



Submission to the Non-Fatal Offences Against the Person (Amendment) (Stalking) Bill 2021

February, 2022

Women's  Aid

Women's Aid welcomes this Bill and appreciates the cross-party collaboration to get it passed quickly, to provide for the much needed offence of Stalking. While welcoming this Bill, Women's Aid would like to highlight the following concerns and offer the following recommendations.

Summary of Recommendations

1. In Section 10A(2)(a) line 22 and in Section 10A(2)(b) line 29 of the proposed Stalking offence substitute “and” with “or” so that it reads (changes in bold)

(2) For the purposes of this section, a person engages in stalking behaviour towards another where—
 - (a) he or she, by his or her stalking behaviour intentionally or recklessly, seriously interferes with the other person's peace and privacy by means of repeated and unwanted behaviour **or**—
 - (i) causes alarm, distress or harm to the other person, or
 - (ii) causes a substantial adverse impact on the other person's usual day-to-day activities,
 - and
 - (b) his or her stalking behaviour is such that a reasonable person would realise that the conduct would seriously interfere with the other person's peace and privacy **or**—
 - (i) cause alarm, distress or harm to the other person, or
 - (ii) have a substantial adverse impact on the other person's usual day-to-day activities.

2. In Section 4 of the proposed Stalking offence, insert the words “or about” after “by any means with”, so that it reads:

(4) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with **or about** the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

Burden of proof: Subsection 2 of the proposed Stalking offence s.10A:

If this Bill is passed as is, the offences of Harassment and Stalking will have the same maximum penalty of ten years. However, the burden of proof will be higher for the Stalking offence than the Harassment offence.

For Harassment it will be sufficient to prove that a person interferes with the peace or privacy of another person OR causes them alarm, distress or harm. The reasonable person test also allows for either OR these requirements to be met. The Harassment offence in the Non-Fatal Offences Against the Person Act, 1997 states:

(2) For the purposes of this section a person harasses another where—

(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy **or** causes alarm, distress or harm to the other, and

(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy **or** cause alarm, distress or harm to the other¹.

¹ S10 (2) of the Non-Fatal Offences Against the Person Act, 1997, emphasis added

Instead, in the proposed Stalking offence it will be necessary to prove BOTH that a person interferes with the other person's peace and privacy AND that they cause alarm, distress or harm to the other person. This heightened burden also applies regarding the reasonable person or objective test.

The proposed offence of Stalking in the Bill reads²:

(2) For the purposes of this section, a person engages in stalking behaviour towards another where—

(a) he or she, by his or her stalking behaviour intentionally or recklessly, seriously interferes with the other person's peace and privacy by means of repeated and unwanted behaviour **and**—

(i) causes alarm, distress or harm to the other person, or

(ii) causes a substantial adverse impact on the other person's usual day-to-day activities,

And

(b) his or her stalking behaviour is such that a reasonable person would realise that the conduct would seriously interfere with the other person's peace and privacy **and**—

(i) cause alarm, distress or harm to the other person, or

(ii) have a substantial adverse impact on the other person's usual day-to-day activities.

² Proposed S10A(2) of the Non-Fatal Offences Against the Person Act, 1997, emphasis added

Recommendation

1. In Section 10A(2)(a) line 22 and in Section 10A(2)(b) line 29 of the proposed Stalking offence substitute “and” with “or” so that it reads (changes in bold)

(2) For the purposes of this section, a person engages in stalking behaviour towards another where—

(a) he or she, by his or her stalking behaviour intentionally or recklessly, seriously interferes with the other person’s peace and privacy by means of repeated and unwanted behaviour **or—**

(i) causes alarm, distress or harm to the other person, or

(ii) causes a substantial adverse impact on the other person’s usual day-to-day activities,

and

(b) his or her stalking behaviour is such that a reasonable person would realise that the conduct would seriously interfere with the other person’s peace and privacy

or—

(i) cause alarm, distress or harm to the other person, or

(ii) have a substantial adverse impact on the other person’s usual day-to-day activities.

Reasons

Women's Aid believes that there should not be a heightened burden of proof between the offences of harassment and stalking due to the inclusion of “and” and not “or” for both the proof of the offence itself and for the objective test for the following reasons:

1. Women's Aid is concerned that this additional burden and test will preclude successful prosecutions of the proposed Stalking offence. Prosecutors may choose the Harassment offence over the Stalking offence, as easier to prove, thus making the new offence effectively redundant.
2. Women's Aid believes that the focus of the offence of Stalking should be on the conduct of the perpetrator and not on the impact on the victim. Impact on the victim may be relevant at sentencing but should be immaterial to the constitution of the offence and proof thereof.
3. This impact on the victim may be hard to prove and may differ from person-to-person depending on personal characteristic, history and circumstances. Focusing on the harm done to the victim rather than the actions of the perpetrator may make the very strength and resilience of certain victims work against them and will put the onus on the victim to prove the harm/alarm suffered. This is why there needs to be an “or” not “and” for the constitution of the offence.
4. Moreover, the Minister has stated in the Seanad Report stage debate, there may be circumstances where stalking offences may take place where a victim does not even realise it is happening to him or her; in which case how can impact be proven? The behaviour of the perpetrator, could however be extremely dangerous as they may be

stalking the victim with a view to further and more serious offences and should be sanctioned regardless of the impact or even the knowledge of the victim.

5. Furthermore, a heightened burden of proof for a complainant seeking to invoke protections for Stalking rather than Harassment, when the penalties are the same, impedes access to justice under the Constitution and moreover to effective access to justice which is provided for in Article 81(2)(e) TFEU. Women's Aid believes that as the penalties are exactly the same, there is no good legal reason why the Stalking offence should have a heightened burden of proof compared to the Harassment offence and that this additional burden should be removed.

Prohibition to communicate about a person: Subsection 4 of the proposed Stalking offence, s.10A

This subsection provides that when a person is guilty of Stalking, the Court may order that they do not communicate with or approach the other person³.

(4) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means **with** the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

³ Proposed Section 10A(4) emphasis added

The equivalent provision in the Harassment offence as amended by the Harassment, Harmful Communications and Related Offences 2020 Act⁴ states:

(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means **with or about** the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

In our experience, perpetrators may abuse, harass and stalk victims not only by communicating directly with them but also by communicating about them to third parties, for example posting derogatory comments, lies and rumors about the victim, communicating about the victim with friends and family to find information about and monitor the victim or requesting friends and family pass on distressing messages and threats.

Women's Aid believes that the court should have the possibility to prohibit a person convicted of Stalking to communicate **about** another person as well as with them, as is already the case in the Harassment offence. Therefore, the words "or about" should be inserted as below:

⁴ NFOAP Act, S10(3) Revised Act from the Law Reform Commission, <https://revisedacts.lawreform.ie/eli/1997/act/26/section/10/revised/en/html> emphasis added

Recommendation

2. In Section 4 of the proposed Stalking offence, insert the words “or about” after “by any means with”, so that it reads:

(4) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with **or about** the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

Restraining Civil orders: Subsection 4, s.10A

Women's Aid notes that there are no civil orders in Ireland to restrain perpetrators of harassment or stalking without commencing criminal proceedings. While victims of harassment or stalking by a partner may be able to apply for protective orders under the Domestic Violence Act 2018, victims of harassment or stalking where there is no such relationship have no similar civil law recourse.

Criminal prosecution is not always possible or appropriate for certain victims of stalking or harassment, however they may still need a remedy to stop the behaviour and prevent it getting worse.

During the debate on the Harassment, Harmful Communications and Related Offences Bill the Minister gave assurances that Civil Restraining orders would be addressed in forthcoming legislation and we look forward to such orders being progressed in the near future. We ask that



the Minister states unequivocally how she intends to provide for such civil orders in a statutory format.

We also welcome the Minister's commitment to continue working with the Attorney General to address a number of issues regarding the stalking offence in a forthcoming criminal law (Miscellaneous Provisions) Bill and looks forward to work being progressed as soon as possible.