

Stalking – A Serious Concern

Bar Council – Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar Council welcomes the opportunity to contribute to the Department of Justice's consultation on the creation of a specific stalking offence in Northern Ireland. The Bar recognises that the Department's work in this area builds on the work of the review initiated by the Assembly's Committee for Justice in 2017 and our response to the consultation is structured according to our comments on the various questions contained in the document.

1. Do you think the offences of "harassment" and "putting people in fear of violence" in the current legislation provide sufficient protection to victims?

3. Whilst there is no legal definition of stalking contained in the criminal law in Northern Ireland, we recognise that it often takes the form of a long-term pattern of behaviour than can have devastating and serious impacts for victims. We note that recent figures from the PSNI for the offence of harassment show an increase of 26% in recording figures from 3,048 in 2016-2017 to 3,839 in 2017-2018.¹ It is not possible to quantify the proportion of these which could be classified as stalking without further information although the inclusion of malicious communications offences within this classification may help to explain the rise in this type of offence. Meanwhile the current law principally applying to prosecutions for stalking behaviour is the Protection from Harassment (Northern Ireland) Order 1997 and there are presently a range of offences contained within this which may constitute the stalking type behaviours outlined in paragraph 4.2. As highlighted in Annex A, the most recent figures from the PPS for 2017 show that there were 7 Crown Court Prosecutions, 377 Magistrates' Court prosecutions

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¹ Police Service of Northern Ireland, 'Police Recorded Crime in Northern Ireland: Update to 31 May 2018', June 2018, at <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/police-recorded-crime-statistics/2018/may/crime-bulletin-may-18.pdf> (last accessed 19 February 2019)

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and 33 diversionary disposals in relation to the 1997 Order yet it is unclear as to which relate to stalking type cases.

4. Article 4(1) of the 1997 Order on harassment details the need for a “course of conduct” which is defined as involving conduct on at least two occasions and can include alarming or causing distress. Practitioners indicate that this offence can be used in relation to behaviour of any type, including serious cases in which the harassment has been persistent over a long time period and has had a damaging impact on the complainant. Therefore harassment cases being brought before the courts are likely already covering behaviour of the type which would be considered stalking within this consultation. It is worth noting that the legislative definition of harassment is broad and adaptable in nature which gives it the capacity to cover a wide range of acts.
5. Meanwhile Article 6 of the 1997 Order refers to “putting people in fear of violence” and arises where a person’s course of conduct causes another to fear, on at least two occasions, that violence will be used against them. The offence of causing another to fear violence can be used where a complainant is being harassed by way of threats of violence in the future, whether verbally or otherwise by the defendant’s actions. It is worth highlighting that at present this offence could potentially be relevant in a stalking case and carries a significant penalty in the Crown Court of up to seven years.
6. In addition to Articles 4 and 6 of the 1997 Order, it is also noteworthy that the court may consider a restraining order which is provided for under Articles 7 and 7A. The legislation permits for a restraining order in the case of either a conviction or an acquittal and allows for a wide scope of prohibitions on a defendant’s behaviour at the discretion of the court. Breach of a restraining order is a criminal offence, as noted at paragraph 5.7. Meanwhile there are also other pieces of legislation which may be relevant to cases involving stalking behaviour, such as the Malicious Communications (NI) Order 1988, the Communications Act 2003, the Public Order (NI) Order 1987 and the Family Homes and Domestic Violence (NI) Order 1988.
7. At present the foundation of prosecutions in stalking type behaviour cases is typically the offence of harassment. A key element of a stalking case is the likely involvement of an accumulation of behaviours which combine to constitute intrusive and persistent conduct which causes distress to the complainant. The current legislation already provides the ability to prosecute by way of the bringing

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together of a range of acts under one prosecution, helping to create a comprehensive picture of the nature of the alleged criminal behaviour. Articles 4 and 6 of the 1997 Order can be flexible to enable cases involving stalking type behaviour to be dealt with as a series of acts which may be wide-ranging in both scope and time.

8. The experience of practitioners suggests that the legislative tools for dealing with stalking behaviours are robust in nature which allows for prosecutions in this area; challenges typically arise instead in respect of corroborating evidence. Despite this, we recognise there may be some benefit in exploring the feasibility of evolving our current laws to create a consolidated piece of legislation which could help to distinguish stalking behaviours by ensuring that they do not become hidden amongst or conflated with other related offences. It is also worth highlighting that changing the law in this area will not suffice in terms of addressing the issue of stalking. There is also an essential need for public awareness raising and greater education around recognising the complex nature of stalking and promoting the message that this behaviour will not be tolerated. This work should be taken forward by the Department of Justice with input from other stakeholders working across the justice sector.

2. Have you any direct experience of how stalking cases have been handled by the Criminal Justice System?

If Yes, how can we make the system be more effective in supporting victims of stalking and dealing with such offences?

9. No direct experience but members of the Bar are routinely instructed in prosecuting and defending criminal cases involving offences under The Protection from Harassment (Northern Ireland) Order 1997 in courts across Northern Ireland. We welcome the steps already being taken at a coordinated policy level to help ensure that the criminal justice system operates more effectively in dealing with stalking type behaviours. For example, enhanced cooperation between criminal justice partners and more joined up working in terms of the sharing of best practice referenced at paragraph 6.2 is to be commended. Others will be better placed to comment on the need for more practical support measures for victims.

10. In addition, the Human Rights Guidance for Criminal Justice Partners in relation to domestic abuse and stalking produced by the Attorney General in April 2018 sets out a range of helpful information for actors within the PPS, PSNI, PBNI and the NICTS. Whilst this does not relate specifically to an action for the Bar, we

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consider that paragraph 37 around the need for recording and analysis of every reported incident of stalking by the PSNI is of vital importance in this area given that the currently available statistics around harassment are lacking in detail. We would also be supportive of the comment at paragraph 38 that the PSNI and PPS should be collecting and publishing disaggregated data at regular intervals on stalking which is made publicly accessible. The provision of such information would be useful in helping justice sector organisations to understand the extent of stalking behaviours across Northern Ireland.

3. What do you consider to be the main challenges in identifying cases of stalking at an early stage (as opposed to harassment)?

11. The Bar suggests that the common features of stalking and harassment that present challenges typically include the unwillingness of individuals to come forward with complaints and pursue them through the court process and the potential for counter allegations of abuse by an accused. There can also be issues of identity, particularly in situations involving stalkers who are strangers to their victims.

4. Do you think more could be done to support the effective gathering of evidence to bring stalking charges?

12. The Bar takes the view that this a practical question on which others, such as the PSNI, are better placed to comment.

5. If a new offence of stalking were to be introduced, are the behaviours listed in other jurisdictions above relevant and sufficient? (Scotland/England and Wales)

13. The Bar notes that the stalking legislation in both England & Wales and Scotland does not define stalking in legal terms but instead they list types of conduct which may constitute stalking behaviour. The types of conduct detailed in paragraph 7.13 relating to Scotland appear more comprehensive than the acts listed in 7.14 for England and Wales. If a new offence of stalking were to be introduced, it might be helpful for any listed behaviours not to be exhaustive but rather to be used to provide an indication as to the types of behaviour that may be displayed in this type of case. It could also be useful for legal guidance, similar to that produced by the Crown Prosecution Service in England, to be provided to the legal profession to help in properly differentiating between cases of stalking and harassment.

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There is a risk that stalking could be misidentified as harassment given the likely overlap in legislation if a new offence is introduced and awareness raising will be key to ensuring that this does not happen.

6. Should a new stalking offence require more than one incident to constitute an offence?
7. Should a further offence be considered if threatening or abusive behaviour is committed after a single act?

14. The Bar takes the view that stalking is typically considered to involve a long-term pattern of unwanted and persistent conduct directed by one person against another. Therefore we believe that at least two incidents should be required to constitute an offence of stalking under any new legislation. It is worth noting the general need for care to be taken in approaching the development of course of conduct offences, especially given the risk that it could lead to the criminalisation of individual behaviours which, whilst unattractive, can be a feature within personal relationships.

15. The suggestion of having a related offence which would be capable of being committed after just once incident, as in Scotland which has an offence of threatening and abusive behaviour under Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, is something which may be worth consideration. Whilst the Bar believes that the statistics provided in the consultation paper demonstrate that the 1997 Order is operating effectively, there could be merit in seeking to evolve this area of law by using Scotland's system as a model for development given that our law already shares some similarities with it.

16. However, we note that there is limited evidence contained within the consultation paper as to how effectively the offences are operating in England and Wales & Scotland in practical terms. The Bar would welcome the provision of information detailing the number of charges where a prosecution commenced alongside the number of convictions and acquittals under the offences contained in the relevant legislation in these jurisdictions.

8. Where should we set our levels of penalties? (Scotland/England and Wales)

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17. The Bar agrees that if a new stalking offence is to be created in Northern Ireland then it will be necessary to determine appropriate penalties on conviction. The policy intention behind the treatment of stalking as a separate offence from harassment signifies the devastating and long-lasting impact that it can have on victims and may necessitate that a greater penalty should be attached to it. It is possible that we could seek to evolve our laws to consider the model in Scotland for the offence of stalking under which an individual on conviction on indictment can be sentenced to imprisonment for a term not exceeding 5 years and/ or to a fine or on summary conviction to imprisonment for a term not exceeding 12 months and/or a fine not exceeding £5000.

9. Do you agree that stalking should not be treated solely as a criminal justice issue? What other agencies should be involved?

18. The Bar agrees that stalking should not be treated solely as a criminal justice issue and there must be an overall strategy across Government which works to address wider issues associated with stalking behaviour. Beyond any change to the law, there is a need to promote partnership working across various agencies encompassing the PSNI, PPS, Probation Board and support services which must also be connected in with the Department of Health and HSC Trusts in terms of therapeutic interventions and risk assessments which may help to address offending behaviour. Funding for an awareness raising campaign for the general public, perhaps similar to the PSNI's 'No Grey Zone' campaign on sexual consent, will also be of vital importance if any change to the law is made in Northern Ireland. Training and guidance on the creation of a new offence will also be important for a range of agencies and in the justice sector and beyond. For example, the Bar supports the delivery of a wide variety of continuing professional development events and training to practitioners and could develop a programme of learning relevant to the creation of any new offence.

19. The Bar also recognises that there are clear linkages between the issue of stalking and the Department's work around a proposed domestic abuse offence. We would welcome a joined-up approach to these two areas to ensure that both forms of abuse are effectively combatted.

10. How can we ensure that any new offence of stalking will protect victims from the outset?

11. Do you think there could be a role for using the problem-solving justice approach to address stalking?

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20. The Bar recognises that there could be a role for a problem-solving justice approach in addressing stalking in some circumstances. We previously responded to a DOJ consultation on the creation of a Domestic Violence Perpetrator Programme in 2016 and would welcome the opportunity to review any evaluation of the operation of this programme to date.

12. Do we need to consider introducing a stalking protection order or make changes to an existing order?

21. The Bar would welcome more information on any proposed legal framework before being able to comment in detail. It would also be useful to be able to consider how effectively the new stalking protection orders operate in England and Wales once any evaluation becomes available.

22. However, in general terms we would point out that if any new order is introduced then it would need to be applied for and granted based on an assessment of necessity to the civil standard. If such an order were to be brought in, it might be appropriate for it to share features of other orders, such as an Anti-Social Behavioural Order or Sexual Offences Prevention Order, including criminal penalties for breach.

13. Should the court be able to convict of an alternative offence?

23. The Bar has no difficulty with the suggestion of this in principle given the provisions of Article 6 of the 1997 Order but would welcome more detail on any alternative offence before being able to comment further. As suggested previously, the Scottish model may be appropriate for consideration in this context.

14. Do we need the power of entry provision to allow police to apply for a warrant to search premises for evidence?

24. The Bar has no issue with the suggestion that any legislation would have to include a specific power to allow police officers to apply for a warrant to enter and search premises, if a new offence of stalking were to be created as a summary only offence. However, if the Scottish model were to be emulated in this jurisdiction then this issue would not arise as the offence of stalking and the

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offence of threatening and abusive behaviour would both be indictable, meaning that police officers would have the power to enter and search.