time and emphasis was placed on the psychological state of the victim.

5.2.6 In forensic terms, the coercive control model also facilitates a move away from the assumption that domestic abuse is ‘situational’ and less about a relationship having ‘gone wrong’ to being a matrix of entrapment caused by a perpetrator who has a pathological need to control. In the words of Professor Monckton-Smith,

97 *Op Cit.* See our comments in part 1 of this report.

> "[d]ominant discourses construct domestic abuse as a 'couple's problem' which is generated through the particular dynamics in any relationship between two people. This position considered a domestic abuse myth, suggests that domestic abuse is situational and provoked…in contrast, discourses of coercive control situate the problems and the abuse within the perpetrator, arguing they will continue with the same behaviour pattern in all relationships."[98]
>
> "The forensic narratives are dominated [by] the defence and prosecution counsel looking at this as a relationship that's gone wrong rather than the pathological behaviours of somebody who has issues with control." **Semi-structured interview.**

5.2.7 Even without the context of the Intimate Partner Femicide Timeline, a relationship

[98] 8 Monckton-Smith (Jane) *Intimate Partner Femicide: Using Foucauldian analysis to track an eight-stage relationship progression to homicide. Op Cit.* p 13 citing Dobash and Dobash (2002) and Stark (2009).

which is governed by controlling and coercive behaviour can, in the worst case, lead to either suicide or homicide.[99] See also *"Domestic Homicides and Suspected Victim Suicides During the Covid 19 Pandemic"*[100] where it is said that the risk factors for homicide and suicide were domestic abuse and that within domestic abuse, coercive and controlling behaviour is an important risk factor.[101] Murder is a concomitant of the

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99 See Stark (Evan) *"Coercive Control How men entrap women in personal life"* OUP 2007 pp 276-277 citing Nancy Glass et al *"Risk for Intimate Partner Femicide in Violent relationships"* DV report 9 no 2 Dec 2003/Jan 2004 1,2 30-33.

100 Home Office NCCP, *Vulnerability Knowledge and Practice Programme, Domestic Homicides and Suspected Victims Suicide During the Covid-19 Pandemic* 2020-2021, Lis Bates (Lis), Hoeger (Katherine), Stoneman (Melanie-Jane) Whittikar (Angela).

101 *Ibid* at 4.2.2 (page 54) it also makes the point that coercive control is under reported "as it is a pattern of behaviour that may be less easily identifiable than discrete incidents involving physical assault or verbal argument".

coercive control used by abusers.[102] As expounded below, it frequently occurs in circumstances where the abuser fears that the relationship will end.[103] In this regard, see the Femicide Census at 2.8 on post-separation

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[102] Monckton-Smith (Jane) 2019 Intimate Partner Femicide: Using Foucauldian Analysis to track an eight-stage progression to Homicide Violence Against Women 2019. See also Monkton-Smith (Jane) *"In Control Dangerous relationships and how they end in murder"* (2021).

[103] The thing, which precipitates the change in thinking from a need to control to a need to kill the object of the control in the homicide timeline, *Intimate Partner Femicide Using Foucauldian Analysis to track an eightstage progression to Homicide Violence Against Women. P 8 Monkton-Smith (Jane)* "[t]he argument proposed is that IPF is part of a journey where the motivation to abuse (need for control) is linked to the motivation to kill (loss of, or threat to control). Breakdown in control can be preceded by a somewhat broad spectrum of triggers, and this often revolves around separation but also financial ruin and mental or physical crises. This means there will be many more relationships where there is a breakdown in control than there are homicides. However, if the response shows signs of last chance thinking, or determined revenge, the risk of homicide escalates".

killings. Of the 888 women who were killed over the 10-year period covered by the census, 378 (43%) were known to have separated or to have taken steps to separate from the perpetrator.[104] This is reinforced by stage 4 of Professor Monckton-Smith's Femicide Timeline "the reasons given for men killing their partners overwhelmingly revolved around the withdrawal of commitment and separation. This separation could be real or imagined or just threatened."[105]

5.2.8 As we discuss at paragraph 6.2 of this report, there was evidence (within our sample of cases) to support the proposition that the end

[104] Femicide Census: "*If I am not in Friday, I might have been dead*" by Long (Julia), Wertans (Emily), Harper (Keshia), Brennan (Dierdre), Harvey (Heather), Allen (Rosie) and Katie Elliott (Katie) with Ingala Smith (Karen) and O' Callaghan (Clarissa). 2009-2018 Page 30.

[105] *Op Cit* at p17.

of a relationship tends to precede a killing.[106] In 43[107] out of 89 murder cases (48%) the sentencing remarks disclosed that there were either reports of jealousy or resentment on the part of the perpetrator at the breakdown of the relationship. In the majority of cases, this appeared to be the catalyst for the murder. The perpetrator was male in 42 out of these 43 cases. There were no cases where a female perpetrator was said to have exhibited coercive control towards the victim prior to the killing. There was one case (**CF1**) where the perpetrator was said to have been "obstructive, abusive, argumentative threatening, aggressive and violent when in drink or craving drink" and in respect of whom

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106 In *Building a temporal sequence for developing prevention strategies, risk assessment and perpetrator interventions in domestic abuse related suicide, honour killing and intimate partner suicide* p35 Monckton Smith (Jane) Siddiqui (Hannana) Haile (Susan) Sandham (Alex) refer to a trigger event in the context of honour killings and suicides.

107 There was one case in which it was not clear and so this case was excluded in the computation.

the judge did not accept her account of being coercively controlled by the victim.

5.2.9 Conversely, homicide (whether manslaughter or murder) can also occur where a party to the relationship's sense of entrapment (as a result of being subject to controlling and coercive behaviour) means that they feel that there is no way out other than to kill. The victim of the abuse then becomes the perpetrator of the murder.

5.3 Offenders Who Are Also Victims

5.3.1 We have so far focused on men and their perpetration of femicide. Research shows that when women are convicted of murdering their male partners, they often tend to be the victims of previous domestic abuse by their partners.[108] Women who have suffered domestic abuse in a relationship which is governed by coercive control are likely to kill because the coercive control had led to such

[108] *Women who kill: How the State Criminalises Women We Might Otherwise be Burying Howes* (Sophie) p 29 "The triggers to women's lethal violence".

a degree of entrapment that they can see no other or lawful way out of her situation. Stark identifies what he calls “perspecticide”[109] as playing a part in this.

5.3.2 In circumstances where such women are convicted of murder, research has shown that this is often because of failings in the criminal justice system. Either, such women are not properly protected from previous domestic abuse or not properly represented at trial.[110]

Attendees of focus groups agreed:

> We see that in frontline services and reports and we see that in the media all of the time where women are accused, when arrested. That gendered lens is not just in the judiciary it is throughout our society.
> **Focus group attendee.**

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109 Stark (Evan), Coercive Control *“How men entrap women in personal life”* OUP (2007) at p 267 “one of the most devastatingly psychological effects of isolation is the above related incapacity to know what you know.”

110 Howes (Sophie) *Women who Kill: How the state criminalises women we might otherwise be burying* Feb 2021.

5.3.3 Another reason we suggest that such women are often convicted of murder is that the dominant discourse[111] is not yet one of coercive control, which, as we have already argued, underpins domestic abuse. This reasons for this are explored further in Part 9 of this report. It is however now recognised that in principle, coercive control can feature in both partial defences to murder.[112]

5.3.4 We did not find that sentences imposed on women for murder were longer than those imposed on men. In fact, the average sentence on women was shorter being 17.6 years for women as opposed to 20.8 years for men – although the small number of women in the case review (8 sentenced for murder) prevents firm conclusions being made. This apparently being the case, it would be wrong,

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111 Monckton-Smith (Jane), *Intimate Partner Femicide: Using Foucauldian analysis to track an eight-stage relationship progression to homicide. Op. cit.*

112 See the decision in *R v. Challen [2019] EWCA Crim 916.* Although it is important to note that in *Challen* the Court of Appeal were concerned with provocation and not the recently introduced partial defence of loss of control.

given published research about domestic abuse and coercive control, for there to be an increase in sentences per se. All of our focus group attendees were in agreement with this.

5.3.5 Any policy which did not take account of the fact that a minority of perpetrators are also victims of the very mischief that the sentencing policy is designed to reflect/address would lead to injustice. There would, in other words, be unintended consequences. Professor Jeremy Horder and Kate Fitz-Gibbon make the compelling point that under the current sentencing framework in Schedule 21, *Kiranjit Ahluwalia*[113] if again convicted of murder, would be subject to a

[113] Whose case Professor Susan Edwards has argued was the paradigm case of coercive control. Professor Edwards cites Taylor CJ in *R v. Ahluwalia (1992) 96 Cr. App R. 133* as effectively describing coercive control when he cited a letter the appellant had written to the deceased as evidence of "the state of humiliation and loss of self-esteem to which the deceased's behaviour had reduced her". See Edwards (Susan) "*Coercion and Compulsion re-imagining crimes and defences"* 2016 Crim LR 878.

starting point of 25 years[114] because of course, she had taken a weapon (petrol) to the scene and she used it to kill the deceased. There is a disconnect between aspects of the substantive law following the changes brought about by the Coroners and Justice Act 2009 (to which we have referred in paragraph 5.1.16) and the sentencing framework which has remained largely unchanged and as we have stated at paragraph 2.3, remains fixed in 2003. The above research calls for greater flexibility in the sentencing framework so that the culpability of women offenders who are also victims can be better assessed.

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[114] Horder (Jeremy) and Fitz-Gibbon (Kate) "*When sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing.*" C.LJ 2015 74(2). 307-328 which describes the previous paragraph 11(c) in Schedule 21 to the Criminal Justice Act 2003 as "an arguably very weak attempt to take into account circumstances which will include those in which abused women may kill their abusive partners hardly matches the effort devoted to carving out a partial defence to murder, based, when a loss of control is added to the picture, on this very ground."

5.3.6 A way to define the gravity of domestic murder and pre-empt any injustice which flows from the tension described above would be to use the coercive control theory to ascribe a level of seriousness to a murder. Broadly speaking, this is because the coercive control theory/model which is centred on the restriction of liberty reflects pre-existing gender inequalities. In her 2012 work[115] Jane Monckton-Smith cites Evan Stark:

> "coercive control takes the enforcement of gender stereotypes as its specific aim, the degradation of femininity as a major means, and reinforces sexual inequality in society as a whole in ways that constrain women's opportunities to 'do' femininity, it is about the construction and deconstruction of gender identity in ways that other forms of violence against women are not."

5.3.7 By way of illustration, the focus of coercive control on say, micro-regulation of activities

[115] Monckton Smith (Jane), Murder, Gender and the Media 2012 Palgrave Macmillan, Basingstoke. Page 138.

which society has traditionally deemed to be 'women's work' (such as housework and looking after children) also means that women who kill are less likely to have been coercively controlling towards the partner whom they have killed. Such women are unlikely to have proved to have a history of perpetrating the abuse which is common in relationships governed by coercive control namely, non-fatal strangulation and 'rape as routine'. In his recent book, *Domestic Abuse and Human Rights*, Jonathan Herring cites the work of Professor Marianne Hester and colleagues[116] "[who] found that while significant numbers of men reported emotional, physical or sexual harm, only 4.4% of men experience coercive and controlling violence, and of these, half admitted doing the same to their partner."[117] In any event, coercive control is capable of

[116] M. Hester, C. Jones and E. Williamson "*Is it Coercive Controlling Violence? A Cross-sectional Domestic Violence and Abuse Survey of Men Attending General Practice in England and Wales*" (2017) 17 Psychology of Violence 417.

[117] *Op. cit* p 44.

aggravating conduct of which it is a continuation specifically, a need to control and it is also capable of mitigating a killing which is explicable by a need to escape control.

5.3.8 As explained in paragraph 5.2.8 above, many murders of women by their male intimate partners or ex partners tend to be committed either at the end of the relationship or when the victim of the murder has resolved that she will leave the relationship or even after the relationship has ended. This leads to the change of thinking (which is identified by Professor Monckton-Smith).[118] Namely, a change from the need to exert control over a person to the decision to kill that person once it is appreciated that control cannot be maintained. The coercive control theory speaks to the motivation for such killings being about an inability to accept the end of the exploitation of the male privileges which are so common in controlling and coercive relationships. Jealousy is often perceived to be a factor but, in fact, this is but one aspect

[118] See paragraph 5.1.4 above.

of the coercive control strategy which is based on male privilege afforded by patriarchy. As Stark says "[t]he ultimate expression of property rights is the right of disposal illustrated by the statement that frequently precedes femicide "If I can't have you no one will."[119]

5.3.9 The exception to the above proposition, that the end of a relationship has significance in terms of a motivation to kill, is possibly jealousy which as we have noted in Part 5.1.12[120] was specifically addressed by Parliament in s.55(6)(c) Coroners and Justice Act 2009.[121] Practice in the criminal courts also shows however, that jealousy is a common narrative relied on in the absence of

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[119] 9 Stark (Evan), Coercive Control "*How men entrap women in personal life"* OUP (2007) p208.

[120] see above 5.1.15

[121] As already observed, the section provides that sexual infidelity is to be disregarded in considering the trigger to a loss of control the policy underlying this being that jealousy cannot ever justify killing.

a proper understanding of coercive control as the basis of domestic abuse.[122]

5.3.10 Of the 99 cases which involved a male perpetrator in our 120 case sample, the perpetrator was said by the sentencer to have exhibited coercive control towards the victim in 46 cases. There was at least one very clear example of the sentencing judge disregarding what the family of the victim said was coercive control but imposing an otherwise high sentence [**CM16**]. Later in this paper, we address the overlap between coercive control and the other themes we have discerned in the course of the review. Obviously, coercive control had to be measured according to sentencing remarks which, as we have already observed, is an imperfect way of identifying all the relevant factors in a case.

[122] See *R v. Challen [2019] EWCA Crim 916* where jealousy was said to be the motivation of the appellant in her first trial when in fact there was another explanation (gaslighting) which reflected her experiences and her actions.

5.4 Coercive Control is Still Poorly Understood

5.4.1 Concerns were expressed in the majority of our focus groups about the fact that coercive control is still poorly understood and that it is often overlooked in the context of intimate partner killing.

5.4.2 Although there is still very limited empirical evidence on this issue, this lack of understanding has been identified elsewhere. A Review of the *controlling or coercive behaviour offence* (March 2021)[123] provides a quantitative analysis of data from the criminal justice system together with a qualitative analysis of how the offence is working with a view to identifying the need for policy changes. The key findings of the review included (but were not limited to) the following: (1) there are still difficulties in

[123] The Home Office conducted a review of the controlling or coercive behaviour offence, which was introduced in December 2015 and report provided in March 2021 see https://www.gov.uk/government/publications/review-of-the-controlling-or-coercive-behaviour-offence.

recognising coercive control (2) there is a lack of systematic data across the criminal justice system on *inter alia* the characteristics of coercive and controlling offences. One research recommendation was that there should be research taken across the criminal justice system to assess the current levels of awareness and understanding of the legislation and its application in practice in order to identify any required changes to the available guidance and training.

5.4.3 The report draws on academic research in particular one study of policing in

Merseyside.[124] It is concluded (in the context of promoting the use of the offence of *Controlling and Coercive behaviour* in s.76 of the Serious Crime Act 2015) that "the successful implementation of the coercive control offence is dependent on more than

[124] Barlow (Charlotte), Walklate (Sandra), Johnson (Kelly), Humphreys (Les) and Kirby (Stuart) in N8 Policing Research Partnership *Police Responses to Coercive Control* where in a study of Merseyside Police key findings were: low use of the law, indicating issues with police understanding and recording of coercive control, potential missed opportunities for identifying coercive control in broader domestic abuse cases, such as Actual Bodily Harm ('ABH'), issues identified with police investigation and prioritisation of coercive control offences compared to other types of domestic abuse related crime, particularly low arrest and solved rate in comparison to other types of domestic abuse-related crime such as ABH, problems identified with effectively evidencing coercive control and issues with officers regarding the extent and implications of risk in coercive control cases.

just legislation”[125] citing Burman and Brooks-Hay who have argued “legislative change cannot on its own lead to improvements. Whatever laws we have will only be as effective as those who enforce, prosecute and apply them. Improving these practices- through education, training and embedding best practice- is likely to be more effective than the creation of new offences alone.” Further, reliance is also placed on the arguments propounded by feminist scholars that training needs to be at the centre of a unified approach. In the words of Julia Tolmie “[i]f the law is to be successfully applied, shifts will need to be required in the collective response of all key criminal justice decision makers, including prosecution lawyers, judges, juries….”

5.4.4 Insufficient understanding of coercive control means that it may not be readily identified

[125] *Ibid* at page 37 referencing Burman and Brooks-Hay (2018) *‘Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control*’, Criminology and Criminal Justice, vol. 18 (1) pp 78

either by investigators or by lawyers and judges. One reason for this can be the way in which it makes victims appear complicit in their own abuse.

5.4.5 As stated by one of the focus groups attendees:

> “One of the tactics that abusers often use in coercive control cases is to create a context in which she makes the decision. So for example: She becomes isolated because every time she has friends around he behaved in such an embarrassing way that she's the one who stopped them but he's now got plausible deniability - I didn't isolate you, [you] did that to yourself. That makes it even harder to kind of actually be able to have concrete evidence put forward.” **Focus Group attendee.**

5.4.6 Many victims of coercive control do not themselves recognise that they are the victims of this pattern of behaviour. This can be because they are being gaslighted or because as we explain below, there can be an idiosyncratic unspoken language between

abuser and victim which has developed over time and exists in a forum of intimacy. In one high profile case (outside the case sample) where a woman had killed her husband the deceased would control the appellant with a stern look alone. In another high profile case also outside the sample, where a woman had killed her husband who she said had coercively controlled her for years, the defendant would be asked “where did you park your car?” as an indication that she should stop talking and or the deceased’s eyes would change in a way which only she would notice.

5.4.7 Another reason for the difficulties in identifying coercive control is that it is often described as a highly personal or bespoke form of abuse. As such, it is often hidden and difficult for a victim to explain:

> “What I would say is that- the death threats and other threats are often inferred and subtle and would not be recognised by persons looking for explicit death threats,

but they absolutely mean something to the victim." **Focus Group attendee**

5.4.8 Coercive control then is a form of 'bespoke' abuse in the sense that the perpetrator will discern the victim's particular and specific vulnerabilities at the outset of the relationship and then proceed to exploit those vulnerabilities. In his book *"Coercive Control: how men entrap women in personal life,"* Professor Evan Stark states "only in coercive control do perpetrators hone their tactics to their special knowledge of everything from a victim's earnings and phone conversations to her medical problems, personal fears…".[126] We found the following clear examples of 'bespoke' abuse. First, **CM49** where the perpetrator of the murder was 13 years older than the victim. He knew that she had been sexually abused as a child and physically abused by her former partner. The perpetrator poured hot tea in the bed, spat on it and made the victim lie in it because she had described

[126] Stark (Evan), "*Coercive Control How men entrap women in personal life*" OUP (2007) p 206.

to him that when she had been abused as a child, her stepfather had spat on her. In the words of the sentencing judge “it is an irresistible inference in my judgment that you spat at her to dredge up her memories and humiliate her.” In this case the tailored abuse clearly aggravated culpability whether the concept of coercive control was mentioned or not. The benefit of the coercive control model is that it provides a forensic template for what this sentencing judge was able to discern and describe.

5.4.9 In **CM59** the perpetrator told people that the victim was pregnant and that he had children knowing that this was not the case but that it was what the victim really wanted. In this case the sentencing judge highlighted this by way of background to set the context of the murder but stated that it did not aggravate the offender’s culpability.

5.4.10 The fact that acts of coercive control are “often culturally and contextually

prescribed."[127] means that it can also be hidden by intersectional abuse unless police, the CPS, prosecution and defence lawyers know what to look for. There is frequently an interface between coercive control and other oppressive and/or discriminatory factors like mental health, honour-based violence (and therefore, limited or no family and friends support) or issues such as those pertaining to culture or a lack of recourse to public funds faced by migrant women which will go to compound the entrapment.

5.4.11 We found the following apparent examples of intersectional abuse within the case sample. **CM1** was a case where the victim was murdered by her husband because she would not support his application for immigration

[127] Walklate (Sandra), Fitz-Gibbon (Kate) and McCulloch (Jude) "*Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories*" Op. cit. citing Velonis, *"He never did anything you typically think of as abuse Experiences with violence in controlling and non-controlling relationships in a non-agency sample of women"*, Violence Against Women 22(9):1031-1054 2016):1036.

status. This illustrates a way in which women from minority ethnic backgrounds are harmed by coercive control and which may not be picked up on by frontline agencies or other participants within the criminal justice system. Similarly, in **CM2**, we found a clear example of honour-based violence where despite the breakdown of the relationship the perpetrator continued to harass the victim eventually killing her when he found out that she was with another partner. In **CM14**, the victim had begun an affair with the cousin of the perpetrator, the perpetrator eventually found out, he assaulted her and threatened to shame her in the Muslim community. This threat prevented the victim from leaving the relationship in which she was trapped. The perpetrator eventually attacked her with the use of three knives inflicting 75 stab wounds on her body.

5.4.12 In **CM67**, the couple had an arranged marriage which was problematic in that there was said to be tensions between the perpetrator and victim's family from the beginning. Hostilities continued and issues

spread into the relationship. On 25 December, an argument broke out between them, and the perpetrator launched a frenzied attack on the victim striking her with a frying pan and then stabbing her 38 times with a large kitchen knife before strangling her.

5.4.13 In **CM74** the perpetrator deployed coercive control against the victim which tactics included controlling her use of the internet and the phone thereby preventing her from being able to communicate with her family in Yemen. The victim indicated that she wanted a divorce, but the perpetrator feared that if this happened, she would return to Yemen taking their children with her. He suffocated the victim and went on to drown her children.

5.4.14 Recognition of the way in which controlling and coercive behaviour works ought to lead to strategies for addressing domestic abuse. However, the fact that the bespoke nature of coercive control can provide the forensic tools with which to dismantle intersectional abuse will not be appreciated where there continues to be a lack of training:

> “The length of time and pattern of abuse. That is really not recognised. We do a lot of work in our sector- both frontline and policy perspective. We do a lot of work around how these forms of abuse interlock. But often what happens in the Criminal Justice System, they take one strand of that form of abuse. I think there needs to be recognition that often – for example for many black and minority women there will be aspects of coercive control but also lack of recognition of honour-based violence that is going on or lack of recognition about a history around forced marriage. What will happen sometimes is that there is a differentiation where one strand of that particular perpetration of the crime is fore fronted by whichever agency initiates the kind of support and that is really problematic.” **Focus group attendee**.

5.4.15 One consequential difficulty of the lack of understanding of coercive control (both in front line responders and from investigators) is the capacity it provides for abusers to distort the facts so that police have difficulty in

arresting the primary aggressor. Feminist scholars have pointed out their concerns in this regard.[128] This is particularly the case where front-line responders and lawyers focus on the immediate discrete incident at the expense of taking the time to understand patterns of control and coercion. When individual incidents are focused on, they are often open to the criticism that they do not, in themselves and /or in isolation, constitute conduct which is criminal.[129] Further, the work of Professor Marianne Hester has revealed

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128 Edwards (Susan) (2016) *Coercion and Compulsion-re-imagining crimes and defences*: Criminal Law Review (12) PP876-899.

129 "The failure of criminal justice agencies to respond appropriately to domestic abuse is a key factor in the significant under reporting of domestic abuse" see Women who kill which references CWJ launch super complaint. Centre for Women's Justice Super-Complaint Police failure to use protective measures in cases involving violence against women and girls. March (2019) available at: https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5c91f55c9b747a252efe260c/1553069406371/Super-complaint+report.FINAL.pdf

that the absence of a questioning of gender dynamics together with a focus on discrete incidents has meant that women are three times more likely than men to be arrested during police call outs to domestic incidents.[130]

5.4.16 This, coupled with the fact that it is widely understood that there is limited reporting of domestic abuse,[131] has an impact on the collection of data. The Home Office Homicide Index[132] for example, consists of information entered onto the Homicide Form at various stages through the progression of a case– whereas this includes an option to tick various suggested methods of killing, matters recorded in terms of domestic violence include a yes/no tick for whether the killing was linked to prior incidents of domestic "violence"[133] against the victim/suspect. This

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130 Hester, *Marianne Portrayal of Women as intimate partner domestic violence perpetrators* Violence Against Women 18(9) 1067-1082.

131 Op cit. n.127.

132 Has a template for the collection of data.

133 Violence" is the word used on the form.

is based on the subjective opinion of the Officer in the case, but may also be informed by previous crimes recorded. The officer's opinion will often just depend on the way the evidence was investigated, framed and the outcome of the trial against a background of a lack of training and knowledge. There is no reference to "coercive control" in the standard form provided for the collation of the information. Some aspects of what we refer to as the coercive control model are referred to in the reasons for the homicide i.e., end of the relationship, jealousy.

5.4.17 We do not know how often coercive control could be said to have occurred in our sample of cases in circumstances where we have had to rely solely on sentencing remarks to discern its presence or absence. A lack of proper statistical information in this regard compounds misunderstandings and assumptions.

5.4.18 We echo the opinion of Professor Monckton-Smith when we say that it is important to emphasise that, in our view, training is about

imparting sufficient knowledge and understanding of coercive control so as to be able to create a consistent forensic approach to domestic abuse by looking at a history and identifying a pattern and within that pattern, the existence of the relevant evidence. Training is not necessarily about developing empathy but should focus on the identification of the relevant evidential patterns.

> “…. coercive control isn't just psychological abuse, it has got a motivation. So you have to understand the motivation to control somebody, which as Evan Stark says, it's all about just trapping someone in a relationship so they don't have the ability to leave. And just understanding that very one small thing.”

> “…. police officers maybe come sit and listen to the stories of victims very, very powerful. Very good for empathy and all of that kind of thing. But does it give them the skills going forward? The actual skills to be able to identify coercive control. You know, recognise it when they see it. Get past

some of that confirmation bias." **Interview with criminologist.**

5.4.19 The situation in the criminal justice system contrasts with that in the family jurisdiction where there is now considerable emphasis on understanding coercive control. In the family courts, emphasis has been placed on identification of the patterns of coercive control. In *Re H-N and Others* (domestic abuse fact finding hearings)[134] the Court of Appeal held that the definition in Practice Direction 12J namely,

> "Coercive behaviour means an act or a pattern of acts of assault, threats, humiliation or other abuse that is used to harm punish or frighten the victim"
>
> "Controlling behaviour" means an act or pattern 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

[134] *Re H-N and Others (domestic abuse fact finding hearings) [2021] EWCA Civ 448*

> gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour”
>
> "is and remains fit for the purpose for which it was designed namely to provide the courts with a structure enabling the courts first to recognise all forms of domestic abuse and thereafter how to approach such allegations when made in private law proceedings” at [28].

At [29] the Court approved Hayden J’s judgment in *F v.M*[135] where he said;

> “[i]n the family court the expression [coercive and controlling behaviour] is given no legal definition, in my judgment it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however requires a recognition that coercion will usually involve a pattern of acts encompassing for example, assault, intimidation, humiliation and

135 *F v.M [2021] EWFC 4.*

> threats. ‘Controlling behaviour’ really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a ‘pattern’ or a ‘series of acts’ the impact of which must be assessed cumulatively and rarely in isolation”

5.4.20 Further, at [30], the Court in HN observed that Hayden J had also undertaken:

> “the valuable exercise of highlighting the Home Office statutory guidance produced pursuant to s.77 of the Serious Crime Act 2015 which identified the paradigm behaviours of controlling and coercive behaviour” which guidance was “relevant to the evaluation of evidence in the family court.”

We would only add that it is easy to see why controlling and coercive behaviour needs no definition or further exposition in the family court which is largely concerned with fact finding exercises. In the criminal jurisdiction however, practitioners need to be able not just to

understand the pattern of controlling and coercive behaviour but need to understand coercive control within the context of full and partial defences which have been developed independently of our understanding of coercive control and so the exercise is more complex. We touch on this in part 9 of this report.

5.4.21 **Recommendation 1: We recommend** that there should be a separate specific system for the collection of all relevant data in relation to all domestic homicides, which is maintained by the Home Office or the Ministry of Justice in conjunction with the Office of the Domestic Abuse Commissioner. See recommendations table in Part 10.

5.4.22 **Recommendation 2: We recommend** mandatory training for all lawyers and judges on understanding and applying the concept of coercive control. (See recommendation table in Part 10)

6. Wider Harms Which Characterise Domestic Murders

6.1 Summary

6.1.1 We have tried to identify the conduct overlying the culpability and the wider harms which sentences in domestic homicides ought to address having regard to the statutory purposes of sentencing namely, protection of the public, rehabilitation and the reduction of crime (in the form of domestic homicide).

6.2 End of the Relationship or Other Trigger

6.2.1 As stated at paragraph 5.2.8 above, the case sample showed that there did appear to be a link between resentment at the end of the relationship on the part of the male perpetrator and there being a history of coercive control. Indications of feelings of jealousy or of resentment at the end of the

relationship were apparent and they could be considered to be the catalyst for a killing in 45 cases (38%). In all but one case, the perpetrator was male.

6.2.2 We were particularly interested to see where common factors (such as the end of the relationship being a catalyst for the killing) converged with other factors which pertain to this type of killing. One of the most striking factors about many domestic murders is overkill. First, we examine the prevalence of overkill.

6.3 Overkill

6.3.1 One of the wider harms is caused by **'overkill'**[136] because it causes intense distress to the families of victims knowing not only that their loved one has been murdered but that such extensive and gratuitous

[136] As defined in section on terminology 1.3.12 namely, killing involving "the use of excessive, gratuitous violence beyond that necessary to cause the victim's death."

violence has been perpetrated against her.[137] It involves mutilation amounting to a violation of the female body and such murders of women resonate with wider misogynistic imagery in violent pornography. There is also something of an anomaly in the fact that concealment destruction or dismemberment of a body is a statutory aggravating factor under Schedule 21 paragraph 9(g) and that overkill (which is not officially recognised) may involve a similar violation of the body but is not even performed with the intention of hiding evidence.

6.3.2 It seemed to us that overkill is one of the things which is at the heart of the issue identified by those who are aggrieved by the disparity between the 15 and 25 year starting points in Schedule 21. It is anomalous that a single stab wound by someone who has taken a knife or other weapon to the scene should attract a higher starting point than someone who has stabbed his partner in her home

[137] More often than not, the victim is a woman see the figures at paragraphs 5.1.6-5.1.9.

where a weapon has been readily available and then gone on to '**overkill.'**[138]

6.3.3 Some of the attendees of our focus groups believed that 'overkill' in a murder was an expression of anger at the victim.

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[138] Julie Devey in "*The changes we can make."* The campaign film was directed by Levi James, a final-year student at the University of the West of England https://youtube/EhBEbMQbIG8 We acknowledge of course that in cases like CM14 (where the victim was unhappy in marriage and had begun an affair with the cousin of the perpetrator. The perpetrator's brother discovered and blackmailed the victim which caused her depression to worsen. When the perpetrator discovered, he began assaulting the victim, threatened to shame her in the community. This fear prevented the victim from leaving the relationship. On the day of the incident, the perpetrator assaulted and slashed the victim with kitchen knife. When the neighbours tried to intervene, he then dragged the victim back inside and attacked her further with three kitchen knives inflicting 75 stab wounds) the sentence was on a par with a sentence where the starting point is determined by paragraph 4 but as Treasury Counsel pointed out, there were very few cases where the aggravating features brought the sentence up to this level.

> "For me overkill speaks to motivation and I am thinking of motivation is not necessarily an instant spontaneous thing in this type of homicide. The motivation kind of comes from the history. I think that's why we need to understand the context of the relationship." **Focus Group attendee.**
>
> "I think it speaks to the amount of anger, resentment to people - it is a generalisation but quite often there is a huge amount of anger when men kill women. I think that the overkill speaks to that kind of anger" **Focus Group attendee.**

6.3.4 The further analysis of cases where there had been a clear indication of overkill[139] showed that in the sample of 120 cases (of which 99 involved male perpetrators and 21 involved female perpetrators) there were a total of 56 cases (47%) where overkill can be considered to have occurred. Male perpetrators accounted for all but one overkill cases. Of the 56 cases referred to above, 53 (95%) resulted

[139] See paragraphs 1.3.14 on terminology and 1.4.10 on methodology of this review.

in a murder conviction with the remaining 3 (5%) resulting in a manslaughter conviction. A weapon was used in 49 of the 56 cases (88%) cases where overkill was present.

6.3.5 In the 56 cases we identified as being overkill cases, overkill was referred to in sentencing remarks in the form of sustained attack/ prolonged mental/physical suffering and was mentioned as an aggravating factor in 40 cases (71%). There was also one case where it was instead reflected in the harm/culpability assessment. The nature of the killing did not always have significance attributed to it. This is perhaps indicative of the fact that the concept does not sit easily within the statutory aggravating factors in Schedule 21 as they specify prolonged mental and /or physical suffering when overkill by definition is the result of a continued attack after death occurs or after sufficient violence so as to cause death.

6.3.6 Further, women did not tend to kill by way of ‘overkill’. Rather, the majority of killings perpetrated by women involved a single and

fatal stab wound. For example, in 16 cases in the sample (13%) the killing was carried out by way of infliction of a single stab wound (which could indicate that the stabbing equated to a functional purpose in causing death) in 10 of these cases (63%) the perpetrator was female and in 6 (37%) the perpetrator was male.

6.3.7 Overkill featured in one case (**CF17)** of murder where a woman who had killed in a way that could be defined as ‘overkill’. In this case a review of the facts on the CCDCS suggested that the perpetrator had been the victim of coercive control by the deceased. The extent of it was not accepted by the sentencing judge. There were no cases in which a female perpetrator had been said to coercively control the victim of the murder. It was thought (by attendees of focus groups) that in circumstances where overkill is a feature of cases where women kill, then it is attributable to the need to ensure that the abuser/controller is dead:

> “I think with the overkill on behalf of women – there is actually evidence of the control because he is coming across as this omnipotent monster that needs overkill. It is a different kind of context for overkill for men when they overkill, that is kind of rage whereas when women are doing the overkill, it comes from a place of desperation at this all powerful [other].” **Focus Group attendee.**

This is further explained by Stark who describes the victim of coercive control’s survival strategy as being one which involves the idealisation of the abuser and the internalisation of his rules. This psychological construction then disintegrates with the killing:

> “By internalising the rules by “owning” them Laura found a way to master their unpredictability and the chronic anxiety they elicited. If the rules were hers and not merely Nick’s she could draw a certain satisfaction from meeting them even when he was violent, constructing an image of him within herself that was orderly,

> reasonable and approving and which could contain her mounting rage in the obsessive enactment of domesticity. The Nick within was protective, not merely delusional. It enabled Laura to hide her survival self in an internal image of her victimizer and so counter the emptiness that made her victim self so vulnerable to self-loathing. Laura's inner conversation with "Nicky" protected her against annihilation even as her behavioural conformity made her appear lost in the rules. When Nick was killed, the imago's function began to atrophy, the rage surfaced in a suicidal gesture."[140]

6.3.8 Most focus group attendees shared our views on the wrongs and harms of overkill although attendees at one group observed that they thought we should obtain psychiatric input on this issue. We are not averse to obtaining psychiatric input however, we have not had the resources to do so within the scope of this review. We are also mindful that much of our

[140] Stark (Evan) *Coercive Control How men entrap women in personal life.* Op cit. at p 336.

thinking is about steering the law away from psychiatric explanations for concepts which are better explained by a forensic approach to domestic abuse and/ or coercive control given the progress which has been made in this area. In this regard, see the discussion in the context of *R v. Dhaliwal* in part 1 of this report.

6.3.9 How overkill is defined in law is a matter for parliamentary counsel but there is some scope for incorporating the concept within the present paragraph 9(c) and (g) of Schedule 21.

6.3.10 If the occurrence of overkill is relevant to anger then it becomes important to explore the background leading up to the killing in any particular case. We were able to discern that it often co-occurred with jealousy and/or possessiveness.

6.4 Jealousy

6.4.1 In more than half (56%) of the overkill cases involving a male perpetrator, feelings of jealousy or resentment at the end of the relationship could be considered to be the

catalyst for the killing. Of all 99 cases which involved a male perpetrator, jealousy or resentment at the end of the relationship was apparent and a perceived diminution in control thought to be a catalyst in the killing in 44 (44%) cases. In **CM55** there is reference to morbid jealousy[141] in the judgment of his renewed application to appeal. This was not mentioned in sentencing remarks. We also noticed that, in one of murders committed by a woman against her male partner, the defence psychiatrist (who had assessed the defendant before trial) had made the point that the account of the behaviour of the deceased was consistent with someone who suffered from morbid jealousy and that there were other factors one would expect to find in a case of morbid jealousy such as the misuse of cannabis and cocaine. Morbid jealousy is not a psychiatric diagnosis but a psychiatric syndrome and is often linked to alcohol and substance abuse.[142] It affects far more men

[141] *R v. Mustafa [2019] EWCA Crim 1926, [21].*

[142] Morbid Jealousy in Alcoholism Midal (Albert), Mirza, (Sudeshni), Mirza (H), Babu (V.S) CUP 2nd Jan 2018.

than women and is thought to be a ‘red flag’ for homicide. Again, this emphasises our view that any psychiatric explanations for domestic killings should be seen in the context of any patterns of controlling behaviour which exist.

6.4.2 Of the 55 overkill cases involving a male perpetrator, 40% were cases in which it was noted that the perpetrator had previously controlled and coerced the victim **and** there were feelings of jealousy or resentment at the end of the relationship that could be considered the catalyst for the killing. Of the total 99 cases which involved a male perpetrator, almost 3 in 10 (29%) were found to be cases where the perpetrator had been coercive and controlling towards the victim and feelings of jealousy or resentment at the ending of the relationship were discernible. As stated at paragraph 5.3.10 above, there were no cases where a female perpetrator was said to have controlled the male victim.

6.5 Strangulation

6.5.1 We performed a further analysis on our sample of cases in relation to strangulation. Of the 120 cases in our sample, 35 cases (29%) involved strangulation in some form. In 32 of the 35 cases the method of killing included manual strangulation with the remaining three involving a ligature.[143] In 77 % of the cases, the perpetrator was convicted of murder. In the remaining 23%, they were convicted of manslaughter.

6.5.2 In 15 of the 35 cases which involved strangulation (43%), the sentence was held by the sentencing judge to have been aggravated due to the suffering inflicted by the nature of the attack. In the remaining 20 cases (57%) however there was no acknowledgement of the method of killing in aggravating factors.

[143] This was higher than the proportion of killings in the Homicide Index 2016-2020 where the proportion of those killings carried out by strangulation was 21%.

6.5.3 Significantly, of the 15 cases where the offence was said to be aggravated by the nature of the killing, in 11 cases (73%), the strangulation was accompanied by either an assault or an attack with the use of a weapon.

6.5.4 The average length of the minimum term in the 27 cases of murder which involved strangulation was 18 years and 7 months

6.5.5 The context of the use of strangulation in the sample is illustrative. For example, in 13 of the 35 cases (37%) where strangulation had been used, coercive control had been deployed by the perpetrator during or after the relationship.

6.5.6 Equally, in 12 of the 35 (34%) cases involving strangulation, the jealousy of the perpetrator or the fact of the relationship being at an end could be construed as the catalyst for the killing.

6.5.7 The victim had been a previous victim of domestic abuse by the perpetrator in 16[144] of the 35 cases (46%).

6.5.8 Significantly, in 8 of the 35 strangulation cases, the perpetrator was noted to have had a history of perpetrating non-fatal strangulation.

6.6 Strangulation as a Gendered Form of Killing

6.6.1 A breakdown in terms of gender showed that strangulation (in which the cause of death is asphyxiation) is a gendered form of killing. By way of example, in 34 of the 35 (97 %) cases, the perpetrator was male. In the one case where the perpetrator was female, the victim was also female. Of the 34 strangulation cases which had a male perpetrator, 27 resulted in a murder conviction. The remaining 7 cases resulted in a manslaughter conviction of which 3 were by way of

[144] In one case, it was unclear on the information to which we had access and so that case has not been included in the computation.

diminished responsibility and 4 were by way of unlawful act manslaughter. The sole case where the female perpetrator deployed strangulation as the method of killing resulted in a manslaughter conviction by way of diminished responsibility.

6.6.2 Of the 34 strangulation cases with a male perpetrator, 16 cases were cases where manual strangulation was the sole method of killing (47%). In the remaining 18 cases, strangulation was carried out with a ligature or was accompanied by an assault or an attack with a weapon. The sole case of strangulation with a female perpetrator was committed by manual strangulation.

6.6.3 In 14 of the 34 strangulation cases with a male perpetrator (41%), the sentencer considered the offence was aggravated due to the suffering inflicted by the attack but in the remaining 20 cases (59%) there was no recognition of the method of the killing in those factors which were said to aggravate the offence. However, the sole case where there was a female perpetrator was said to

have been aggravated by the nature of the killing.

6.6.4 Of those 14 cases where the offence was said to have been aggravated by the method of the killing, it is perhaps telling that in 11 cases, the strangulation was accompanied by either an assault or an attack with a weapon. In only 3 cases where manual strangulation was the sole method of the killing was the method of the killing, namely, strangulation, considered to be an aggravating factor.

6.6.5 The perpetrator was male in all 13 cases of strangulation (37%) which followed a period of coercive and controlling behaviour. This was similarly the case in the 12 cases where the killing occurred as a result of jealousy or was prompted by a response to the ending of the relationship between the perpetrator and the victim.

6.6.6 In 15 of the 34 cases involving a male perpetrator (44%), the victim was noted to have previously been a victim of domestic abuse. This was also the case for the victim in

the sole case of strangulation involving a female perpetrator.

6.6.7 Of the 13 murder cases committed solely by way of manual strangulation, the average minimum term was 18.1 years. However, there was one case which fell into the 30 year starting point[145] because it was done for gain and when this case was removed from the computation, the average minimum term was 17.1 years.

6.6.8 The remaining 14 strangulation cases resulting in a murder conviction involved an additional assault with or without a weapon or the use of a ligature. The average sentence length was 18.6 years.

6.6.9 Our findings on strangulation are consistent with the findings in other research. In the 10 years covered by the research carried out by the Centre for Women's Justice and Justice for Women, in 71% of the cases (n=65), women who had killed their abusive partners had stabbed the deceased, in 9% of cases

[145] See paragraph 2.2 of this report.

(n=8) women attacked the deceased with another type of weapon, in 5% (n=5) women had physically attacked their partner with the assistance of another person and in 7% (n=6) of cases, women had set fire to their partner or committed arson that had resulted in his death. The research found just one case of strangulation by a woman.[146]

6.6.10 Further, Professor Susan Edwards points out that in figures collated for cases since 1986,[147] choking, strangling and asphyxiating a female partner (either manually or through the use of a ligature) has been a primary method of killing. Below, we explain our concern that strangulation of women by men has become normalised.

[146] Howes (Sophie) *Women who kill; How the state criminalises women we might otherwise be burying* February (2021) p 23.

[147] Edwards (Susan), *The strangulation of female partners* Crim LR 2015 12 949-966.

6.7 Discussion of Strangulation in Focus Groups

6.7.1 Participants mostly[148] felt that strangulation should be an aggravating factor in murder and indeed, manslaughter. This is partly because of the nature of it. It takes time to strangle a victim causing death by asphyxiation.

> "I have read about 900 domestic homicide reviews now, quality assured them. There is something about strangulation I perceived that has this unique horror to it. Using the hands but the eyes to eyes- it's intimate and it's very hard to describe- the horror is truly unique" **Focus Group attendee**.

> "We know often that non- fatal strangulation is used specifically as a warning and a threat for - if you if you step

[148] One person dissented because they were of the view that guidelines generally are unhelpful and the subject of making strangulation an aggravating feature was not discussed in one focus group meeting because the idea was generated in a subsequent focus group discussion.

out of line will go like this further. Obviously often this is not captured or recorded. It is only when you ask a woman who is a victim, and you ask them questions that they may identify that, and they sort of brush it off. Where you have a history which is recorded on a DASH or whatever – then the method of killing at the end should be clearly an aggravating factor". **Focus Group attendee.**

"It is almost always about the perpetrators wanting the last word but if you work with the perpetrators, you hear this over and over again - like I wanted her to shut up I wanted her to be quiet but I wanted to win you have to have the last word. That is what the whole kind of attacking the throat and putting the hands over the mouth – it is all about silencing." **Focus Group attendee**.

6.7.2 At paragraph 7.19 below we make recommendations concerning strangulation in the context of murder and at paragraphs 8.1.23-8.1.24 we make corresponding

recommendations in the context of manslaughter. In our view, strangulation should amount to a statutory aggravating factor in murder.

6.7.3 This is for the reason that manual strangulation as a method of committing murder has particular significance within the matters under consideration in the review. First, the above suggests that it is a gendered form of killing. Second, incidents of non-fatal strangulation are generally thought to be an accurate predictor of fatal violence.[149] This is most clearly evidenced by the fact that the occurrence of non-fatal strangulation forms a

[149] See *Domestic Homicides and Suspected Victim Suicides during the Covid 19 Pandemic* at 4.4, page 58 which notes that a review of the literature makes it clear that where the risk factors co-occur, risk of homicide may be further elevated. Further, there is a notable correlation between the three factors of separation, nonfatal strangulation and homicide in that separation may represent a loss of control, non-fatal strangulation is a means of exercising control.

specific question in the DASH.[150] Third, non-fatal strangulation has been the subject of legislation in the 2021 Act.[151] Fourth, non-fatal strangulation is prevalent in relationships which are governed by coercive control.

6.7.4 Fifth, we want to achieve consistency throughout the way in which the law addresses the wrong of femicide. Whereas we have been concerned with the specifics of domestic homicide, there is always the question of how such killings sit with killings (whether by way of murder or manslaughter) of women who are not, and never have been in an intimate relationship with the offender. The prevalence of strangulation in these crimes is notable. Part of the rationale of making strangulation a statutory aggravating factor is to achieve consistency in the way in which the law treats gendered killing.

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150 Domestic Abuse Stalking and Honour Based Violence risk identification assessment.

151 See s 70 which inserts s75 A, 75B into the Serious Crime Act 2015.

6.7.5 Concerning wider harm, feminist scholars- have advocated reform of the law on the question of how we view strangulation.[152] Professor Susan Edwards, writing in 2015, referred to the prevalence of strangulation in the killing of female partners and also referred to the absence of strangulation in non-domestic cases. Further, that previous law reform initiatives[153] had stopped at considering the implications of strangulation and were limited to other high-risk behaviour such as possession of pornography depicting rape.

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[152] *Edwards (Susan), The strangulation of female partners Crim LR 2015 12 949-966*

[153] *Ibid. R v. Coutts [2007] 1 Cr. App. R 6* a conviction of murder in circumstances where the appellant had claimed consent to strangulation and it was held that the trial judge should have left an alternative count of manslaughter to the jury initiated policy on the criminalisation of possession of pornographic images of rape and assault.in the Criminal Justice and Immigration Act 2008 s.63 as amended by Criminal Justice and Courts Act 2015 s.37.

6.7.6 It is only recently that policy and law have come to accept the role of strangulation in domestic abuse.[154] Recent research on non-fatal strangulation highlights the comprehensive harms involved.[155] The introduction by Parliament of a stand-alone offence of non-fatal strangulation under provision of s.70 of the 2021 Act represents a considerable advance in the way the law views strangulation in the context of domestic abuse. This now contrasts with the way in which it is considered within the context of sentencing when death has occurred.

6.7.7 Professor Edwards observed (as long ago as 2015) that strangulation was not identified anywhere in Schedule 21 Criminal Justice Act 2003 but that of course, a sentencing judge could consider, what was then, paragraph 5(1) (a) (seriousness) 5(2) (e) (sadistic

154 The Domestic Abuse Act 2021 s.70.

155 *"The Neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence. A systematic review"* Bichard (Helen), Byrne (Christopher), Saville (Christopher WN) and Coetzer (Rudi) PsyArXiv 15th May 2020.

conduct) and the aggravating factors under what was paragraph 10 the content of which (as we have already noted,[156] were in virtue of the word “include”)[157] not intended to be exhaustive. In other words, there was the opportunity for sentencing judges to take into account the seriousness of strangulation.

6.7.8 Importantly, Professor Edwards also pointed out that the Sentencing Guidelines Council’s Overarching Principles Domestic Violence Definitive on domestic abuse,[158] “reversed the previous situation where the domestic context was regarded as a mitigating factor allowing courts to excuse men as “not normally violent” “no danger to the public”[159] or else describe their conduct as “out of character”[160] but

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156 Edwards (Susan), *The strangulation of female partners* Crim LR 2015 12 949-966

157 See paragraph 3.1.9 of this report and reference to *R v. Sullivan (supra).*

158 Overarching Principles: Domestic Violence Definitive Guideline which applied to sentences imposed on or after December 18th 2006.

159 *Op. cit. R v. Reilly 1982 4 Cr App R S 288.*

160 *Op. cit. R v. Beaumont 1992 13 Cr App R S 270.*

nevertheless made the point that strangulation was not mentioned in the guideline. The author noted the Court of Appeal's willingness to ascribe a proper level of culpability where strangulation was concerned saying that by 2013 there was a growing judicial awareness of the danger and seriousness of strangulation."[161]

6.7.9 We have considered whether, rather than recommending that strangulation should be a statutory aggravating factor per se we should just say that it should be noted that the presence of strangulation should go to increase a minimum term imposed because making it a specific statutory aggravating

[161] At p963 citing *R v. Jones [2013] All ER D 181* where the Court of Appeal upheld a sentence of 15 years imprisonment in circumstances where the appellant had strangled his female partner. The writer refers to the court as stating "(i) the fact that the act of violence was one of extreme dangerousness and that…it had been an intentional assault intended to frighten and demonstrate control over the deceased (ii) that it was not an isolated act of violence and (iii) the defendant's behaviour after having killed the deceased."

factor may have the effect of placing too much emphasis on the mode of killing. Further, it may be possible to incorporate the proposition that an offender's culpability is increased because of strangulation by modifying paragraph 9(c)[162] of Schedule 21. While we recognise that there is a valid argument that there could be a danger with placing too much emphasis on the method of killing, our preferred route would be to make strangulation an aggravating factor. This is because it is both gendered and it is conduct which encapsulates the vulnerability of the victim.

6.7.10 We note that there is still no specific reference to strangulation in the definitive guidelines on Domestic Abuse[163] and in the definitive guidelines on manslaughter.[164]

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[162] Paragraph 9(c) "mental or physical suffering inflicted on the victim before death."

[163] Sentencing Council Overarching Principles Domestic Abuse.

[164] See part 8 of this report.

6.7.11 We also go on to make parallel recommendations on manslaughter in that we suggest consideration of whether there should be a reference to strangulation in sentencing guidelines on domestic abuse and the Definitive Guideline on manslaughter. We consider that strangulation should be considered to be an aggravating factor in murder and one which increases culpability or at least, aggravates, manslaughter. We address this further in our section on manslaughter at paragraphs 8.1-8.3.

6.7.12 At this point, we also note that judges who are sentencing in cases of murder are obliged to take account of the Domestic Abuse Guideline (where the guideline does not conflict with other relevant guidelines) and so any amendment to the guideline may well have an impact on sentencing in murder. However, as we have observed at paragraphs 1.1.8 above, there will always be killings which are motivated by misogyny but where the victim and the offender are not and never have been in an intimate relationship and where

accordingly, the Domestic Abuse Guideline does not apply.[165]

[165] In cases of manslaughter, even where the offender and the deceased are in an intimate relationship, it has been held that the Overarching Principles Domestic Abuse Guideline does not apply to every case in the home see *R v Pybus* at paragraph 8.3.21 pf this review. This exemplifies our point in relation to the absence of a forensic understanding of domestic abuse in the criminal justice system- see part 5 above.

7. New Category in Schedule 21

7.1.1 Whereas we think that there should be an increased focus on the extent of culpability by way of coercive control in domestic murders (whether the offender has been convicted of murder either because they are a perpetrator of coercive control or because they are a victim of it) we have concerns about how this is to be achieved.

7.1.2 We say at the outset that an additional paragraph in Schedule 21 which is intended to provide a new (higher) starting point in domestic murders is not something we recommend. First, we do not need a higher starting point. Notwithstanding what was said by the Court of Appeal in *Sullivan*[166] (supra) sentences have already generally become longer than they were before the statutory framework in Schedule 21 was introduced.

[166] *R. v Sullivan [2004] EWCA Crim 1762* See paragraph 3.1.8 of this report

Some of our stake holders were clear that they could not support any such proposals for the introduction of a new starting point.[167] We agree with the Prison Reform Trust and other stakeholders that any such change would need to be the subject of extensive public consultation. The limitations of this Review mean that such a proposal is not consistent with its scope. We think that the addition of paragraph 5A in 2010 (which, as already stated, was done without the sort of

[167] The Prison Reform Trust stated that "like many commentators over many years, we regret the piecemeal approach that successive governments have taken to change in both the substantive law on homicide and that in sentencing for that and other serious matters it leads to unintended and normally unwelcome consequences". They are concerned that the UK has now the highest number of life sentenced prisoners than any other country in Europe. Further, there is little if any evidence that longer sentences have any impact on increased deterrence, long sentences have an impact on protective factors which ultimately serve to prevent offending on release. See generally, Prison Reform Trust: Long-term prisoners: the facts, England and Wales, October 2021.

consultation or debate to which we refer) exemplifies the proposition that ‘hard cases make bad law’ and that legislators should be circumspect about introducing new paragraphs based on particular cases.

7.1.3 A further problem with a new paragraph (which would provide a higher starting point in the case of domestic murders) is that it would run the risk of creating inconsistency with the present sentencing framework. For example, a case which ought to fall within Schedule 21 paragraph 3 because it is a murder committed in the course of a rape might have a lower starting point in a new coercive control defined paragraph and yet coercive control is an abuse in which ‘rape as routine’ can feature. This would be anomalous. Schedule

21 is already riddled with anomalies which need to be addressed in law and policy.[168]

7.1.4 Although coercive control is at the centre of our thinking, and it is clearly a feature in domestic homicides where the perpetrator and the victim are in a relationship there will be cases of femicide where there is no evidence of coercive control. The benefit of the coercive control model is that it is based on structural inequalities between men and women. Accordingly, in killings of women

[168] See Roberts (JV) and Saunders (J) "*Sentencing for murder: the Adverse and Unintended Consequences of Schedule 21 of the Criminal Justice Act 2003*" Crim. L. R (2020) 10 895-906 where the authors argue that the starting points in schedule 21 offend against the concept of ordinal proportionality. They take the example of the disparity in starting points between a defendant who kills after planning but does not trigger the circumstances of a 30 year or 25 year starting point and a defendant who kills a security guard in the course of a commercial burglary having picked up a weapon in a warehouse and intending to cause really serious harm who would have a starting point of 30 years. The authors argue for the introduction of a definitive Sentencing Council style Guideline in cases of murder.

where the evidence of coercive control is lacking there will usually be evidence of some of the features which are significant in coercive control cases whether that be strangulation or something else such as jealousy. In some cases, there may well be a history of coercive control by the offender in his relationships, the killing may signify an escalation of prior domestic abuse in the perpetrators previous relationships. Accordingly, there is likely to be broad consistency between domestic homicides and those which cannot be classed as such but where the latter bear some of the factors or hallmarks with which we have been concerned in this review.

7.1.5 We think that statutory aggravating and mitigating factors in paragraphs 9 and 10 respectively should be updated in order to reflect the specific and wider harms that have been identified in domestic murders. This would be consistent with our enhanced (and developing) understanding of domestic abuse.

7.1.6 If coercive control is used to define the gravity of domestic murders in more forensic terms, then it would follow, that these murders would be aggravated and mitigated in terms of the type of harms which obtain.

7.1.7 If this were to be the case, we think that provision should be made to disapply paragraph 4 in the context of domestic murders as we have defined them. If a knife or other weapon is taken to the scene, then that may be indicative of a level of some sort of planning and premeditation which can be reflected in aggravating factors.[169] However, the culpability and extended harm is best reflected in matters which are specific features of domestic murders as opposed to being reflected in a starting point determined by paragraph 4.

[169] Paragraph 9(a) “a significant degree of planning or premeditation.” We also recognise that a starting point of 25 years can be determined in circumstances where a sentencer can find that a particular murder was not planned.

7.1.8 Moreover, there is a strong argument that most domestic murders are planned to some, or even a great, extent. The evidence for this is in the Intimate Partner Femicide Timeline which has been devised by Professor Monckton-Smith and to which we referred at paragraph 5.1.4 above. An application of the coercive control behaviour framework to the facts in many cases of domestic homicide will be likely to reveal a degree of planning. If this is done at the investigation and evidential stages, as we envisage that it should be, then the fact can be represented in the present statutory aggravating factor. A strict application of Paragraph 4 of Schedule 21 is otiose in such circumstances.

7.1.9 In the context of defences, there is precedent for a provision to disregard certain factual scenarios if those scenarios run contrary the policy behind the legislation. See for example s.55(6)(c) Coroners and Justice Act 2009, which provides sexual infidelity is to be disregarded when considering the trigger to a loss of control. This is because jealousy

caused by infidelity should not be a justification for killing.

7.1.10 Such a disapplication as proposed at paragraphs 7.1.7-7.1.8 is justifiable on the basis that the vulnerability of the victim is not a prerequisite for the paragraph 4 starting point and that the harms (which the amendment leading to what is now paragraph 4 were intended to address in 2010) are quite different to those factors which are specific to domestic murders. If the specific harms are seen as aggravating or mitigating the murder, then there is likely to be sufficient flexibility within paragraphs 9 and 10 of Schedule 21.

7.1.11 If there is to be a disapplication of paragraph 4 in the context of domestic murders for the reasons which we have set out, the question arises as to why, logically, there should not be a disapplication of paragraph 3 if a firearm is used and the murder is a domestic murder. We are not recommending the general disapplication of paragraph 3. We found two cases where a firearm had been used by a man to kill his intimate partner (**CM76** and

CM85). We think that the answer to this question lies in the fact that there are strong policy reasons for the prohibition of possession of firearms and that the rationale underlying the policy is to prevent the harm which follows from their illegal possession and use.[170] This policy is the rationale for strict liability offences in relation to the possession of firearms. Unlike knives or other sharp instruments, firearms are not within every-day or easy reach in the home. The use of firearms in a domestic context was considered in *R v Tucker*[171] where the court considered the policy of public safety as described in *Jones*[172] but in Tucker there was little acknowledgement of the themes which we have identified as being of concern in this review. The Court specifically held that the case did not include a breach of trust. We consider a breach of trust to be an integral aspect of domestic abuse. In Tucker, a minimum, term of 26 years was reduced to 22

[170] *R v. Braddish (1990) 90 Cr. App. R. 271.*

[171] *R v. Tucker [2011] EWCA Crim 3046.*

[172] *R v. Jones [2006] 2 Cr. App. R.*

years in respect of an appellant who has been convicted of murder after a trial where he had unsuccessfully relied on the partial defence of provocation having shot his partner in the back of the head while she was in the bath and after she had taunted him about her infidelity.

7.1.12 There may be hard cases as a result of the application of paragraph 3 (in so far as firearms are concerned) in all domestic murders. To take a hypothetical example, a woman who lives on a farm uses a gun which has been left out of the gun cupboard to kill her abusive husband. Given the policy with which this review is concerned, it would be wrong for her to be subjected to a starting point of 30 years. However, all starting points set out in schedule 21 are prefaced by the word “normally” implying that there is scope for a departure from a starting point. If there is a coherent policy pertaining to domestic murders which takes into account structural inequality but is nevertheless gender neutral, we see no reason for a mechanistic application of the schedule in such cases.

7.1.13 Accordingly: **Recommendation 3 we recommend** that the starting point of 25 years which applies in circumstances where a knife or other weapon is taken to the scene should be disapplied in cases of domestic murder because the 25 year starting point is one in which the vulnerability of the victim is not given any consideration. The harms that the previous paragraph 5A was introduced to prevent are very different from the sort of harms which occur in domestic murders. See recommendations table in Part 10.

7.1.14 **Recommendation 4: We recommend** that domestic murders should be given specialist consideration within the present sentencing framework under Schedule 21. A level of seriousness should be determined by application of the coercive control model within the 15 year starting point. This is intended to ensure that gendered circumstances (such as killing at the end of a relationship and, jealousy) are used to ascribe seriousness to the murder and that wider legal harms are identified and reflected in the sentence. See recommendations table in Part 10.

7.1.15 **Recommendation 5: We recommend** that where there is a history of coercive control that this should be an aggravating or a mitigating factor and that paragraphs 9 and 10 of Schedule 21 should be amended accordingly. See recommendations table in Part 10.

7.1.16 **Recommendation 6: We recommend** that if a murder takes place at the end of a relationship or when the victim has expressed the desire to leave then this should be regarded as an aggravating factor and that paragraph 9 of Schedule 21 should be amended accordingly. See recommendations table in Part 10.

7.1.17 **Recommendation 7: We recommend** that present mitigating factors in paragraph 10(d) be amended so as to be consistent with the policy underlying s.55(5)(c) Coroners and Justice Act 2009. Specifically, that sexual infidelity on the part of the deceased cannot mitigate the murder. See recommendations table in Part 10.

7.1.18 **Recommendation 8: We recommend** that overkill should be defined in law as a specific legal harm and that it should be an aggravating factor in murder. Paragraph 9 of schedule 21 should be amended accordingly. See recommendations table in Part 10.

7.1.19 **Recommendation 9: We recommend** that in the event of murder by strangulation or in a murder where strangulation has occurred then this method of killing should be an aggravating factor and that paragraph 9 of schedule 21 should be amended accordingly. See recommendations table in Part 10.

7.1.20 **Recommendation 10: We recommend** the use of a weapon in domestic murders should not necessarily be seen as an aggravating factor.

8. Sentencing in Manslaughter – Sentencing Council Guidelines 2018

8.1 Voluntary Manslaughter

8.1.1 Voluntary manslaughter comprises the partial defences to murder namely, Diminished Responsibility which is provided for by s.2 of the Homicide Act 1957 (as amended) and Loss of Control which is provided for by s.54-55 Coroners and Justice Act 2009. As already stated at paragraph 5.1.15 above, the partial defences were reformed by the Coroners and Justice Act 2009.

8.1.2 In 2018, the Sentencing Council published a definitive guideline in relation to manslaughter[173] which was effective from 1st November of that year. For ease of reference,

[173] The Sentencing Council: Manslaughter Definitive Guideline Published in July 2018 and in effect from November 2018.

the Definitive Guideline is reproduced in **Appendix F**. We noted where cases within our sample, fell either side of the implementation of the definitive guideline and we refer to this factor where it is relevant. Under the guidelines for diminished responsibility (which deal with custodial sentences) harm is obviously of the utmost seriousness involving as it does, death, but culpability ranges from low to high and there is considerable disparity between the low culpability category and the higher culpability category.

8.1.3 Statutory aggravating factors under the guideline include “[o]ffence motivated by or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity” they do not include misogyny, coercive control, and strangulation. “Other aggravating factors” include a “history of violence or abuse towards the victim by the offender”. Further, it is an aggravating factor

that “the offence involved the use of a weapon.”

8.1.4 Clearly, it is understood that the Domestic Abuse Guideline[174] should be considered where it is applicable.

8.1.5 In our case sample, there were 11 cases where diminished responsibility was run as a defence but the defendant was nevertheless convicted of murder. There were a total of 8 cases of finding or acceptance of diminished responsibility where a man had killed his intimate partner. Of these cases, 5 were cases (**CM22, CM26, CM27, CM40**, and **CM48**) which involved the perpetrator suffering from a serious mental illness involving schizophrenia, psychosis and/or delusions. These perpetrators were sentenced to hospital orders with restrictions under s.37, s.41 of the Mental Health Act 1983 (as amended) or orders under s.45A Mental Health Act 1983 namely, hospital order

[174] Overarching principles: Domestic Abuse Sentencing Council.

and limitation directions[175] and it is accepted that the matters with which this review is concerned cannot impinge on the decisions of sentencing judges informed by medical evidence consistent with the requirements of the Mental Health Act 1983 (as amended).

8.1.6 Two cases; **CM26** (pre guidelines) and **CM57** (post 2018 guidelines) involved older offenders who had pleaded guilty to killing their wives both of whom suffered from dementia with the perpetrators said to be feeling guilty about putting the victim in a care home. They were sentenced to 2 years custody and 2 years custody suspended respectively. The former offender had struck his wife several times with a pole and then smothered her. The latter had stabbed himself and left a suicide note he was treated for superficial wounds. Both offenders were

[175] An order by a judge, which mandates transfer to hospital for treatment with a limitation direction. The limitation direction has the same effect as the s.41 restriction order but ceases to have effect on the expiry of the determinate term. However, the offender continues to be subject to the hospital regime.

judged to have had lower culpability. Without knowing more about the facts of the cases, it is difficult to comment further. However, it is noteworthy that in each case, asphyxiation (the consequence of strangulation) was the course of death.

8.1.7 It is important to give consideration to issues of 'caregiver stress' which carries weight in the public consciousness[176] but simultaneously, to ensure that each of these types of cases are not, in reality, cases where there has been domestic abuse which has continued into old age. In this regard, see Jonathan Herring;

> "A middle path is appropriate. There is much elder abuse which can be usefully examined as part of intimate relationship

[176] Herring (Jonathan) Domestic Abuse and Human Rights *Op. cit. at 225.*

abuse which is simply the continuation of a violent relationship into old age."[177]

8.1.8 More widely, Jane Monckton-Smith has drawn attention to societal willingness to accept violence where it is masked by a discourse of romantic love because this is somehow palatable. In an analysis of cases she found a correlation between the absence of declarations of love by men and their murder convictions. She also found that in "those cases where men were represented as loving

[177] *Ibid* at p227 citing C. Walsh, J. Ploeg. L. Lohfeld et al., Violence across the Lifespan: Interconnections among Forms of abuse as described by Marginalized Canadian Elders and Their Caregivers (1999) 19 *Journal of Interpersonal Violence* 282; B Penhale , 'Bruises on the soul: Older women, Domestic Violence and Elder Abuse (1999) 11 Journal of Elder abuse and Neglect 1; C. Cooney and A Mortimer, 'Elder Abuse and Dementia: A Pilot Study (1995) 41 *International Journal of Psychiatry* 276;S Harris, For better or for Worse Spouse Abuse Grown Old (1996) 8 *Journal of Elder Abuse and neglect* 1; M Lundy and S Grossman 'Elder Abuse: Spouse/Intimate Partner Abuse and Family Violence Among Elders' (2004) 16 *Journal of Elder Abuse and Neglect* 85 .

the tariff for a manslaughter for example where love was in evidence, was approximately five years."[178]

8.1.9 We would hope that as understanding of coercive control and the signs indicating its presence become more widespread, that all cases which have resulted in homicide where the requisite intention for murder is present will be carefully scrutinised.

8.1.10 One case, **CM69**, which resulted in a life with a 10 year minimum term sentence together with a s.45A order, involved strangulation preceded by a long history of coercive control including 3 prior incidents of serious violence and asphyxiation. The case bore the hallmarks of risk as identified in Jane Monkton- Smith's timeline in that the perpetrator and the victim had divorced and they had then resumed their relationship before the killing.

[178] Monckton-Smith (Jane) "Murder gender and the media narratives of dangerous love" Palgrave Macmillan (2012) p84.

8.1.11 Strangulation played a significant role within the context of manslaughter. Of all 7 strangulation cases which resulted in manslaughter convictions for men, 3 cases were by way of diminished responsibility.[179] It is difficult to conceive of it playing a significant role in loss of control cases given the time it can take to strangle a victim. However, in order to maintain consistency, we have included loss of control cases in our recommendation on strangulation set out below.

8.1.12 Finally, in one case, **CM58** (pre the Sentencing Council guideline being implemented in 2018) the perpetrator received a sentence of 5 years in circumstances where he had pleaded guilty to killing his wife during the course of what was said to be a frenzied and sustained attack with a knife, by beating and strangulation. This was after a 25 year relationship and in circumstances where the offender who had been diagnosed with prostate cancer, was said to be suffering from

[179] The other 4 were by way of unlawful act manslaughter.

a moderate depression and concerned that his wife was going to leave him. The killing therefore had a number of the indicia about which we have expressed concern within the context of our discussion on murder cases and begs the question of whether the factors, which we consider, aggravate murders, should also be said to aggravate manslaughter by way of diminished responsibility when there is no question of a Mental Health Act disposal. We think that there should be a particularly careful scrutiny of these cases in order to ensure that they do not contain the hallmarks of coercive control.

8.1.13 One particular matter relating to a case outside our sample of 120 cases was brought to our attention through victims who had approached the Domestic Abuse Commissioner and had worked with Refuge. The mother and daughter of Joanna Simpson who was the primary victim of Robert Brown[180] were concerned about the length of determinate sentences for manslaughter.

[180] *R v Brown [2011] EWCA Crim 2796*

Although this particular case was not within our sample of 120 cases, it is said that it is the paradigm example of a case of domestic homicide where the context and background was not fully explored at trial. The facts were Joanna Brown (nee Simpson) was killed by her estranged husband, Robert Brown, on Halloween 2010. She was killed in her own home and her children were witnesses to the fact of the attack and to the offender driving their mother's body away from the scene after she had been violently killed by being hit on the head fourteen times with a hammer which the offender had brought to the scene in his daughter's school bag. Despite considerable evidence of pre-planning,[181] he was convicted of manslaughter by way of diminished responsibility (with the recognised medical condition being an adjustment disorder) in May 2011. Robert Brown was sentenced to a total of 26 years imprisonment (consisting of 24 years for manslaughter and 2 years for obstructing a coroner, to be served

[181] Which took the form of the perpetrator digging a grave prior to the killing.

consecutively) of which he must serve half in custody.[182] The Court of Appeal upheld the sentence on appeal. The family of the victim have expressed concern, not only that the background of domestic abuse had not been explored at trial, but that they do not feel protected by a law which enables release at the halfway point of the sentence. This is in circumstances where the appellant had been found to be suffering from what is usually a mild and short lived recognised medical condition of an adjustment disorder. In April 2020, *the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 SI 2020 No.158* was enacted and has meant that in a relevant violent or sexual offence where an offender is sentenced to 7 years, then he or she is only eligible for release when he or she has served two thirds of his or

[182] This would not be the case today. The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 which came into force on 1 April 2020 now provides that a violent offence for which a sentence of at least 7 years is imposed, then the offender must serve two thirds.

her sentence. In addition, s.130 of the Police Crime Sentencing and Courts Act 2022 reduces the period of 7 years to one of 4 in relation to certain offences of which manslaughter is one.

8.1.14 Refuge made the point that where perpetrators of domestic abuse and manslaughter are able to rely on conditions which do not require treatment in a secure hospital such as depression or in the case of Robert Brown, an Adjustment Disorder, for the purpose of diminished responsibility then there will be no medical checks as to whether they are still suffering from the condition at the release point in the event that they are given a determinate sentence (as many will be).[183] This is worrying given that the conviction of manslaughter means that at the very least it was a "significant contributory factor"[184] in causing them to kill. The safety of the public

[183] The starting point under the present Definitive Guideline is 24 years where an offender retains a high degree of culpability.

[184] S.2(1)(b)(1B) Homicide Act 1957 (as amended).

and secondary victims ought to be of paramount importance.

8.1.15 This is a valid point which was raised in one of our focus groups independently of the case of Robert Brown. It was felt that any question about the length of sentences could not really be addressed in the absence of knowing the full extent of the risks of further killings.

8.1.16 We are not making any recommendations in line with the above for the following reasons. First, the case of Robert Brown was decided before the Manslaughter Definitive Guideline was published and brought into force. The case in question would be one of high responsibility under the sentencing structure in the guidelines where the starting point would be 24 years with a range of 15-40 years. The facts of this particular killing suggest that any sentence would now be at the higher end of the range. Second, the alteration to the automatic release provisions referred to in paragraph 8.1.13 above now means that an offender such as Robert Brown will serve two thirds of the custodial term.

Third, there are now particular provisions which can be applied in the sentencing of dangerous offenders.[185] However, were there to be any such recommendation, we believe that any future proposal should be the subject of further research and detailed consultation with psychiatrists and the parole board as these professionals would be instrumental in making such assessments. Psychiatric consultation has been beyond the scope of this review.

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[185] There is provision for courts to impose extended sentences comprised of a custodial term and an extended licence period in cases of offenders who are considered dangerous under Part 10 Sentencing Act 2020. An Offender is dangerous if it is considered that he poses a significant risk that he will commit further specified offences and cause serious physical or psychological harm to one or more people. The offence must be one listed in Schedule 18 Sentencing act 2020. Manslaughter is a listed offence. We recognise however, that many domestic abusers are able to slip under the radar of dangerousness for the reasons referred to by Professor Edwards. In this regard, see paragraph 6.7.8 above.

8.1.17 We hope that our recommendation (if adopted) that detailed statistics in relation to domestic homicides should now be maintained by Government, will mean that in the future we are better informed in relation to such proposals. |It may well be that the maintenance of such records will reveal that there is a need to further consider the licence provisions of offenders who have been convicted of manslaughter by way of diminished responsibility in virtue of recognised medical conditions for which they are not (and never would be) detainable under the Mental Health act 1983.

8.1.18 In our sample of 120 cases, 4 out of the 13 women sentenced for manslaughter were guilty of the offence by way of diminished responsibility. In **CF9**, the offender was sentenced by way of a hospital order. She had been happily married to the victim for 60 years and had been suffering from dementia.

8.1.19 In **CF6**, the offender accepted a plea to manslaughter by way of diminished responsibility which was offered on the day of

trial. She was suffering from PTSD and said to be suffering from “battered wife syndrome,” she had lost care of her child partly because of concerns about domestic abuse. However, this plea was not offered by the prosecution until the day of trial.

8.1.20 Only one woman (in **CF11**) was found guilty of manslaughter after trial where her defence had been self-defence and Diminished Responsibility. She was initially sentenced to 18 years imprisonment but her conviction for manslaughter was quashed by the Court of Appeal. The Court ordered a re-trial at which she was again convicted of manslaughter (as opposed to being acquitted on the basis of self-defence) and sentenced to 11 years imprisonment.

8.1.21 There were only two cases in the whole sample of 120 cases where the partial defence of loss of control had been successfully relied on in the context of a trial for murder. Both cases related to women who were charged and prosecuted for murder and both of whom relied on domestic abuse and

coercive control in order to support the partial defence. We return to this in Part 9.

8.1.22 The point made below in relation to the use of weapons (usually a knife) in unlawful act manslaughter has equal application to cases of voluntary manslaughter.

8.1.23 **Recommendation 11: We recommend** that in cases of manslaughter by way of diminished responsibility consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor increasing seriousness.

8.1.24 **Recommendation 12: We recommend** that in manslaughter by way of loss of control consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor increasing seriousness.

8.1.25 **Recommendation 13: We recommend** that in cases of manslaughter, consideration should be given to sentencing guidelines being amended to make coercive control on the part of the perpetrator of the killing towards the victim an aggravating factor which increases seriousness. Further, that consideration ought to be given to making coercive control by the victim of the killing towards the perpetrator of the killing a mitigating factor reducing seriousness.

8.1.26 **Recommendation 14: We recommend** that consideration be given to whether the Overarching Principles on Domestic Abuse be amended to denote that assaults committed by non-fatal strangulation are an aggravating factor.[186] See recommendations table in Part 10.

[186] Unless, of course, this amounts to double counting in any particular case.

8.2 Involuntary Manslaughter

8.2.1 The majority of manslaughter convictions were on the basis of Unlawful Act Manslaughter for which sentencing guidelines now exist. As can be seen from those guidelines, culpability of the offender is ascribed to one of four categories. In cases indicating **very high culpability** there is a starting point of 18 years with a range of 11-24 years, in cases indicating **high culpability**, there is a starting point of 12 years with a range of between 8-16 years custody, in cases indicating **medium culpability** there is a starting point of 6 years with a range of between 3-9 years and in cases indicating **lower culpability** there is a starting point of 2 years with a range of 1-4 years.

8.2.2 Of the 13 women in the sample who were convicted of manslaughter rather than murder, 7 were convicted of unlawful act manslaughter.

8.2.3 Where a weapon has been used, the sentences will fall into category B.[187] They rarely fall into Category D.[188] Case (**CF10**) was one example, with the original sentence of 8 years imprisonment being reduced on appeal to one of 6 years. From a general perspective, it cannot be argued that there is anything wrong or inconsistent with the categories in the sentencing guidelines for unlawful act manslaughter. The real issue is lack of an available defence to murder which is consistent with the experience of women in a situation of entrapment because of domestic abuse.

8.2.4 Of significance is the fact that statutory aggravating factors include the offence being

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[187] High culpability – where the factual matrices are likely to be death occurs in the course of an unlawful act where there was an intention to cause harm not amounting to grievous bodily harm ('GBH') or in the course of an unlawful act which carried a high risk of death or GBH which ought to have been obvious to the offender.

[188] Which includes factual circumstances in defence of self or another but not amounting to self-defence or where there was no intention to do any harm.

motivated by or demonstrating hostility towards those with protected characteristics in our present hate crime legislation.[189] This has the effect of excluding misogyny as sex is not a protected characteristic. An aggravating factor is that the offence involved the use of a weapon.

8.2.5 Our figures concerning the use of a weapon and the gender divide which exists in this regard were set out in Part 1. Again, these figures are broadly consistent with other research projects. In particular that conducted by The Centre for Women's Justice.[190]

8.2.6 Feminist scholars have long argued that because of the difference in strength between women and men, women are compelled to use a weapon in order to kill. This raises questions of whether the Court of Appeal are correct in stating or holding that the use of a

[189] Part 2.2 and 4.2.6 - 4.2.8

[190] Howes (Sophie) *Women who kill; How the state criminalises women we might otherwise be burying* February (2021).

weapon is always an aggravating factor.[191] As death is a consequence element of the act of murder (and manslaughter) and it tends not to take place if perpetrated by women in the absence of the use of a weapon, then what has been deemed to be an aggravating factor is, in fact, accommodated within the offence for which she is convicted.

8.2.7 To regard the use of a weapon as an aggravating factor potentially militates against the rule against 'double counting'[192] in sentencing. In this regard, see also Latham LJ in *R v. Richardson (Adam)*[193]

> "[t]he use of a weapon will not necessarily and of itself be an aggravating factor. For example if a knife is picked up in the case of a quarrel, or a fight and then used in a fatal attack, it is difficult to see how the use

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191 *R v. M, AM and Kika [2010] 2 Cr App R (S) 19 at [7]* cited in *R v Dillon (Paul) [2015] EWCA Crim 3.*

192 Namely that the offence/category can be determined by factors which should not then be counted to aggravate the offence.

193 *R v. Richardson (Adam) [2006]] 1 Cr App R (S) 43* p420

of a knife can then be said to be an aggravating factor, that is why the offence is one of murder."

8.2.8 As we have explained in paragraph 6.5 above, manual strangulation does not involve a weapon but given its gendered nature, there is no justification for a killing by strangulation to be mitigated or seen as less serious on the basis that a weapon was not used. Our view that the use of a weapon is not necessarily an aggravating feature is theoretically consistent with our observations in relation to strangulation.

8.2.9 All of the participants in the focus groups supported the proposition that the use of a weapon should not be a statutory aggravating factor for the reasons we have outlined.

8.2.10 **Recommendation 15: We recommend** that in cases of *domestic* manslaughter consideration should be given to sentencing guidelines being amended to indicate that the use of a weapon is not necessarily an aggravating factor. See recommendations table in Part 10.

8.3 Gross Negligence Manslaughter

8.3.1 There has been public concern about high profile killings of women following assaults which are alleged to have been consensual during sex which is said to have ‘gone wrong’. This is often referred to by campaigners, academics and policy makers as “the rough sex” defence. In other words, it is said that the victim has consented to an assault short of actual bodily harm. The law has been clear since *Brown*[194] was decided in 1994, that a person cannot consent to actual bodily harm contrary to s.47 Offences Against the Person Act 1868 (‘OAPA’) or to an assault which

[194] *R v Brown and others [1994] 1 A.C. 212*.

would amount to grievous bodily harm contrary to s.20 OAPA. The fact that Brown has been put on a statutory footing in s. 71 of the 2021[195] Act may mean that offences once charged as gross negligence manslaughter are now charged as unlawful act manslaughter but that may also depend on how such cases are perceived in social terms. By way of explanation, there is a tendency to perceive cases where an assault during sex (which assault is said to be consensual for the purpose of sexual gratification) as being completely distinct from any of the violence and control which exists elsewhere in relationships between intimate partners.

8.3.2 Palmer and Wiener[196] have argued that the essence of the ongoing debate on this subject

[195] S.71 provides that consent to harm for sexual gratification is not a defence. It applies to offences under s.47, s.20 and s.18 Offences Against the Person Act 1861.

[196] Palmer (Tanya) and Weiner (Cassandra) *"Telling the wrong stories: rough sex, coercive control and the criminal law"* Child and Family Law Quarterly Vol 33 No 4 2021.

exists in the narratives which are being played out because of the role that 'rough sex' can play as both an instrument and manifestation of coercive control. Taking the highly publicised **CM9** (see below) as their starting point, they analyse the use of rough sex within a coercively controlling, abusive relationship and its construction within the criminal law. The writers argue that there are three alternate constructions which have been applied historically within criminal law. Namely, (i) violent sexual assault (ii) deviant sexuality and (iii) accidental injury.

8.3.3 The cases in our sample of 120 cases which are relevant to this discussion, involved findings of accident accepted by investigators and the courts (who are obviously bound by the way in which the case is investigated and presented).

8.3.4 The above researchers make the point that the cases, which they analyse,

> "Appear to suggest a particular willingness to apply this narrative [which is one of accident] in cases of men injuring women

in the course of sexual activity and to normalise a degree of rough sex, reframed as ‘vigorous sexual activity’ in heterosexual relationships. This has implications for the framing of rough sex in coercive, controlling heterosexual relationships, which are themselves heavily shaped by normative gender roles."

8.3.5 Elsewhere, it has been argued, correctly in our view, that the issue of what is often referred to as ‘rough sex gone wrong’ now needs to be reconsidered in the light of coercive control[197] where coercion can be achieved by things like “silent treatment” or tailored threats and that it cannot therefore be assumed that particular sexual activity within

[197] Herring (Jonathan) and Bows (Hannah) citing Jenny E Mitchell and Chitra Raghaven, *“The impact of coercive control on use of specific sexual coercion tactics”* November 2019 in the 2021 V 27 Violence Against Women and Kathleen C Basile *Histories of Violent Victimisation Among Women Who Reported Unwanted Sex in Marriage and Intimate Relationships: Findings From a Qualitative Study* 2008 14 Vol 14 Issue 1 Violence Against Women 29

a settled relationship is always consensual. Of particular concern, is the fact that such sex can involve choking/strangulation.

8.3.6 Where killing in these circumstances results in a conviction of murder, then clearly, Schedule 21 provides the sentencing framework. Academic and other commentators have made the point that the ‘rough sex’ defence is being used to escape liability for murder where such liability should properly be incurred. In this regard, see Part 9 below on defences to murder. See further, Bows and Herring citing Professor Edwards’ research together with briefings by the campaigning group We Can’t Consent To This (WCCTT), previous arguments by commentators and feminist academics that:

> “[t]his method of killing as well as the broader context of death occurring during or immediately after sexual activity is thus heavily gendered and reflects wider homicide trends; strangulation as a method of killing in domestic/intimate partner homicide has remained constant over the

> last three decades and is the primary method of killing of a female partner in a heterosexual relationship.|"[198]

8.3.7 The point has been well made that the reason for this is because the perpetrator can argue a lack of the relevant *mens rea* or fault element[199] by saying he had no intent to cause really serious harm. None of the reforms in relation to non-fatal strangulation/consent have dealt with the consequence of a straightforward denial of *mens rea/fault*. In our section on defences to murder, we suggest that consideration should be given to further reform which is aimed at limiting such a defence in murder allegations.

8.3.8 Our remit is to consider the adequacy of sentencing provisions when 'rough sex' leads to a conviction of manslaughter (whether that

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198 Bows (Hannah) and Herring (Jonathan) "*Getting away with murder a review of the rough sex defence"* JCL 84 (525) December 2020

199 Herring (Jonathan) and Bows (Hannah) *"Regulating intimate violence: rough sex, consent and death"* [2021] CFLQ 311 at page 3.

is gross negligence manslaughter or unlawful act manslaughter). Our sample of 120 cases contained 3 gross negligence manslaughters. They were all committed by men against female victims. Two of these cases involved killings which occurred in the course of violent sex to which the victim was said to have consented (although strangulation was not the mechanism of killing).

8.3.9 By definition, investigations into the circumstances of such killings are circumscribed by the fact that the victim cannot give an account of consent.

8.3.10 The Manslaughter Definitive Guideline in relation to sentences for gross negligence manslaughter contain four categories of culpability which are delineated according to prescribed characteristics: lower culpability, medium culpability, high culpability and very high culpability with starting points of 2 years, 4 years, 8 years and 12 years custody. The ranges for each of those starting points are: 1-4, 3-7, 8- 12 and 10-18 years custody respectively.

8.3.11 As stated above, our sample contained three cases of gross negligence manslaughter. In two of these cases **CM9, CM29** the factual matrix was said to be a sex-game or “rough sex” which had ‘gone wrong’. These cases merit scrutiny. On the basis of the present law, the cases can present difficult sentencing exercises.

8.3.12 In **CM29** the offender had held a knife to the neck of the victim during sexual intercourse and it was his case (accepted by the prosecution) that the knife had slipped and cut the carotid artery causing death. It was accepted (not only in virtue of the plea) but on the basis of that plea that there had been no intention to stab the victim but that the holding of the knife at the victim’s neck was a form of simulated threatening behaviour “to heighten sexual pleasure”. The perpetrator pleaded guilty after the Plea and Trial Preparation Hearing but before the trial and received the appropriate credit for having done so.

8.3.13 He was sentenced to six years imprisonment which showed a reduction from the eight

years which would have been appropriate after a trial. The danger of stabbing the victim was said to be obvious. ‘Consent’ was held by the sentencing judge to be of limited mitigation given the “acute risk of serious violence and death being visited on [his] sexual partner”. It was accepted by the sentencing judge that the knife was held for the purpose of sexual gratification and of simulating threat[200] and this involved repeated and colossal danger. Culpability was said to be high in light of lies to the police, the use of alcohol and drugs. The sentencing judge eschewed the description of the sexual conduct as “rough sex” and “adventurous” saying “it was simply extremely dangerous sadomasochistic sexual conduct.” The offending was placed within category B – high culpability.[201]

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[200] The judge specifically said therefore that this was not a case where if it had involved a conviction of murder that there should have been a 25 year starting point.

[201] The offending is serious because the offender had shown a blatant disregard for a very high risk of death arising from the negligent conduct.

8.3.14 The use of drugs and alcohol were held to be an aggravating feature. Culpability was held to be high in light of the fact that the perpetrator "must have been acutely aware" of the extreme dangers of using a knife in the way that he did. There was said to be a demonstrably obvious risk of death or of really serious injury.

8.3.15 In **CM9**[202] a plea to gross negligence manslaughter was accepted at the close of the prosecution case in a murder trial and a trial for causing grievous bodily harm with intent. By way of background, the victim had been in an intimate relationship with the perpetrator for a few months. She was 13 years younger than the perpetrator. At the time of the sexual conduct and thereafter, death, the victim's blood alcohol level was dangerously high (at 389 mg per 100 ml of blood) placing her into the toxicological bracket of coma and death. Her cocaine level was at 0.74 mg per litre of blood and her

[202] Which has been the subject of much academic discussion.

Cocaethylene[203] level was at 0.59 mg per litre. In other words, she was intoxicated to the point where it is difficult to accept that she could have had or retained the capacity to consent.

8.3.16 The sentencing judge was sure, to the relevant standard, that the perpetrator had caused the majority of injuries by beating on the night that the victim died. It was the perpetrator's account that in addition to consenting to beating, the victim had asked him to insert a bottle of spray carpet cleaner inside her vagina. This caused internal lacerations which resulted in arterial and venous haemorrhage. The perpetrator had noticed obvious injuries but despite this, he did not summon assistance or call an ambulance. Rather, he had left her at the foot of the steps and gone to bed neither did he place her on a pillow, cover her with a blanket or place her in the recovery position.

[203] The substance to which cocaine and alcohol are converted within the body.

8.3.17 In reaching an assessment of the perpetrator's overall culpability, the sentencing judge bore in mind the contention that the conduct amounting to gross negligence was the failure to get the victim help after the infliction of serious injury (to which it was claimed she had consented). This was in circumstances where there was a risk of death as a result of her condition which would have been obvious to a reasonable and prudent person.

8.3.18 The prosecution submitted that the offence fell within Category B, high culpability but did not submit that the injuries which had been caused to the deceased had been inflicted unlawfully and therefore did not submit that the case met the criterion "the negligent conduct was in the context of other serious criminality."

8.3.19 The judge held that he was satisfied so that he was sure that the perpetrator had caused the bulk of the injuries to the victim's breasts, bottom/lower back and that they amounted to actual bodily harm of a quite serious type and

that the authorities were clear that the victim could not in law, consent to actual bodily harm or grievous bodily harm for the purpose of sexual pleasure. He held that, in *R v BM*[204] the Court of Appeal had authoritatively considered whether the consent of a victim could provide a defence to offences contrary to s.47 and s.20 Offences Against the Person Act 1861. The fact that consent was no defence meant that the failure, on the part of the perpetrator, to call for help was therefore negligence in the context of other criminality.[205]

8.3.20 It was held that the insertion of the cleaning spray was not unlawful (the judge having concluded that the victim had the capacity to

[204] *R v M (B) [2018] 3 WLR 883 [21].* In which case the Court of Appeal was concerned with the question of whether alteration of body parts with consent amounted to Grievous Bodily Harm.

[205] Therefore, placing it within category B of the Definitive Guideline.

consent)[206] but that it must have been plain to the perpetrator that the insertion of the bottle even if not unlawful, carried a high degree of risk. The question of whether, rather than using lubricant to remove the bottle, it would have been a better idea to call an ambulance, was never put in cross-examination. Further, the offence was aggravated by the perpetrator's failure to try to prevent the victim from becoming potentially fatally intoxicated. In the final analysis, the offending "was not quite the type of 'serious offending 'contemplated in Category B" however, it was not a Category D[207] case and the case was properly placed towards the upper end of Category C. There were a number of mitigating factors but the offence was aggravated by drink and drugs. The starting point was 5 years and 6 months after balancing out the aggravating and mitigating factors and a full one third reduction for a

[206] It is difficult to see how the judge could not be sure that the victim did not have the capacity given the level of intoxication.

[207] Lower culpability.

guilty plea meant the sentence which was imposed was one of three years and 8 months.

8.3.21 The most recent decision of the Court of Appeal on the issue of manslaughter in circumstances where the victim is found to have consented to harm during a sexual encounter was in relation to unlawful act manslaughter. See the Attorney General's application to refer the sentence in *R v. Samuel Pybus*[208] as unduly lenient. In refusing to refer, the court held that 6 years imprisonment was an appropriate starting point on a guilty plea to unlawful act manslaughter. The offender had strangled the victim who was said to have consented to "erotic asphyxiation"[209] in the course of a sexual encounter. By way of background, the offender was married but saw the victim (S)

[208] *R. v. Pybus (Sam Joseph) [2021] EWCA Crim 1787*

[209] At paragraph [19] of the judgment the court observed that in the court below there had been evidence independent of the offender that suggested the victim's "participation was consensual and was initiated by her."

with whom he was said to have had sexual encounters 6 times a year. This involved “rough sex including choking.” The case was presented at first instance as one in which there was uncertainty about the force or duration of the manual strangulation which was said to be the cause of death and about the point at which the victim had reached unconsciousness during the strangulation. In seeking to argue that culpability should have been high as opposed to medium, the Attorney General was constrained by the fact that leading prosecution counsel in the court below had concurred with the sentencing judge that there was a difference between an obvious risk and a high risk and that although while the more obvious the risk, the easier it was to categorise it as high “a foreseeable risk is not a high risk.” Further, the Court of Appeal agreed that “[the Crown] were only able to speculate as to the mechanism of death and specifically in relation to the nature of asphyxiation in terms of its duration and the ultimate loss of consciousness. [28].” The

sentence on the basis of C (medium culpability) was held to be unassailable.

8.3.22 The court distinguished between an obvious risk of harm and a high risk of harm. In finding that there was no demonstrable error of law, the court also emphasised that this was a case which turned on its facts [35].

8.3.23 We think that where strangulation is practised in this way there must always be a high risk of death and that any attempt to distinguish between obvious and high is a legal nicety. Many experts would argue that an act of strangulation does not just carry with it an obvious risk of death but can equally be said

to carry a high risk which ought to be obvious to anybody.[210]

8.3.24 It is of course the case that the Court of Appeal's powers in considering a reference are circumscribed and in the context of an Attorney General's reference, the court is bound by the facts as presented to a sentencing judge. In *R v. Pybus* however, the Court of Appeal implicitly sought to categorize the killing of the victim as the consequence of sexual choice as opposed to the consequence of the development of social norms based on structural inequality.

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[210] See, Shield MDs (Lisa) Corey MD(Tracy S) Weakley-Jones MD (Barbara) Stewart MD (Donna) *"Living Victims of Strangulation 10 year review of cases in a metropolitan community*" Am J Forensic Med Pathol Vol 31Number 4 (2010) at 324 "The fine line between life and death in strangulation depends on a host of factors, including the strength of the victim/perpetrator, drugs involved, natural state of health of the victim and circumstances of whether an onlooker may be present who may disengage the perpetrator from the victim prior to the fatality."

8.3.25 To return to the points made by Palmer and Weiner, in addition to the immediate harm of death, the policy underpinning law ought to consider the wider harms which emanate from the behaviour which can and does lead to this category of homicide.

8.3.26 The danger is that this type of offending provides a "cultural scaffolding"[211] for the method and circumstances of the types of murder with which this review is also

[211] McGlynn (Clare), Vera-Gray (Fiona), Kureshi (Ibad) and Butterby (Kate) "*Sexual violence as a sexual script in mainstream online pornography."* The British Journal of Criminology, April 2021, 61, 1243–1260] The authors cite Garvey as having referred to 'the cultural scaffolding of rape' "namely, the construction of cultural norms and practices that support rape or set up its preconditions" which move towards "a legitimate framework of sexual norms."

concerned.[212] This is harmful in itself. By analogy with sexual offences and by way of further illustration, in a research project on sexual violence as a script in mainstream online pornography,[213] it has been argued that the availability of certain classes of material to first time users of pornography, raises questions about "the role of the criminal law, self-regulation and corporate accountability".[214] It is said in this context that "when pornography is understood as a key social institution legitimizing sexual harms then the distortion between what counts as

[212] Concerning our sample of cases, the point is exemplified when it is considered that in one of the two cases in which a woman was convicted of manslaughter by way of loss of control, the deceased who had coercively controlled her kept a knife in the bedroom. In another case where the female perpetrator was convicted of murder it was in circumstances where she had awoken to find the deceased holding a knife over her.

[213] McGlynn (Clare), Vera-Gray (Fiona), Kureshi (Ibad) and Butterby (Kate) *"Sexual violence as a sexual script in mainstream online pornography."* The British Journal of Criminology, April 2021, 61, 1243–1260

[214] *Ibid.*

criminal, what counts as harmful and what counts as sexual constitutes '*in itself*' a form of cultural harm."

8.3.27 The prevalence of strangulation/choking (i) in pornography, (ii) as a method of deploying control in relationships which are characterised by coercive control and (iii) as a gendered method of committing murder suggests that this type of manslaughter (which can and does arise from choking/ strangulation) should, in our view, always attract a higher starting point within the manslaughter guidelines namely, one in high culpability category.[215] Whereas strangulation has a particular resonance, the argument extends to other forms of assault which imitate the use of violence in coercive and controlling behaviour. In addition to causing death in the cases with which we are concerned, the wider harm is effected through the normalisation of such behaviour. In our

[215] Category B Definitive Sentencing Guidelines Manslaughter.

view there are sound policy reasons for the recommendation we make below.

8.3.28 There was support for our proposals concerning death following consent to assault the victim during the course of a sexual encounter in all of our focus groups.

8.3.29 **Recommendation 16: We recommend** that where death occurs in the course of violence which is alleged to be consensual during a sexual encounter between the perpetrator and the victim then whether the offender is charged with unlawful act manslaughter or with gross negligence manslaughter, the killing should be categorised as category B high culpability. See recommendations table in Part 10.

9. Defences

9.1 Summary

9.1.1 We have not had adequate resources to be able to conduct a full or sufficiently detailed review of defences in cases of domestic homicide. In order to do this with reference to our sample of cases it would have been necessary to have access to the CCDCS in every case on the sample and to have carried out structured interviews with the lawyers concerned. Further, in our view, a wholesale review of defences to domestic homicide requires a full public consultation involving all stakeholders including the higher courts judiciary which is outside the practical scope of this project. There are complex matters of law, policy and practice involved. The most we attempt to do in this part is to adumbrate the relevant issues with a recommendation that further work be undertaken in the future.

9.2 Complete Defence of Self Defence

9.2.1 Self-defence and accident are complete defences to murder. In this review, we are concerned with self-defence.

9.2.2 In order to be able to rely on the common law defence of self-defence a defendant must be able to show that he or she only used such force as was necessary in the circumstances as he or she genuinely believed them to be.[216] The force used has to be proportionate. The exception is in a householder case where force may be disproportionate as long as it is not "grossly disproportionate."[217] In such a case, the defendant must believe that the victim is a trespasser in the property at the time of the use of force.[218] Even if the force used is merely disproportionate, it must still be reasonable in the circumstances.[219] The question of whether the circumstances were reasonable is determined as a defendant

[216] S.76(1)-(3) Criminal Justice and Immigration Act 2008

[217] S.76(5A) Criminal Justice and Immigration Act 2008

[218] S.76(8A) Criminal Justice and Immigration Act 2008.

[219] *R v. Ray (Steven) [2017] EWCA Crim 1391.*

believed them to be. A defendant's belief may be a mistaken one[220] as long as it is not induced by voluntary intoxication.[221] There is no longer a duty to retreat rather it is only a relevant factor to be taken into account.[222] In deciding the question of whether or not the force was reasonable in the circumstances as a defendant believed them to be, a person acting for a legitimate purpose is not expected to weigh to a nicety the exact measure of any action.[223]

9.2.3 It is rare for perpetrators to be able to rely successfully on self-defence in intimate partner homicides. In the Homicide Index data received to inform the review and where the final outcome was known at the point when the Home Office provided the data, there were 7 acquittals including discontinuation of proceedings in cases of intimate partner homicide in the period between April 2016

[220] S.76(4) Criminal Justice and Immigration Act 2008.

[221] S.76(5) Criminal Justice and Immigration Act 2008.

[222] S.76(6A) Criminal Justice and Immigration Act 2008.

[223] S.76(7) Criminal Justice and Immigration Act 2008.

and December 2020. This consisted of 2 women who were acquitted on the basis of self-defence (one of whom was finally acquitted on a re-trial) and 5 men. Further research augmented by press reports showed that one man was accused of setting his wife on fire but successfully argued that she had accidentally caught fire while making him porridge. Another, who was acquitted of murder, had been accused of throwing boiling chip oil on his wife but was able to argue that she had pulled it on herself.

9.2.4 Self-defence has long been recognised to be problematic in cases where women have killed their male partners and this is so even in situations where there is a history of domestic abuse or coercive control.[224] If a woman is not thought to be under attack at the time of the killing, then it is most unlikely that her actions will be seen to have been reasonable. In

[224] *Women who kill: why self-defence rarely works for women who kill their abuser* Howes (Sophie Kate), Swaine Williams (Katy), t Wistrich (Harriet) Crim. L.R 2021 947-957 at 947.

theory, the defence of self-defence permits pre-emptive action on the part of the defendant. However, research conducted by the Centre for Women's Justice[225] found that out of 92 cases over a 10 year period, only 6 women had successfully relied on self-defence and that none of the 6 had been able to rely on pre-emptive force.

9.2.5 The reasons as to why self-defence is largely unsuccessful for women who have killed as a result of being trapped in abusive relationships are not always attributable to fault with the substantive law.

9.2.6 As one lawyer said:

> "Problems include jury perceptions of how a victim of domestic abuse should present. Women who use fatal violence are not

[225] *Women who kill; Defending women we might otherwise be burying* Howes (Sophie) cited in *Women who kill: why self-defence rarely works for women who kill their abuser* Howes (Sophie Kate), Swaine Williams (Katy), t Wistrich (Harriet) Crim. L.R 2021 947-957 at 949.

seen as vulnerable, trapped or deserving of sympathy":

"Men who kill, if they are otherwise upstanding good characters, tend to be treated sympathetically, whereas women who kill are considered as stepping massively out of line….this is incredibly old fashioned" **interview with lawyer.**

9.2.7 In summary it is thought that the reasons why women who kill their male partners are convicted include first, the predominance of myths and stereotypes for example, the erroneous belief that it is always possible to leave a relationship in which a victim is entrapped by coercive control. Second, the criminal justice system operates under constraints of funding and to timetables which militate against early effective disclosure (by defendants who are victims) as to the history of the relationship with the deceased. It is well documented that many victims of coercive control have great difficulty in disclosing the details of their treatment at the hands of their abuser. Third, the fact that experts in

domestic abuse including coercive control and consequent risk assessment have not been readily used to date hinders jury understanding and facilitates the perpetuation of domestic abuse myths such as “she gave as good as she got.” Fourth, courts are only just beginning to give juries directions on the myths and stereotypes of domestic abuse. Fifth, this is in circumstances where there is no proper forensic understanding of domestic abuse and its effects. At the heart of a proper understanding of coercive control is the appreciation that discord in a controlling dynamic tends to be manifest in the event of a challenge by the victim to the controlling abuser. However, the challenge usually leads to behaviour which is such that the victim then lives within the rules for fear of upsetting the abuser and causing a repeat of the behaviour. This is commonly misconstrued as the victim not minding the rules and/or enjoying the relationship.

9.2.8 In order for such women to be acquitted, the effects of coercive control need to be appreciated within the context of the defence

of self-defence. A woman who has been subjected to coercive control is likely to have been affected by it and have a far greater sense of fear which may lead her to pick up a knife (or other weapon) or take action which is viewed objectively as being disproportionate.

> "[There is] increased fear because of the history of abuse and increased perception of the threat of violence that leads to a disproportionate act."
>
> "Because of the history of domestic violence, the perception of threat is likely to be greater." **Interview with lawyer.**

9.3 Problems with the Substantive Law

9.3.1 Problems also arise because of the gendered nature of the substantive law. As our case sample analysis shows, women predominantly use a knife or other weapon when they kill, and this tends to lead to the killing being perceived as disproportionate in the circumstances existing at the time. The focus is on the immediate as opposed to the context and background.

> “the predominant issue when representing women who kill is I think: issues that are directly to do with gender; directly to do with the very fact in the context of a domestic homicide and the items and objects coming to hand are weapons such as knives so when it comes to the sentencing regime the focus is on the weapon and not the context that has led to the picking up ultimately that an individual is forced to do of a weapon.” **Focus group attendee**.
>
> ‘The critical thing is why somebody picked up a knife. Was it because they were defending themselves? **Focus group attendee.**

9.3.2 The reasons why women use weapons are covered extensively in the literature on feminist jurisprudence which has been summarised most recently in a case study of two cases with reference to the research contained in *Women who Kill: defending*

women we might otherwise be burying[226] and also by Professor Susan Edwards.[227]

9.4 Disproportionate Force Restricted to Householders

9.4.1 There is consternation among commentators that the law on self-defence permits the use of disproportionate force by a householder against a person whom the householder believes to be a trespasser at the relevant time but that a victim of abuse cannot use disproportionate force to defend herself from an abuser within the home unless the criteria in s.76 (5A), (8A)(d) are fulfilled.

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[226] Howes (Sophie) *Women who kill defending women we might otherwise be burying Op Cit* cited in. Howes (Sophie) Swain Williams (Katy) Wistrich (Harriet) *Women who kill why self-defence rarely works for women who kill their abuser* Crim L. R 2021 11, 945-957

[227] Edwards (Susan) *"Demasculinising" the defences of Self-Defence and the "Householder Defence" and "Duress"* Crim. L.R. 2022, 2, 111-129

9.4.2 In *R v. Cheeseman*[228] it was held that the engagement of the defence turned on the householder's belief as to whether V was a trespasser at the time of the violent incident. In other words, the defence does not only apply in the case of intruders.

9.4.3 Potentially then, the enhanced defence applies to some, but not all, victims of domestic abuse. For example the defence presumably applies in the following hypothetical examples (i) the case of a householder who has obtained a non-molestation order which is then breached by V who enters the property and is violent or (ii) where the property is in the name of the defendant and she has told an abusive V that he must leave before or at the time of the violent act[229] (iii) The defendant (D) owns a property and begins a relationship which is coercive and controlling, her partner (P)

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228 *R v. Cheeseman [2019] EWCA 149.*

229 The extent of the application of the law is unclear but at the time of writing, a judgment of the Court of Appeal Criminal Division is pending.

moves into her property very quickly after the start of the relationship. On an occasion when P is being violent and threatening to D, she tells him to leave. P refuses to do so and is therefore a trespasser in D's home. He continues to be violent and D reaches for a knife with which to defend herself. She fatally stabs P inflicting a single wound. Under the present law, D is entitled to use force which is disproportionate.

9.4.4 By way of contrast, in a situation where P and D live together and bought the home together, P cannot be construed as a trespasser in the property when he begins to use violence. The level of threat would be exactly the same as in the other examples but D in examples (i)-(iii) above would be entitled to a direction from the judge that she could use disproportionate force whereas D from the second example would not. Such women would have the advantage over those who are joint householders with an aggressor.

9.4.5 This is anomalous because it is women who do not have the agency support or legal

support or who are householders in common with their abusers who would be most in need of the defence in law.

9.4.6 From a legal perspective, it could be argued that s. 76(5A) has been construed so as to make little if any real difference. In this regard, see *R v. Ray (Stephen)*[230] where it was held that the jury must first decide whether the force was "grossly disproportionate" and only if it was not, would go on to determine whether it was reasonable in all the circumstances further, that 'disproportionate' and 'reasonable' are not the same things for the purpose of s.76.

9.4.7 However, when factors such as the infliction of a single stab wound against a background of say, coercive control are taken into account, it is arguable that the enhanced defence could make a practical difference in some cases.

[230] *R v. Cheeseman [2017] EWCA Crim 1391.*

9.4.8 An attempt to extend[231] the permissibility of disproportionate force in the 'Householder defence' provided by s.76(5A), (8A)(d) Criminal Justice and Immigration Act 2008[232] was rejected by the Government during the passage of the Domestic Abuse Bill (the 2021 Act).[233] The Government stated that existing full and partial defences cover circumstances

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231 By creating an analogous defence.

232 S.76(5A) provides "In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances"

(6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances". 233 The proposed amendments to the Domestic Abuse Bill were part of a wider campaign to provide for a defence of compulsion to commit offences because of domestic abuse in certain types of criminal offences.

233 The proposed amendments to the Domestic Abuse Bill were part of a wider campaign to provide for a defence of compulsion to commit offences because of domestic abuse in certain types of criminal offences.

in which a defendant is also the victim of domestic abuse. “We are not aware of any significant evidence that demonstrates that the panoply of the current full and partial legal defences available are failing those accused of crimes where being a victim of domestic abuse is a factor to be taken into consideration.”[234] More recently, the case has been made for the introduction of a specific defence to a wide spectrum of offences which have been committed and which are directly referable to domestic abuse[235] and for an extension to s.76 to create a defence for the victims of domestic abuse which would have the effect of creating a defence which is

[234] Edwards (Susan) *“Demasculinising” the defences of self-defence, the householder defence and duress”* Crim. L.R. 2022, 2, 111-129 citing Hansard HL deb vol 811 col 1890 21.4April 2021 and written evidence from the Prison Reform Trust

[235] Double Standard: Ending the unjust criminalisation of victims of violence against women and girls. https://www.centreforwomensjustice.org.uk/double-standard

analogous to the ‘householder defence’ for the use victims of domestic abuse.

9.4.9 We think, that at the very least, further consideration needs to be given to the possibility of extending the latitude enjoyed by householders who are confronted by intruders, to victims of domestic abuse who kill their abusers in circumstances of domestic abuse. This is particularly so when it is considered (i) that it is thought that it tends to be the use of a weapon which leads to the force being perceived as disproportionate and (ii) that the majority of killings by women of their male partners are caused by a single stab wound. The benefit of extending the ambit of s.76 (5A), (8A) as suggested above is that there is a legal coherence which comes with extending the ambit of the present law. It would widen the law and prevent anomalies such as those which are implicit in the above examples.

9.4.10 There are alternative possible reforms which could be considered in terms of giving women who kill equal access to self-defence. A partial

defence which is a direct alternative to self-defence is one possibility.

9.4.11 In this regard, further consideration could be given to the creation of a partial defence of self-preservation. Such a partial defence was considered by the Law Commission during the consultation stage of their review into the partial defences to murder in 2003-6.[236] The partial defence was contemplated in two possible forms. First a wide one which could apply where a defendant faced a threat but not so immediate a one as to justify the use of force. Second, a narrow form where some force was justified but not the degree of force which was actually used.

9.4.12 The idea was not pursued in light of the introduction of the partial defence of loss of control. Loss of control may apply when there is a “fear of serious violence” but this is subject to the fulfilment of other statutory

[236] Law Commission CP173 Partial Defences to murder at 12.82.

requirements which we address at paragraphs 9.5.5 below.

9.4.13 Another option which might be considered is the introduction of a partial defence for victims of domestic abuse which is based on an offender having been subjected to coercive control. This would accommodate an offender's fatal response to a pattern of behaviour which may not amount to serious violence and in circumstances where there is no obvious or immediate trigger.[237] It would be consistent with the more forensic approach to domestic abuse to which we have alluded elsewhere in this report. As such, it would remove many of the problems which have been identified as characteristic of the trials where women have killed their abusive

[237] For example, in one recent first instance case where a 66 year old woman stabbed her husband of 22 years the press reporting focused on an argument between the defendant and the deceased over some bubble and squeak notwithstanding that the defendant's defence was loss of control due to years of being exposed to coercive control from which she felt that she could not escape.

partners. A focus on coercive control would help to redefine those narratives which tend to be employed in the trials of women who kill abusive partners. For example, it would dispel the myth that if a victim stayed in a relationship, then it could not have been that bad. There would be less of a temptation on the part of prosecutors to characterise abusive relationships as “volatile” and “toxic.” This characterisation tends to come into play in situations where victims of controlling and coercive behaviour challenge such behaviour. The principle argument against the concept of a partial defence based on coercive control is that it would mean that coercive control could not constitute the basis of a full defence and, as such, this would hinder the development of our continued developing understanding of domestic abuse.

9.4.14 The advantages of such a partial defence include the fact that there would be less use of the bad character provisions in circumstances where an offender’s coercive control in the relationship has been re-framed to the detriment of the victim of that coercive

control.[238] It would remove the present emphasis on the psychiatric condition of the offender and more readily meet what some experts claim is a normal response to the abuse of coercive control.

9.4.15 Any consideration of the above should be predicated on a detailed analysis of the efficacy of the present partial defence of loss of control.

9.4.16 There are legal difficulties with running loss of control as an alternative to the complete defence of self-defence. Both partial defences of loss of control and diminished responsibility are theoretically inconsistent with self-defence as they are mitigatory defences reducing what would otherwise be murder to manslaughter. As such, they require an intent

[238] 8 For example, in her first trial Sally Challen's complaint to the police that the deceased had been visiting brothels which used victims of human trafficking was dismissed as her being drunk and unreasonable. It was adduced as bad character evidence notwithstanding that she was not intoxicated at the time she killed the deceased.

to kill or cause really serious harm whereas in a true defence of self-defence *mens rea* or fault will be negated. This makes it difficult for a defendant to rely on self-defence and the partial defences in the alternative. As we point out below, to plead loss of control militates against the use of self-defence.

9.4.17 Loss of control is still relatively new. We indicated in paragraph 5.1.15 that the reforms to the partial defences of provocation and diminished responsibility were introduced as a result of consultations by both the Law Commission and the Ministry of Justice on the efficacy of the partial defences in cases where women had killed an abusive partner.[239] The reforms were based on legislative proposals by the Law Commission but nevertheless departed from those proposals in significant respects.

9.4.18 As stated in part 5 of this report, the partial defence of provocation was replaced by the new partial defence of loss of control. S.54-55 of the Coroners and Justice Act 2009 have

[239] Partial Defences to murder L.C 290 at 1.1.

now been in force for over 10 years and it is necessary for a detailed post-legislative scrutiny to be conducted with a view to considering whether the partial defence has fulfilled its legislative aims and those which were envisaged by the Law Commission.

9.5 Voluntary Manslaughter

9.5.1 Loss of Control

9.5.2 The analysis of the case sample showed that Loss of control was relied on infrequently and was rarely successfully deployed when it was relied on. It was relied on in 11 (9%) of the 120 cases in the case sample. It was successful in 2 of those cases.

9.5.3 It does appear that the partial defence is not being successfully relied on by men who have killed their intimate female partners. Both the two cases in the case sample where it was successful involved women killing their abusive male partners. Both those cases involved the Crown Prosecution Service pursuing a murder allegation and in the case of one woman, it was pursued at a re-trial

after the jury in the first trial had failed to agree on a verdict.

9.5.4 A principal policy aim underlying the introduction of the partial defence of loss of control was to try and accommodate the concept of excessive force in self-defence.[240] This is the basis on which the fear of serious violence constituent of the requisite trigger (either on its own or in combination with the justifiable sense of being seriously wronged) was introduced.

9.5.5 The wording of s.54 of the 2009 Act is complex and the courts have had to construe it in a way which seems to defeat the policy objective of the partial defence. In *Clinton*[241] it was held that in order for the partial defence to be left to the jury there must be evidence of all three components of the defence. The components are (i) a loss of control, (ii) a trigger (as defined in statute) to that loss of control and (iii) the possibility that a properly directed jury could conclude that a person of

[240] See paragraph 9.4.10

[241] [2012] EWCA Crim 2.

the age and sex of the defendant with a normal degree of tolerance and self-restraint in the circumstances of the defendant might have reacted in the same or similar way as she/he did. The elements are distinct and in order for the partial defence to be left to the jury, there must be sufficient evidence of each so that a jury could reasonably conclude the defence applies. Each component requires separate consideration. The circumstances in which the partial defence can be left to the jury contrasts with the abolished partial defence of provocation which a judge was obliged to leave to a jury if he or she considered that there was some evidence from which the jury could conclude that the defence might apply.

9.5.6 The prosecution has to negate the defence to the criminal standard where it is raised by a defendant and some would argue that the law is too complex for juries involving, as it does, a threefold consideration of double negatives. This difficulty is compounded by the following. First, the courts have not really decided what is meant by loss of control itself avoiding

placing a detailed construction on the words. See *R v Gurpiner*[242] where the Court of Appeal declined to decide exactly what was meant by the words "loss of control." Second, a construction based on ordinary English language is not consistent with the fact that, research has now shown that many domestic killings are often planned.[243] The law was enacted before coercive control became part of our legal discourse and without any reference to the power/control and entrapment principles which have followed the promulgation of Evan Stark's work which constructs coercive control as a crime against liberty. The 'crime of passion' narrative which still dominates societal thinking is entirely inconsistent with a response to an extreme case of coercive control. This is notwithstanding the caveat in the legislation that the loss of control "does not need to be sudden" which was of course meant to

[242] *[2015] 1 Cr. App. R 31 at [20].*

[243] See the reference to temporal sequencing in murder and the development of the 8 stage homicide timeline in Part 5 of this report.

accommodate the way in which women who had been subjected to long term domestic abuse sometimes responded by killing.[244]

9.5.7 There are a number of problems when it comes to configuring a history of coercive control with the partial defence of loss of control.

9.5.8 First, in terms of the need for there to be sufficient evidence of a loss of control itself a loss of control cannot be inferred from the evidence.[245] This has the practical effect of making it a stand-alone partial defence as opposed to an alternative to self-defence. This was the situation in our case reference (**CF21**) where the female defendant ran lack of intent- the trial judge refused to leave loss of control to the jury on the basis that there was no sufficient evidence from which the jury might conclude that the defence applied. In practical terms, the accused or another witness must testify to the loss of control. There are unlikely to be other witnesses in a domestic setting

[244] *R v. Humphreys. (supra)*

[245] R v. Goodwin [2018] EWCA 2287.

where the likelihood is that only the accused and the deceased were present. In so far as testimony from the defendant is concerned, she must testify to the fact that she lost control and so the partial defence is inconsistent with the complete defence of self-defence which unless it comes within s76 (5A), (8A) of the Criminal Justice and Immigration Act 2008,[246] depends on a measured reaction. *Mens rea* or fault is negated in self-defence but the mitigatory status of the partial defences means that all the elements of murder are present and so the two defences are theoretically inconsistent. This has the practical effect of meaning that the Crown Prosecution Service tends not to accept guilty pleas to manslaughter by way of loss of control but would rather pursue a murder conviction at trial.

9.5.9 Second, although the "trigger" under s.55(6) can be satisfied, because coercive control can lead to a sense of being seriously wronged, it

[246] Allowing the use of force to be disproportionate.

does not always necessarily lead to what can be described as a fear of *serious* violence, which is a particularly high threshold. The wrong which coercive control instigates is the wrong of entrapment not the wrong of putting someone in immediate fear.[247] Fear may play a part in coercive control but there are other factors such as dependence which are at play. As such, the victim is as likely to feel rage at the incursion into her autonomy and liberty as she is fear. This is likely to militate against the successful use of the partial defence because anger is too easily conflated with "a considered desire for revenge"[248] which prevents reliance on the partial defence. In addition, there are stereotypical perceptions of how victims should present. In

[247] Although fear is causative and plays a role, it is not necessarily sufficient for the partial defence. Further, although entrapment can be caused by fear as a result of acts which are coercive, it can evince other emotions which are not accommodated by the partial defence.

[248] Coroners and Justice Act 2009 s5 (4) the section will not apply if in doing or being a party to the killing D acted in a considered desire for revenge.

the arena of the court room, problems about societal perceptions of who or what sort of woman is a victim are brought into sharp focus.

9.5.10 Third, the bespoke or personalised nature of coercive control can go to increase the gravity of the trigger rather than to the loss of control. This is potentially useful for cases of coercive control given the highly personal or bespoke nature of the abuse, but the decision in *Clinton*[249] namely, that there must be separate consideration of the three constituents of the partial defence namely, loss of control, the trigger, and whether a person of the age and sex of D with a reasonable degree of tolerance and self- restraint means that if there cannot be said to be a loss of control then the gravity of the trigger cannot even be considered. If the prosecution is able to show that the defendant had not lost her self-control, then the trigger cannot be considered by the jury, however compelling the evidence.

[249] *Ibid.*

9.5.11 There were only two cases in the case sample where loss of control was successfully advanced as a defence. In each case, the perpetrator was a woman who had been subjected to coercive control by the deceased. The sentences were within the manslaughter guidelines. Both convictions were the result of murder trials and in our view, it is significant that the trials were defended by specialist solicitors and/or counsel and/or had considerable input from specialist solicitors. Even then, the perpetrator in one case was retried after the first jury had been unable to reach a verdict.

9.5.12 In that case, the jury had found the defendant guilty of manslaughter notwithstanding that the trigger was not readily discernible and so the sentence was affected (CF08).

9.6 Diminished Responsibility

9.6.1 The partial defence requires a defendant to prove on the balance of probabilities that at the time of the killing, she or he was suffering from an abnormality of mental functioning

arising from a recognised medical condition which impaired his or her ability to understand his or her conduct, make a rational judgment and or exercise self-control. Further in order to provide an explanation for the killing, this must be a "significant contributory factor in causing D to carry out the conduct. [of killing]."

9.6.2 The principal problem in so far as diminished responsibility is concerned in cases where women use fatal violence is that it pathologies a normal response to domestic abuse. Coercive control is a pattern of behaviour which evinces a predictable response on the part of the victim. Diminished responsibility is predicated on abnormality of mental functioning caused by a medical condition.

9.6.3 Previous domestic abuse may lead to diagnoses such as those of PTSD or personality disorder (depending on childhood and adolescent experiences) which go to make a person hypervigilant and react to something in a particular way.

9.6.4 It is in such situations that the interface between "recognised medical conditions"[250] (such as say, PTSD)[251] and the results of coercive control should become significant. Such a dynamic was accepted by the Court of Appeal in *Challen.*[252]

9.6.5 However, psychiatrists are not usually experts in domestic abuse or coercive control and either fail to identify the pattern of coercive control and or the way in which it is either causative of or has interacted with psychiatric conditions. They would be assisted by expert opinion on domestic abuse or coercive

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[250] See s.2(1)(a) Homicide Act 1957. The statutory test of diminished responsibility requires the defence to prove on the balance of probabilities that D suffered from an "abnormality of mental functioning" which arises from "a recognised medical condition."

[251] *R v. Farieissia Surayah Shabirah Martin [2020] EWCA Crim 1790.*

[252] Although in that case, the court were considering the interplay between a dependent personality disorder, a mood disorder bordering on bipolar affective disorder and a long history of coercive control.

control, it is still not the case that such experts are routinely called.

9.6.6 In our case sample, there were four women convicted of manslaughter on the basis of diminished responsibly.

9.7 Lack of Intent to Cause Really Serious Harm

9.7.1 We have highlighted the context in which this defence to murder has arisen in cases of consensual violence during the course of sex at paragraphs and 8.3.7 of this report.

9.7.2 Within the sample of cases there were two cases which ultimately led to convictions for gross negligence manslaughter where the defence was that death or really serious harm had been unintended and occurred in the course of sex. In case **CM9** the prosecution started as a murder and concluded as a gross negligence manslaughter with the prosecution concluding that they would not be able to prove the requisite intent for murder. There has been concern among academics and other commentators that since the

implementation of the reforms to the partial defences brought about by the Coroners and Justice Act 2009, there have been unintended consequences. One unintended consequence of the reform of the partial defences has been to increase reliance by men on other defences which effectively shift the blame onto the (female) victim. Professor Edwards writes that the diminution on reliance on the partial defences of loss of control and diminished responsibility has corresponded with the emergence of the 'rough sex defence' where a perpetrator will argue that he[253] cannot be guilty of murder as he had no intent to cause grievous bodily harm. This latest development has been recently summarised as another false narrative by Herring and Bows as follows:

> "[Legislative attempts to address the rough sex defence] "have not appreciated that the problem is not with the substantive law itself, but the way evidence is presented at

[253] It is overwhelmingly men who kill women in these circumstances and not vice versa.

> trial and the broader social context within which these offences occur. The history of the law of male violence against women has been marked by excuses for violence, often shifting the blame and focus of the attention on the woman and away from the accountability of the male behaviour. This history of killings in that context is littered with excuses such as ‘she had an affair’ or ‘she kept nagging’ or ‘she was just so annoying’ or now, ‘she enjoyed rough sex.’ So there is a long history of the law enabling men to use stories to justify their abuse. The ‘rough sex defence is the latest in long line of these.”[254]

9.7.3 At paragraph 8.3.20 above we referred to the comments of the trial judge in **CM9** that particular questions had not been posed during investigation/prosecution of the perpetrator. This reinforces the views expressed by Herring and Bows.

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[254] Herring (Jonathan) and (Hannah): *Regulating intimate violence: rough sex, consent and death* – [2021] CFLQ 311, page 7.

9.7.4 Any review of defences should consider lack of intent in the context of these types of cases.

9.7.5 **Recommendation 17: We recommend** a comprehensive review of defences to murder in the form of a full public consultation involving all stakeholders including the higher courts judiciary. This should involve post-legislative scrutiny of the partial defence of loss of control, consideration of the defence of self-defence and consideration of what commentators have called ‘the rough sex defence’

Clare Wade QC

June 2022

10. Table of Recommendations

Recommendation 1 Paragraph 5.4.23	**Collection of data** We recommend that there should be a specific system for the collection of all relevant data in relation to all domestic homicides, which is maintained by the Home Office or the Ministry of Justice in conjunction with the Office of the Domestic Abuse Commissioner.
Recommendation 2 Paragraph 5.4.24	**Training** We recommend mandatory training for all lawyers and judges on understanding and applying the concept of coercive control.
Recommendation 3 Paragraph 7.1.13	**Taking a knife or a weapon to the scene** We recommend that the starting point of 25 years which applies in circumstances where a knife or other weapon is taken to the

	scene should be disapplied in cases of domestic murder because it denotes a starting point in which the vulnerability of the victim is not given any consideration. The harms that the previous paragraph 5A was introduced to prevent are very different from the sort of harms which occur in domestic murders.
Recommendation 4 Paragraph 7.1.14	We recommend that domestic murders should be given specialist consideration within the present sentencing framework under Schedule 21. A level of seriousness should be determined by application of the coercive control model within the normal 15 year starting point.
Recommendation 5 Paragraph 7.1.15	**Coercive controlling behaviour as aggravation and mitigation** We recommend that where there is a history of coercive control that this should be an aggravating

	or mitigating factor and that paragraphs 9 and 10 of schedule 21 should be amended accordingly.
Recommendation 6 Paragraph 7.1.16	**End of relationship** We recommend that if a murder takes place at the end of a relationship or when the victim has expressed the desire to leave the relationship then this should be regarded as an aggravating factor and that paragraph 9 of Schedule 21 should be amended accordingly.
Recommendation 7	We recommend that present mitigating factors in Schedule 21 paragraph 10(d) Sentencing Act 2020 should be amended so as to be consistent with the policy underlying s.55(5)(c) Coroners and Justice Act 2009. Specifically, that sexual infidelity on the part of the deceased cannot mitigate the murder.

Recommendation 8	**Overkill** We recommend that overkill should be defined in law as a specific legal harm and that it should be an aggravating factor in murder. Paragraph 9 of schedule 21 should be amended accordingly.
Recommendation 9 Paragraph 7.1.19	**Strangulation** We recommend that in the event of murder by strangulation or in a murder where strangulation has occurred, then this method of killing should be a statutory aggravating factor and that paragraph 9 of Schedule 21 should be amended accordingly. We also make a similar recommendation concerning manslaughter. See our recommendations 11 and 12 below.
Recommendation 10	We recommend that the use of a weapon in domestic murders

Paragraph 7.1.20	should not necessarily be seen as an aggravating factor.
Recommendation 11 Paragraph 8.1.23	**Voluntary manslaughter** We recommend that in cases of manslaughter by way of diminished responsibility consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor.
Recommendation 12 Paragraph 8.1.24	We recommend that in manslaughter by way of loss of control, consideration should be given to sentencing guidelines being amended to make strangulation an aggravating factor.
Recommendation 13 Paragraph 8.1.25	We recommend that in cases of manslaughter, consideration should be given to sentencing guidelines being amended to make coercive control on the part of the perpetrator of the killing towards the victim a factor which

	indicates higher culpability. Further, that consideration should be given to making coercive control towards the perpetrator of the killing by the victim of the killing a factor denoting lower culpability.
Recommendation 14 Paragraph 8.1.26	We recommend that consideration be given to whether the Overarching Principles on Domestic Abuse should be amended to contain explicit reference to assaults consisting of non-fatal strangulation being an aggravating factor.
Recommendation 15 Paragraph 8.2.10	We recommend that in cases of domestic manslaughter, consideration should be given to sentencing guidelines being amended to indicate that use of a weapon is not necessarily an aggravating factor.
Recommendation 16	We recommend that that where death occurs in the course of

Paragraph 8.3.29	violence which is alleged to be consensual during a sexual encounter between the perpetrator and the victim then whether the offender is charged with unlawful act manslaughter or gross negligence manslaughter, the killing should be categorised as category B high culpability.
Recommendation 17	We recommend a comprehensive review of defences to murder in the form of a full public consultation involving all stakeholders including the higher courts judiciary. This should involve post-legislative scrutiny of the partial defence of loss of control, consideration of the defence of self-defence, consideration of what commentators have called the 'rough sex defence'.

11. Appendices

Appendix A: Terms of Reference

Please see: https://www.gov.uk/government/publications/domestic-homicide-sentencing-review-terms-of-reference/domestic-homicide-sentencing-review-terms-of-reference (Accessed 16th February 2023)

1. Purpose of the Review
A review to ascertain, to the extent possible, how the current law applies to cases of domestic homicide (prosecuted as either murder or manslaughter) where an individual has caused the death of an intimate partner or former partner, and to identify options for reform where appropriate.

2. Objectives
The review will look at a cross-section of cases (in the form of an initial case review) to determine how cases of domestic homicide are dealt with under relevant sections of the current criminal law including statutory principles on sentencing for murder in relation to minimum term orders and relevant Sentencing Guidelines in relation to manslaughter, to assess how

perpetrators and victims are being treated within the law.

The review will consider the following:

- The impact of statutory starting points for minimum terms set out in Schedule 21 of the Sentencing Act 2020 and the statutory aggravating and mitigating factors in paragraphs 9 and 10 of the same Schedule on sentences for murder where the victim is an intimate partner or former partner of the perpetrator. This will include an assessment of whether these starting points and the aggravating and mitigating factors are leading to gender (or any other) disparities in terms of sentencing outcomes.
- The review will then assess whether, in the light of this evidence, the statutory starting points in Schedule 21 and the aggravating and mitigating factors, as applied in these cases of domestic homicide, are fit for purpose.
- One particular issue that the review will consider is how the relevant provisions in Schedule 21 to the Sentencing Act 2020 in relation to murder and Sentencing Guidelines in relation to manslaughter are used in cases of domestic homicide where a weapon has been used in various circumstances, notably cases where a weapon has been brought

to the scene of a killing with the necessary intent and where a weapon that is already at the scene has been used in a killing.

- The review will also consider any differences in the approach to sentencing of cases where a victim of domestic abuse has used a weapon to kill the perpetrator of such abuse compared to domestic homicide cases where a weapon is not used (by either a victim or perpetrator of domestic abuse) or where a weapon is used by a perpetrator of domestic abuse against his or her victim, in cases of murder and manslaughter.
- The use of current defences to charges of murder when used by domestic abuse victims who kill their abuser.
- To include specific consideration of any differences, in terms of case outcomes (including sentencing outcomes), arising from the use of these defences, including partial defences, when compared with charges of murder where the victim has not been an abuser.
- The way in which the Definitive Sentencing Guidelines for Manslaughter are being applied in cases of domestic homicide, particularly those

which are relevant to domestic abuse and how they may affect sentencing outcomes.

3. Scope

The review will examine cases of domestic homicide where an individual has caused the death of an intimate partner or former partner and has been charged and/or convicted of either murder or manslaughter. Such cases will have been dealt with in England and Wales. The primary focus of the initial case review will be an analysis of sentencing remarks in relation to the cross-section of cases, i.e. cases resulting in a conviction for either offence. The initial case review will also identify and analyse relevant data.

4. Outputs

There will be an initial report which seeks to provide an analysis of a selection of the above issues drawn from information gleaned from previous cases of domestic homicide ('the initial case review') and draw conclusions where possible.

This will be shared with the independent reviewer (see Governance below) who will consider the findings and, where appropriate, make recommendations for change. Any recommendations should be evidence-

based in that they can be shown to be directly attributable to the findings from the initial case review, any related data analysis and any additional external analysis which the independent reviewer thinks may be relevant. Further internal analysis may also be conducted by the independent reviewer where it is deemed appropriate.

The findings of both the initial case review and the independent reviewer will be published after consideration by the Secretary of State following the end of the review.

5. Timing

The initial case review should be conducted and report by July 2021. The full review, including any recommendations, must be submitted to the Secretary of State by the end of 2021. The Secretary of State will consider the review and its recommendations before determining whether further consultation is needed or publishing the report.

6. Governance and Methodology

The reviewer will take the form of an independent expert who will be appointed by, and accountable to, the Secretary of State for delivery of the review. Details of the governance which achieves this

accountability and the methodology for the review – including analysis of the initial case review and consultation with central government and other relevant bodies – will be agreed between the independent expert and the Secretary of State.

Appendix B: Glossary of Terms

Actus reus – the external element of a criminal offence i.e. the element which does not relate to an offender's state of mind. The actus reus will usually contain three elements namely the conduct element (the act) the circumstance element (the factual matrix in which the act occurs) and the consequence element (the consequence of the act).

Aggravating factor – a factor which increases seriousness for the purpose of sentence.

Battered Woman/Wife Syndrome – a pattern of signs indicated by women who suffer persistent domestic violence which was researched and coined by Leonore E. Walker. Walker based her theory on a cycle of violence involving tension, explosion crisis and reconciliation through which a woman would pass at least twice. Walker concluded that victims stayed in battering relationships because they developed "learned helplessness" as a result of the incidents of extreme violence.

Controlling and coercive behaviour/ coercive control – a pattern of abuse where an abuser uses a strategy of non-reciprocal tactics of intimidation,

isolation and control to undermine a victim's physical and psychological integrity with the main means to establish control being the microregulation of everyday behaviours associated with stereotypical female roles such as housework, child care and aimed at the deprivation of rights and resources that are an integral part of citizenship and personhood.

Crown Court Digital Case System – an electronic system used by the prosecution, defence and the court for recording, storing, accessing all case material in respect of a prosecution in the Crown Court or Court of Appeal (Criminal Division).

Cumulative Provocation – provocative conduct perpetrated by the deceased towards the defendant which has built up over time.

DASH – Domestic abuse stalking and 'honour' based violence risk indicator checklist- a tool for practitioners (police and other) to identify victims of domestic abuse and to assess level of risk.

Defendant – the person accused of an offence.

Diminished Responsibility – one of the partial defences to murder based on an abnormality of mental functioning arising from a recognised medical

condition which substantially impacts a defendant's ability understand the nature of his or her conduct, to form a rational judgment or exercise self-control and which provides an explanation for the killing.

Domestic Homicide Review (DHR) – an examination of the circumstances in which the death of a person aged 16 or over has or appears to have, resulted from violence abuse or neglect by a person to whom he or she was related or with whom he was or had been in an intimate relationship.

External element – see the actus reus.

Fault element – the mens rea of a criminal offence or state of mind of an offender.

Femicide – The killing of women and girls because they are women and girls.

Gaslight – to gaslight is to manipulate someone into questioning their own reality. Gendered-relating or specific to people of one particular gender.

Gross negligence manslaughter – involuntary manslaughter where death results from a negligent breach of a duty of care which is owed by the defendant to the deceased, that in the negligent

breach of that duty, the victim was exposed to the risk of death which was obvious and serious and that the circumstances were so reprehensible as to amount to gross negligence.

Intersectionality – the interconnected nature of social categorisations such as race, class and gender as applied to an individual or group which create overlapping and interdependent systems of discrimination or disadvantage.

Involuntary manslaughter – an unlawful killing which is done without the intention to cause really serious harm or to kill and therefore includes unlawful act manslaughter where recklessness is the fault element and gross negligence manslaughter where gross negligence is the fault element.

Law Commission – A statutory independent body which keeps the law of England and Wales under review and makes recommendations for reform.

Loss of control – One of the partial defences to murder which reduces murder to manslaughter if a defendant kills out of a loss of self-control which is triggered by a fear of serious violence or a justifiable sense of being seriously wronged in circumstances

where a person of the defendant's sex and age with a normal degree of tolerance and self-restraint might have reacted in the same or similar way.

Mens rea – the fault element of a criminal offence which relates to the offender's state of mind i.e. intent, recklessness or negligence as opposed to their act.

Minimum term – the term which an offender convicted of murder and sentenced to life imprisonment must serve before he or she is eligible to apply for parole.

Misogyny – hatred of women.

Mitigating factor – a factor which goes to make an offence less serious for the purpose of sentence.

Morbid Jealousy – a psychiatric syndrome based on pathological jealousy also known as "Othello syndrome."

Murder – an offence the actus reus or external element of which is to unlawfully cause the death of the victim and the fault element or mens rea is to intend to kill or to cause grievous bodily harm.

Overkill – the use of excessive, gratuitous violence beyond that necessary to cause death.

Patriarchy – a social system in which men hold the power to their own advantage and women are excluded from power.

Perspecticide – a term used by Evan Stark to describe the loss of perspective by a victim of coercive control who has been gaslighted.

Post-Traumatic Stress Disorder – a psychiatric diagnosis resulting from a person having experienced or witnessing a traumatic event or events in the case of Complex Post-Traumatic Stress Disorder.

Practice Direction – directions issued by the higher courts setting out best practice.

Provocation – an abolished partial defence to murder whereby a defendant could claim that he or she was provoked to lose his or her self-control because of things done or said by the victim.

Recklessness – a fault element where a defendant appreciates that there is a risk and in the circumstances known to him it is unreasonable to take that risk he goes onto take that risk.

Rough sex defence – the term used by commentators to describe the situation where a

defendant asserts that a victim was injured or died as a result of rough sex to which she consented.

Sentencing Council – an independent non-departmental public body set up in 2010 which develops guidelines on sentence, monitors the impact of sentencing guidelines on sentencing practice and promotes awareness of sentencing among the public.

Sentencing Guidelines – guidelines issued by the Sentencing Council after formal consultation. The guidelines are intended to create transparency and consistency.

Starting point – figure in sentencing guidelines in respect of sentences other than murder (where guidelines are contained in Schedule 21 Sentencing Act 2020) which applies to all offenders irrespective of plea or previous convictions. The guidelines also provide non-exhaustive lists of aggravating and mitigating factors relating to the context of the offence and the offender. These factors can result in an upward or downward adjustments.

The Appellant – the person who has been granted leave to appeal against conviction or sentence.

The Applicant – the person who applies for leave to appeal against conviction or sentence. Ulterior intent- an intention to bring about a consequence beyond the criminal act or crime concerned.

Unlawful Act Manslaughter – a type of involuntary manslaughter where the fault element is recklessness.

Voluntary manslaughter – manslaughter where intent to cause really serious harm or to kill is the fault element and so all the elements of murder are present but the offence is mitigated to manslaughter by one or other of the partial defences namely, diminished responsibility or loss of control.

Appendix C: Schedule 21 Sentencing Act 2020

Please see: https://www.legislation.gov.uk/ukpga/2020/17/schedule/21 (Accessed 16th February 2023)

SCHEDULE 21

DETERMINATION OF MINIMUM TERM IN RELATION TO MANDATORY LIFE SENTENCE FOR MURDER ETC

Modifications etc. (not altering text)
C1 Sch. 21 modified (28.6.2022) by 2006 c. 52, s. 261A(5) (as inserted by Police, Crime, Sentencing and Courts Act 2022 (c. 32), ss. 148, 208(5)(p))

Interpretation

1 In this Schedule—

"child" means a person aged under 18;

"mandatory life sentence" means a mandatory life sentence passed in circumstances where the sentence is fixed by law.

Commencement Information
I1 Sch. 21 para. 1 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

Starting points

2 (1) If—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when the offence was committed,

the appropriate starting point is a whole life order.

(2) Cases that would normally fall within sub-paragraph (1)(a) include—

(a) the murder of two or more persons, where each murder involves any of the following—

(i) a substantial degree of premeditation or planning,

(ii) the abduction of the victim, or

(iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

[F1 (ba) the murder of a child involving a substantial degree of premeditation or planning, where the offence was committed on or after the day on which section 125 of

the Police, Crime, Sentencing and Courts Act 2022 came into force,**]**

(c) the murder of a police officer or prison officer in the course of his or her duty, where the offence was committed on or after 13 April 2015,

(d) a murder done for the purpose of advancing a political, religious, racial or ideological cause, or

(e) a murder by an offender previously convicted of murder.

Textual Amendments

F1 Sch. 21 para. 2(2)(ba) inserted (28.6.2022) by Police, Crime, Sentencing and Courts Act 2022 (c. 32), ss. 125, 208(5)(l)

Commencement Information

I2 Sch. 21 para. 2 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

3 (1) If—

(a) the case does not fall within paragraph 2(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and

(b) the offender was aged 18 or over when the offence was committed,

the appropriate starting point, in determining the minimum term, is 30 years.

(2) Cases that (if not falling within paragraph 2(1)) would normally fall within sub-paragraph (1)(a) include—

(a) in the case of a offence committed before 13 April 2015, the murder of a police officer or prison officer in the course of his or her duty,

(b) a murder involving the use of a firearm or explosive,

(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),

(d) a murder intended to obstruct or interfere with the course of justice,

(e) a murder involving sexual or sadistic conduct,

(f) the murder of two or more persons,

(g) a murder that is aggravated by racial or religious hostility or by hostility related to sexual orientation,

(h) a murder that is aggravated by hostility related to disability or transgender identity,

where the offence was committed on or after 3 December 2012 (or over a period, or at some time during a period, ending on or after that date),

(i) a murder falling within paragraph 2(2) committed by an offender who was aged under 21 when the offence was committed.

(3) An offence is aggravated in any of the ways mentioned in sub-paragraph (2)(g) or (h) if section 66 requires the court to treat the fact that it is so aggravated as an aggravating factor.

Commencement Information
I3 Sch. 21 para. 3 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

4 (1) If—

(a) the case does not fall within paragraph 2(1) or 3(1),

(b) the offence falls within sub-paragraph (2), **F2**...

(c) the offender was aged 18 or over when the offence was committed, **[F3**and**]**

(d) the offence was committed on or after 2 March 2010,

the offence is normally to be regarded as sufficiently serious for the appropriate starting

point, in determining the minimum term, to be 25 years.

(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—

(a) commit any offence, or

(b) have it available to use as a weapon,

and used that knife or other weapon in committing the murder.

Textual Amendments

F2 Word in Sch. 21 para. 4(1)(b) omitted (28.6.2022) by virtue of Police, Crime, Sentencing and Courts Act 2022 (c. 32), s. 208(5)(aa), Sch. 21 para. 9(a)

F3 Word in Sch. 21 para. 4(1)(c) inserted (28.6.2022) by Police, Crime, Sentencing and Courts Act 2022 (c. 32), s. 208(5)(aa), Sch. 21 para. 9(b)

Commencement Information

I4 Sch. 21 para. 4 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

5 If the offender was aged 18 or over when the offence was committed and the case does not fall within paragraph 2(1), 3(1) or 4(1), the appropriate starting point, in determining the minimum term, is 15 years.

Commencement Information

I5 Sch. 21 para. 5 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

[F4 5A (1)This paragraph applies if—

(a) the offender was aged under 18 when the offence was committed, and

(b) the offender was convicted of the offence on or after the day on which section 127 of the Police, Crime, Sentencing and Courts Act 2022 came into force.

(2) The appropriate starting point, in determining the minimum term, is the period given in the entry in column 2, 3 or 4 of the following table that corresponds to—

(a) the age of the offender when the offence was committed, as set out in column 1, and

(b) the provision of this Schedule that would have supplied the appropriate starting point had the offender been aged 18 when the offence was committed, as set out in the headings to columns 2, 3 and 4.

1	*2*	*3*	*4*
Age of offender when offence committed	***Starting point supplied by paragraph 3(1) had offender been 18***	***Starting point supplied by paragraph 4(1) had offender been 18***	***Starting point supplied by paragraph 5 had offender been 18***
17	27 years	23 years	14 years
15 or 16	20 years	17 years	10 years
14 or under	15 years	13 years	8 years

Textual Amendments

F4 Sch. 21 paras. 5A and 6 substituted (28.6.2022) for Sch. 21 para. 6 by Police, Crime, Sentencing and Courts Act 2022 (c. 32), ss. 127, 208(5)(l)

6 (1) This paragraph applies if—

(a) the offender was aged under 18 when the offence was committed, and

(b) the offender was convicted of the offence before the day on which section 127 of the Police, Crime, Sentencing and Courts Act 2022 came into force.

(2) The appropriate starting point, in determining the minimum term, is 12 years.**]**

Textual Amendments

F4 Sch. 21 paras. 5A and 6 substituted (28.6.2022) for Sch. 21 para. 6 by Police, Crime, Sentencing and Courts Act 2022 (c. 32), ss. 127, 208(5)(l)

Aggravating and mitigating factors

7 Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point.

Commencement Information

I6 Sch. 21 para. 7 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

8 Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

Commencement Information

I7 Sch. 21 para. 8 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

9 Aggravating factors (additional to those mentioned in paragraphs 2(2), 3(2) and 4(2)) that may be relevant to the offence of murder include—

(a) a significant degree of planning or premeditation,

(b) the fact that the victim was particularly vulnerable because of age or disability,

(c) mental or physical suffering inflicted on the victim before death,

(d) the abuse of a position of trust,

(e) the use of duress or threats against another person to facilitate the commission of the offence,

(f) the fact that victim was providing a public service or performing a public duty, and

(g) concealment, destruction or dismemberment of the body.

Commencement Information
I8 Sch. 21 para. 9 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

10 Mitigating factors that may be relevant to the offence of murder include—

(a) an intention to cause serious bodily harm rather than to kill,

(b) lack of premeditation,

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the

Homicide Act 1957) lowered the offender's degree of culpability,

(d) the fact that the offender was provoked (for example, by prolonged stress) but, in the case of a murder committed before 4 October 2010, in a way not amounting to a defence of provocation,

(e) the fact that the offender acted to any extent in self-defence or, in the case of a murder committed on or after 4 October 2010, in fear of violence,

(f) a belief by the offender that the murder was an act of mercy, and

(g) the age of the offender.

Commencement Information

I9 Sch. 21 para. 10 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

11 Nothing in this Schedule restricts the application of—

(a) section 65 (previous convictions),

(b) section 64 (bail), or

(c) section 73 (guilty plea),

or of section 238(1)(b) or (c) or 239 of the Armed Forces Act 2006.

Commencement Information

I10 Sch. 21 para. 11 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

Offences committed before 18 December 2003

12 (1) This paragraph applies where the offence was committed before 18 December 2003.

(2) If the court makes a minimum term order, the minimum term must, in the opinion of the court, be no be greater than the period which, under the practice followed by the Secretary of State before December 2002, the Secretary of State would have been likely to notify to the offender as the minimum period which in the view of the Secretary of State should be served before the prisoner's release on licence.

(3) The court may not make a whole life order unless it is of the opinion that, under the practice followed by the Secretary of State before December 2002, the Secretary of State would have been likely to notify the prisoner that the Secretary of State did not intend that the prisoner should ever be released on licence.

Commencement Information

I11 Sch. 21 para. 12 in force at 1.12.2020 by S.I. 2020/1236, reg. 2

Appendix D: Summary of Findings from Review Team from Sentencing Remarks

Methodology

For the first stage of this review, the sentencing remarks of a sample of 120 cases of domestic homicide between 2018 and 2020 where the victim was a partner or ex-partner of the offender were analysed. Most cases were concluded in the courts during the financial years 2018/2019 and 2019/2020.

The cases were identified from data supplied by the Crown Prosecution Service/HMCTS, the Home Office Homicide Index and some ad hoc research (from news reports and other sources).

The sentencing remarks were reviewed with a focus on the following areas:

- Gender of perpetrator and victim.
- Offence sentenced for: murder or manslaughter and, for manslaughter, the type (diminished responsibility, unlawful act etc.).
- Sentence given.
- Defence raised.
- Aggravating and mitigating factors.

- Use of a weapon, including whether it was from the scene or taken to the scene.
- Whether the perpetrator and/or victim had experienced domestic abuse during or after the relationship.

This was then added to as the review developed to also include:

- **End of the relationship and jealousy:** Following a review of the evidence uploaded to the Crown Court Digital Case System ('CCDCS') in the cases of Thomas Griffith and Joe Atkinson, whether the killing had occurred at or after the end of the relationship and evidence of jealousy were factored into our sample of 120 cases. Where the CCDCS could not be used, sentencing comments were used, augmented by media reports.
- **'Overkill':** This is defined in the literature as "the use of excessive, gratuitous violence beyond that necessary to cause the victim's death." For this analysis, a subjective judgment on whether overkill had occurred was made based on the circumstance of each case (for example, if a victim was stabbed 20 times). The use of aggravating factors of "sustained attack" or "physical and mental suffering" applied by the judge in the

sentencing remarks was used as a proxy for whether overkill was being given weight or not when sentencing.

- **Strangulation:** This was done by identifying the presence of strangulation in the killing from the details of the case and whether there was any mention in the sentencing remarks of the method of killing being an aggravating factor and whether there was a prior history of strangulation in the relationship.
- **Coercive control:** Building on the analysis of domestic abuse during or after the relationship, mention of coercive control was reviewed.

Where numbers allowed, the results were analysed by gender.

Limitations

There are several limitations that need to be considered when interpreting the results from this analysis.

- Due to the methods used to identify relevant cases to analyse, there is no guarantee that every relevant case from the period reviewed has been identified.

- Sentencing remarks are, by their nature, a summary of how the sentence was reached and are not a full representation of the case. As such, findings are limited to what has specifically been mentioned in the remarks. For example, factors have only been coded as aggravating or mitigating where explicitly referred to as such. This does not necessarily mean that a judge did not have a particular factor in mind just because it was not remarked on specifically.
- Likewise, findings on previous domestic abuse and coercive control by the perpetrator or victim were limited to what was mentioned in sentencing remarks. Considering the wider issues of under reporting of domestic abuse and challenges in relation to the existence of evidence in domestic abuse cases, these findings are likely to be an under report.
- Cases included those completed in 2018/19 and 2019/20. The Sentencing Council published new guidelines effective November 2018 of how offenders convicted of manslaughter should be sentenced in England and Wales. However, the guidelines promote consistency in sentencing and transparency in how sentencing decisions should

be reached, so are unlikely to change sentence levels for most case types (changes may affect Gross Negligence cases more than others).

- Care must be taken when interpreting small numbers to form conclusions, particularly when working out averages (such as average sentence/tariff length received). This is particularly the case for gender breakdowns due to the relatively small number of cases with female perpetrators.
- Missing data is excluded from calculations.

The findings from the sentencing remarks analysis are limited to what has been recorded and results should therefore be considered indicative and will have an element of subjective interpretation.

Findings

Whilst findings from this review have been included throughout the report, a summary of the findings is provided below. Totals in tables/figures may not add to 100% where they are rounded.

Gender of perpetrator and victim

- As shown in Table 1, most perpetrators were male, accounting for 83% of the total sample, 91% of the murder cases and 58% of manslaughter cases.

- Female perpetrators accounted for 21 (18%) cases in the sample.

Table 1: Offence type by gender of perpetrator

Gender of Perpetrator	Murder	Manslaughter	Total
Male	81 (91%)	18 (58%)	99 (83%)
Female	8 (9%)	13 (42%)	21 (18%)
TOTAL	**89 (100%)**	**31 (100%)**	**120 (100%)**

- In all but one case, the domestic homicides involved those in a heterosexual relationship. There was one case with a female perpetrator and victim.
- Therefore, all male perpetrators had female victims and 20 of the 21 female perpetrators had male victims. As such, most victims (n=100, 83%) were female.

Offence

- There were 89 (74%) sentences for murder and 31 (26%) for manslaughter.
- Table 2 shows the type of manslaughter perpetrators were sentenced for. Unlawful act and

diminished responsibility were the two most common types.

- Six of the 12 manslaughter by diminished responsibility perpetrators were sentenced to a hospital order with restrictions, including one female perpetrator.
- Loss of control was a defence made in 11 (9%) of the 120 cases in the case sample. It was successful in 2 of those cases.

Table 2: Type of manslaughter by gender of perpetrator

Type	Female Perpetrator	Male Perpetrator	Total Number (%)
Unlawful Act	7	6	13 (42%)
Diminished Responsibility	4	8	12 (39%)
Gross Negligence	0	3	3 (10%)
Loss of Control	2	0	2 (6%)
Not Recorded	0	1	1 (3%)

Type	Female Perpetrator	Male Perpetrator	Total Number (%)
TOTAL	**13**	**18**	**31 (100%)**

Sentencing starting points for murder cases

- When sentencing murder cases, a sentencing starting point is allocated based on Schedule 21. The final sentence will also consider aggravating or mitigating factors, previous convictions, and any guilty plea.
- Table 3 sets out the number of murder cases in our sample by their sentencing starting point based on Schedule 21. Most sentences for murder in our sample had a starting point of 15 years. None had a starting point of a whole life order.
- For under-18s, the starting point is 12 years. As shown in Table 3, there was one youth in the sample.

Table 3: Number of murder cases by sentencing starting point

Sentencing Starting Point	Number (%)
12 years	1 (1%)
15 years	68 (76%)
25 years	11 (12%)
30 years	9 (10%)
TOTAL	**89 (100%)**

- The average minimum term for all 89 murder cases was 20.5 years
- For cases with a starting point of 15 years it was 18.7 years.
- The average tariff for murder cases for male perpetrators was 20.8 years and 17.6 years for female perpetrators. However, the small number of the latter (n=8) prevents any firm conclusions being made.
- There were five female perpetrators who had a starting point of 15 years and, as two of them received a lower tariff than this, the average tariff for the five women was 14.6 years compared to

men with a 15 year starting point who, on average, received 19 years. These figures should be viewed with caution however given the very low numbers of females involved.

Use of a weapon

- A weapon was recorded as being used in 72% of the cases analysed and in 73% of murder cases.

Table 4: Use of a weapon by offence

Offence	Murder	Manslaughter	All Cases
Weapon Used	63 (73%)	21 (68%)	86 (72%)
No Weapon Used	24 (27%)	10 (32%)	34 (28%)
TOTAL	89 (100%)	31 (100%)	120 (100%)

- All female perpetrators with a male victim used a weapon. The one female perpetrator who did not use a weapon had a female victim – this was a manslaughter case.
- As shown in Table 5, two thirds of male perpetrators used a weapon.
- In 16 cases in the sample (13%) the killing was carried out by way of infliction of a single stab

wound (which could indicate that the stabbing was purely functional in causing death). In 10 of these cases (63%) the perpetrator was female and in 6 (37%) the perpetrator was male.

Table 5: Use of a weapon by gender

Offence	Female Perpetrator	Male Perpetrator
Weapon Used	20 (95%)	66 (67%)
No Weapon Used	1 (5%)	33 (33%)
TOTAL	**21 (100%)**	**99 (100%)**

- For murder cases, Schedule 21 was amended to include a new category of seriousness based on an offender taking a knife to the scene intending to (a) commit any offence, or (b) have it available to use as a weapon, and (c) used that knife or other weapon when committing the murder. In this sample, the average minimum tariff for cases where a weapon was taken to the scene was 6.5 years higher than the average for cases where a weapon was not classed as having been taken to the scene.

End of relationship/jealousy

- The end of a relationship and/or jealousy was commented on in 45 cases (38%). Only one of these involved a female perpetrator.
- Of all 99 cases which involved a male perpetrator, jealousy or resentment at the end of the relationship was thought to be a catalyst in the killing in 44 (44%) cases.
- Of the 89 murder cases, 43 (48%) involved the end of a relationship and/or jealousy. All but one of these cases involved a male perpetrator.

Coercive control during or after the relationship

- Coercive control of the victim was recorded as having happened in 46 (38%) of the 120 cases. All perpetrators in these cases were male and 45 of these cases were murder cases.
- In 29% of the total 99 cases which involved a male perpetrator the perpetrator had been coercive and controlling towards the victim and feelings of jealousy or resentment at the ending of the relationship could be considered to be the catalyst for the killing.

Overkill

- In 56 (47%) of the 120 cases a subjective assessment was made that overkill had occurred.
- A weapon was used in 49 (88%) of the overkill cases.

By gender of perpetrator

- Male perpetrators accounted for all but one overkill cases, so 56% of the 99 cases involving a male perpetrator involved overkill whereas one (5%) of the 21 cases with a female perpetrator did.
- In more than half (56%) of the overkill cases involving a male perpetrator, feelings of jealousy or resentment at the end of the relationship could be considered to be the catalyst for the killing.
- Of the 55 overkill cases involving a male perpetrator, two in five (40%, n=22) were cases in which it was noted that the perpetrator had previously controlled and coerced the victim and there were feelings of jealousy or resentment at the end of the relationship that could be considered the catalyst for the killing.

Offence type

- Most (95%, n=53) overkill cases were sentenced for murder, but 3 (5%) were sentenced for

manslaughter (all male perpetrator cases). As an aggravating factor.

- Overkill was referred to in sentencing remarks in the form of the aggravating factors of a sustained attack/ prolonged mental/physical suffering in 40 (71%) of the 56 cases. There was also one case where it was instead reflected in the harm/culpability assessment.

Strangulation

- 35 (29%) of the 120 cases involved strangulation. Most (91%, n=32) of these involved manual strangulation, with the remaining three involving the use of a ligature.
- Only one case (manual strangulation) involved a female perpetrator and the victim was also female.
- Of the 34 cases with a male perpetrator, 16 (47%) solely involved manual strangulation and in the remaining 18 (53%) cases, strangulation was carried out with a ligature or was accompanied by an assault or an attack with a weapon.
- 27 (77%) of the 35 strangulation cases were murder cases with an average tariff of 18.6 years.
- Of the 13 murder cases committed solely by way of manual strangulation, the average minimum term

was 18.1 years. However, there was one case which fell into the 30 year starting point because it was done for gain and when this case was removed, the average minimum term was 17.1 years. The remaining 14 strangulation cases resulting in a murder conviction involved an additional assault with or without a weapon or the use of a ligature. The average sentence length was 18.6 years.

- The remaining eight were manslaughter – four by diminished responsibility (including the female perpetrator case) and four as an unlawful act.
- In 16 of the 35 (46%) cases there was a history of domestic abuse by the perpetrator (including the one female perpetrator case); in 13 (37%) of the 35 cases coercive control by the perpetrator was recorded (all male perpetrators); and in 8 cases there was a history of previous non-fatal strangulation (all male perpetrators).
- The end of the relationship and/or jealousy was noted as a catalyst for the killing in 12 (34%) of the 35 cases (all male perpetrators).
- In 15 (43%) of the 35 cases (including the case with the female perpetrator) the method of the killing was noted as an aggravating factor.

However, in 11 of these 15 cases (all male perpetrators) the strangulation was part of a wider attack or assault.

- In 14 of the 34 (41%) strangulation cases with a male perpetrator, the sentencer considered the offence was aggravated due to the suffering inflicted by the attack but in the remaining 20 cases (59%) there was no recognition of the method of the killing in those factors which were said to aggravate the offence.

Appendix E: Home Office Homicide Index Data

Context

Data on police recorded domestic homicides between April 2016 and March 2020 from the Home Office Homicide Index[255] were shared with the Ministry of Justice to support this review.[256] In line with the review's definition of 'domestic', only homicide cases where the perpetrator was an intimate partner and/or ex-partner were included in the data received.

Notes

- As at 15 December 2020 and figures are subject to revision as cases are dealt with by the police and by the courts, or as further information becomes available.
- For the purposes of the Homicide Index, analyses are based on the principal suspect in a given homicide case.

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255 As at 15 December 2020. Figures are subject to revision as cases are dealt with by the police and by the courts, or as further information becomes available.

256 A data share agreement was put in place for this data to be shared in line with Data Protection requirements.

- Suspects in a homicide case are defined as either: a person who has been charged with a homicide offence, including those who were subsequently convicted and those awaiting trial or a person who is suspected by the police of having committed the offence but is known to have died or died by suicide. Suspects that were acquitted have been included in this analysis, which departs from published statistics.

Findings

- Between April 2016 and March 2020, there were 350 cases of intimate partner/ex-partner homicides (including those resulting in acquittal).
- Of the 350 principal suspects of intimate partner/ex-partner homicide cases, 87% (305) were male and 13% (45) female.

Table 1: Intimate partner/ex-partner homicide cases, April 2016 to March 2020

12 Months Ending				TOTAL
March 2017	March 2018	March 2019	March 2020	
97	77	104	72	350

- As shown in Table 2, the most common method of killing in intimate partner domestic homicide cases (44%) was by a sharp instrument.
- Strangulation was the next common method of killing (21% of all cases), however, this was almost purely driven by male suspects (24% of all cases with a male principal suspect, compared with 2% of cases with a female principal suspect).

Table 2: Method used in intimate partner/ex-partner homicide cases, April 2016 to March 2020

	All Cases	Female Principal Suspects	Male Principal Suspects
Sharp Instrument	44%	67%	41%
Blunt Instrument	10%	11%	10%
Hitting, Kicking etc	9%	7%	10%
Strangulation	21%	2%	24%
Shooting	3%	0%	4%
Explosion	0%	0%	0%

	All Cases	Female Principal Suspects	Male Principal Suspects
Burning	1%	2%	1%
Drowning	1%	0%	1%
Poison of Drugs	1%	0%	1%
Motor Vehicle	1%	2%	1%
Other	1%	2%	1%
Not Known	7%	7%	7%
Total	**350**	**45**	**305**

- Where final outcome was known, seven principal suspects went on to be acquitted or the proceedings were discontinued.

Appendix F: Manslaughter Definitive Guideline Sentencing Council

Please see: https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-definitive-guideline-Web.pdf (Accessed 16th February 2023)

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978-1-5286-3935-4