



LAW REFORM
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Issues Paper Number 2

Domestic Violence - Harassment (LRC IP 2-2013)

This is the second Issues Paper published by the Law Reform Commission. The purpose of an Issues Paper is to provide a summary or outline of a project on which the Commission is embarking or on which work is already underway, and to provide readers with an opportunity to express views and to make suggestions and comments on specific questions. The Issues Papers are circulated to members of the legal professions and to other professionals and groups who are likely to have a particular interest in, or specialist knowledge of, the relevant topic. They are also published on the Commission's website (www.lawreform.ie) to ensure they are available to all members of the public.

These Issues Papers represent current thinking within the Commission on the various items mentioned. They should not be taken as representing settled positions that have been taken by the Commission.

Comments and suggestions are warmly welcomed from all interested parties and all responses will be treated in the strictest confidence. These should be sent to the Law Reform Commission:

*via email to consultation.harassment@lawreform.ie with the subject line **Harassment***

or

via post to IPC House, 35-39 Shelbourne Road, Dublin 4, marked for the attention of Colm Kitson BCL LL.M BL

We would like to receive replies no later than close of business 16th August 2013 if possible.

BACKGROUND

This Issues Paper forms part of the Commission's *Third Programme of Law Reform*, which includes a project to review the law on domestic violence.¹ Since the Third Programme was formulated the Department of Justice and Equality began its own general review of the law on domestic violence. In discussions with the Department in 2012, the Commission agreed that it could complement and assist the Department's general review by examining two areas on which the question of reform had been raised.²

The first area which the Commission agreed to examine is whether it should be possible to refuse bail for preventative reasons where a person has been charged with the offence of breach of a domestic violence order under section 17 of the *Domestic Violence Act 1996*, and the Commission published an Issues Paper on this question on 12 July 2013.³ The second area which the Commission has agreed to examine is whether the offence

¹ *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 24.

² Similarly, the Commission's *Report on Charitable Trusts* (LRC 80-2006) contributed to the Government's general review of charity law, which culminated in the *Charities Act 2009*.

³ Law Reform Commission *Issues Paper on Domestic Violence: Bail* (LRC IP 1-2013).

of harassment in section 10 of the *Non-Fatal Offences Against the Person Act 1997* is an effective means for the prosecution of the types of harassing behaviour that are common in a domestic violence setting.

The Commission is seeking the views of interested parties in relation to the following two issues raised by this question. These views will be considered by the Commission in producing its Discussion Paper.

INTRODUCTION

Section 10 of the 1997 Act derives from the Commission's 1994 *Report on Non-Fatal Offences Against the Person* which recommended that "acts of harassment which interfere seriously with a person's right to a peaceful and private life should be captured by the criminal law and not simply those which give rise to a fear of violence. An offence of harassment would capture, for example, the acts of the infatuated psychotic who follows a woman in order to gain her affections."⁴ While the 1994 Report did not use the term "stalking" the reference to following a person in order to gain their affections was clearly intended to encompass this form of harassment. Indeed, during the Oireachtas debates on section 10 of the 1997 Act, the then Minister for Justice Nora Owen commented that "[s]ection 10 provides for the important new offence of harassment which is aimed at what is commonly called stalking".⁵ As discussed below similar (though not identical) legislation has been enacted in many other jurisdictions to deal with harassment, including the English *Protection from Harassment Act 1997* and the Northern Ireland *Protection from Harassment (Northern Ireland) Order 1997*.

Section 10 of the 1997 Act provides:

"(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.

(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 other."⁶

Thus it must be proved that the accused "seriously" interfered with the complainant's "peace and privacy" or caused the complainant "alarm, distress or harm". It must also be proved that this was caused by the accused "persistently following, watching, pestering, besetting or communicating with" the complainant. Section 10 requires that the accused must act "intentionally or recklessly" so "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 other".⁷

⁴ Law Reform Commission *Report on Non-Fatal Offences Against the Person* (LRC 45-1994), paragraph 9.77.

⁵ Vol. 477 *Dáil Éireann Debates*, 15 April 1997, Second Stage debate on Non-Fatal Offences against the Person Bill 1997.

⁶ Section 10 of the *Non-Fatal Offences Against the Person Act 1997*.

⁷ The Commission notes that the Criminal Law Codification Advisory Committee recommended that the fault element (*mens rea*) for this offence should be clarified: see Criminal Law Codification Advisory Committee *Draft Criminal Code and Commentary* (2010 DC O4), Explanatory Note to Head 3203 of the Draft Criminal Code Bill (the draft codification of section 10 of the 1997 Act), available at www.criminalcode.ie and www.justice.ie.

Harassment is punishable by an unlimited fine or imprisonment of up to 7 years, or both, when tried on indictment. When tried summarily the offence is punishable by a Class C fine (a fine of up to €2,500) or imprisonment of up to 12 months, or both.⁸ In appropriate circumstances a person convicted of harassment may also be made the subject of a restriction of movement order under section 101 of the *Criminal Justice Act 2006*. Moreover, whether or not a person is convicted of harassment he or she may be made the subject of a restraining order which directs the person not to communicate by any means with the other person or approach within such distance as the court shall specify of the place of residence or employment of the other person.⁹ A breach of a restraining order is a criminal offence punishable by the same penalties as the principal offence of harassment.

Issue 1: defining harassing behaviour

1.01 Section 10 of the 1997 Act defines the behaviour that can amount to harassment as “following, watching, pestering, besetting or communicating”. The terms “following”, “watching” and “communicating” are self-explanatory. The term “besetting” derives from section 7 of the *Conspiracy and Protection of Property Act 1875*¹⁰ and has been interpreted as meaning occupying or surrounding a place.¹¹ The term “pestering” has been used by the courts in the context of civil injunctions to prevent, for example, unwanted and unsolicited contact between persons.¹² These terms are used disjunctively (“or”), thus any individual behaviour or combination of these behaviours can amount to harassment if they are performed persistently and cause serious interference with another’s “peace and privacy” or cause “alarm, distress or harm”. This is an exhaustive list, in that the behaviour must fall under one of these categories in order for it to constitute harassment for the purposes of section 10.

1.02 The question is whether this list encompasses the types of harassment that should be criminalised. It has been put to the Commission that it should not be necessary to show that the behaviour is “following, watching, pestering, besetting or communicating” or any one or combination of these activities. It could be argued that it is not appropriate that only these types of conduct are criminal while other conduct which does not fit into one of these categories but causes the same harm is not criminal.

1.03 Despite this argument it has been said to the Commission that the current formulation of the offence strikes a good balance between the need to have a broadly drafted offence whilst also ensuring that the offence is sufficiently certain. The Commission has been informed that the majority of section 10 prosecutions arise in the context of a domestic relationship that has broken down. A typical case involves a person being harassed by a former partner where he or she persistently waits outside their home or turns up outside their place of work. In addition to this harassing behaviour (the type commonly referred to as stalking) that is prosecuted under section 10, other examples of convictions have included a man using his mobile phone to record co-workers and a father sending his son 37 unwanted emails. It thus appears that a very wide range of conduct in respect of which the Director of Public Prosecutions has prosecuted to conviction falls within the current scope of section 10 and that the terminology is sufficiently broad to encompass all relevant behaviour.

⁸ Section 10(6) of the *Non-Fatal Offences Against the Person Act 1997*. The maximum fine on summary conviction takes account of section 6 of the *Fines Act 2010*.

⁹ Section 10(5) of the *Non-Fatal Offences Against the Person Act 1997*.

¹⁰ Section 7 of the 1875 Act set out the offence of unlawful intimidation which included where a person “watches or besets” another person. Section 7 of the 1875 Act was replaced by section 9 of the 1997 Act, which provides for the offence of unlawful coercion and which also includes where a person “watches or besets” another person.

¹¹ *J Lyon & Sons v Wilkins* [1896] 1 Ch 811.

¹² *Khorasandjian v. Bush* [1993] QB 727.

1.04 There are also arguments in favour of defining more specifically, by comparison with the list in section 10 of the 1997 Act, the behaviour that can amount to harassment and, in particular, that there be a specific reference to stalking. In 2012 the *Independent Parliamentary Inquiry into Stalking Law Reform* published by the UK Parliament's Justice Unions' Parliamentary Group¹³ found that not defining the behaviour which can amount to stalking inhibited effective prosecutions under the English *Protection from Harassment Act 1997* because it caused uncertainty about what conduct was actually covered by the legislation.¹⁴ These findings led to the introduction of specific stalking offences in section 111 of the *Protection of Freedoms Act 2012* which amended the *Protection from Harassment Act 1997*. The *Protection from Harassment Act 1997* now provides examples of acts that are associated with stalking:

1.05 While other synonyms could be added to the list of behaviours in section 10, for example stalking, molesting, or annoying, these are covered by the 1997 Act as it is currently drafted.¹⁵ Moreover, as was noted above it appears that the most frequent section 10 prosecutions involve the type of stalking behaviour with which section 111 of the *Protection of Freedoms Act 2012* is concerned.

1.06 The Commission notes that there is no international consensus on how harassing behaviour should be defined; specifically how narrow or broad the definition should be and whether stalking should be specifically defined. However, it does appear that section 10 of the 1997 Act is sufficient to catch the types of harassment, such as stalking, that commonly arise in a domestic violence setting.

Q.1: Do you agree that the current definition of harassment in section 10 of the Non-Fatal Offences Against the Person Act 1997 is sufficiently broad to include the types of harassment, such as stalking, that are common in a domestic violence setting?

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Issue 2: the requirement to show persistence

2.01 Harassing conduct is defined by section 10 of the 1997 Act as “following, watching, pestering, besetting or communicating”. This behaviour would generally be lawful but for the fact that it “seriously interferes with [an]other's peace and privacy or causes alarm, distress or harm to the other”.

2.02 As harassment can be committed by conduct that is otherwise lawful, removing the requirement that conduct be persistently performed would mean that one lawful act could become a criminal offence because it interfered with another's “peace and privacy” or caused them “alarm, distress or harm”. There is a danger that this would make harassment an offence capable of catching any form of unpleasant conduct that “seriously interferes with [an]other's peace and privacy or causes alarm, distress or harm to the other”. For example one unpleasant, but non-threatening, communication by a jilted lover might constitute harassment if there were no requirement to

¹³ The Justice Unions' Parliamentary Group (JUPG) comprises over 50 Members of the UK House of Commons and House of Lords from all political parties that meets on a regular basis with a number of trade unions to discuss issues concerning the criminal justice system. The unions involved are the Trade Union and Professional Association for Family Court and Probation Staff, the Public and Commercial Services Union and the Prison Officers Association.

¹⁴ *Independent Parliamentary Inquiry into Stalking Law Reform, Main Recommendations and Findings* (Justice Unions' Parliamentary Group, 2012).

¹⁵ The Commission notes *R v Debnath* [2005] EWCA Crim 3472 where the accused was convicted of harassment for behaviour including registering the complainant on a homosexual dating website for people with HIV and sending the complainant's fiancée emails purporting to be from one of his friends, informing her of alleged sexual indiscretions. The Commission has been invited to look at the topic of cyber-bullying which is a project included in the draft Fourth Programme. The Commission will therefore be examining the application of section 10 to this type behaviour in that project.

show persistence. In this respect the Commission noted in its 1994 Report that “following somebody is not an offence in itself, though being persistently followed may clearly be a frightening experience, as well as constituting an unjustified attack on one’s liberty and privacy”. This would indicate that single incidents of this type should not be captured by the offence.

2.03 The Commission therefore considers that one isolated incident that is not protracted should not give rise to criminal liability; this is also the position in other jurisdictions. However, rather than the requirement to show “persistence”, the term “course of conduct” is frequently used - the UK, New Zealand, California and many other US and Australian States use this term. The question therefore arises whether the requirement that there be a “course of conduct” is preferable than the requirement for persistence.

2.04 The most complete judicial statement on the interpretation of the term “persistently” comes from *Director of Public Prosecutions (O’Dowd) v Lynch*.¹⁶ In or around 1.40 p.m. the complainants, children aged 11 and 14, were in their sitting room watching television. The accused, who was in the complainants’ home to install a kitchen, exposed himself masturbating to the first complainant (aged 11), this was repeated on at least two further separate incidents involving a repetition of the same behaviour over the short period of time that followed. The first complainant alerted her brother, the second complainant (aged 14) to the behaviour. He did not witness anything while they were in the sitting room but nonetheless he suggested that they move outside for safety. Thus there were at least three incidents of exposure (and possibly more) while the children were watching television. The children proceeded to move outside the house. The accused went back to work but the back door remained open. Over the period of time that followed, the accused kept coming out the back door repeatedly looking at the children while making revving noises with his saw. Some time later, the accused exposed himself, masturbating again, while standing at the back door. This incident was clearly witnessed by both complainants but when the accused saw the older child he stopped and went back inside the house. The older child then approached the front of the house with a stick and looked in the window where the accused was repeating similar behaviour. One further incident was witnessed through the window by both complainants. This final incident was in or around 4.45 p.m.

2.05 While this is not the typical behaviour that section 10 of 1997 Act was enacted to deal with, the defendant was charged with harassment. A case was stated to the High Court to determine if the facts disclosed persistence for the purposes of section 10. The High Court held “the requirement of persistence is fulfilled by incidents which are separated by intervening lapses of time” and the facts of the case fell into this category. The Court commented that “incidents capable of being severed even if they are not so separated or, to put the matter another way, immediately succeed each other” are capable of fulfilling the persistence requirement and that “one unambiguously continuous act (*i.e.* an action which could not sensibly be broken down into a succession of actions[)]” may also have the quality of persistence. The Court further held that deciding whether conduct has been performed persistently is a matter “for the judgment of a trier of fact” in any case.

2.06 Thus the term “persistently” has been interpreted in a manner that is not dependant on a specific number of incidents or a time frame within which those incidents must have occurred. In the *Lynch* case the incidents which amounted to harassment occurred over a short time frame of approximately 3 hours while in *The People (DPP) v Quirke* the incidents which amounted to harassment (following the complainant and watching her in her house) occurred at separate times between 2005 and 2008.¹⁷ The Court in *Lynch* also indicated that a single protracted incident, for example one person following another on a car journey for a prolonged period of time, could satisfy the quality of persistence necessary to prove harassment. Thus the term “persistently” would seem to provide sufficient flexibility to allow for the successful prosecutions of improper conduct while also allowing individuals to engage in permissible, but perhaps unpleasant, conduct.

¹⁶ *Director of Public Prosecutions (O’Dowd) v Lynch* [2010] 3 IR 434.

¹⁷ *The People (DPP) v Quirke* [2010] IECCA 98.

2.07 The *Protection from Harassment Act 1997*, the corresponding harassment legislation in England and Wales, requires the prosecution to prove that the accused engaged in a “course of conduct”, defined as involving at least two incidents.¹⁸ It has been consistently emphasised by the courts that two incidents will not always amount to a “course of conduct”. In *Lau v DPP*¹⁹ and *R v Hills*,²⁰ it was held that while two incidents might amount to a “course of conduct”, the incidents must be sufficiently connected to make them more than isolated events. For example, in *R v Curtis* six incidents of violence over a nine month period were deemed to be sporadic outbursts and not a “course of conduct”.²¹ The reason for the court’s decision was that the incidents were separated by periods of reconciliation. However in *Pratt v DPP* two incidents separated by three months were held to constitute a course of conduct because they were predicated on the deterioration of a relationship and this was held to be a sufficient connection between the incidents.²²

2.08 There are problems with the application of the term “course of conduct” where there is one protracted incident. This difficulty has resulted in the courts having to sever protracted incidents into multiple incidents.²³ In *Wass v DPP* the accused had continuously followed the complainant over the course of a day.²⁴ The requirement that there be two incidents was fulfilled by separating the following of the complainant up to the point at which she entered a shop and following of the complainant after she left the shop. In the *Lynch* case the Irish High Court considered that distinguishing the incidents in this manner was “artificial” but also noted that this type of conduct would probably be covered by the Irish legislation without having to make such a distinction.²⁵ In this respect the offence under section 10 of the 1997 Act appears to be wider in scope than the offence in England and Wales because the possibility of one protracted incident amounting to harassment is not excluded by the Irish legislation.

2.09 In any event, Irish case law indicates that the term “persistently” operates in a largely similar manner to the term “course of conduct”. Thus in *Director of Public Prosecutions v Lynch* the High Court cited several authorities from England and Wales when interpreting the term persistently in the 1997 Act. Decisions from England and Wales have also referenced the concept of persistence when determining if there has been a course of conduct.²⁶

2.10 Thus on one view it would not be beneficial to change the requirement for persistence under section 10 to a requirement that there be a “course of conduct”. Such reform would probably not change the application of section 10 given the Irish courts’ interpretation of the term “persistently” and the interpretation of the term “course of conduct” in other jurisdictions.

Q.2: Do you agree that it would not be beneficial to change the requirement for persistence under section 10 to a requirement that there be a “course of conduct”?

¹⁸ Section 7(3) of the *Protection from Harassment Act 1997*.

¹⁹ *Lau v DPP* [2000] 1 FLR 799.

²⁰ *R v Hills* [2001] 1 FCR 569.

²¹ *R v Curtis* [2010] EWCA Crim 123.

²² *Pratt v DPP* [2001] All ER (D) 215.

²³ *Wass v DPP* High Court of England and Wales (Crown Office List) 11th May 2000; *Gunes v Pearson* (1996) 89 A Crim 297.

²⁴ *Wass v DPP* High Court of England and Wales (Crown Office List) 11th May 2000.

²⁵ *Director of Public Prosecutions (O’Dowd) v Lynch* [2010] 3 IR 434. at 440.

²⁶ See *R v Smith* [2012] EWCA Crim 2566.