



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

ASPECTS OF DOMESTIC VIOLENCE

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Law Reform Commission

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Full responsibility for this publication lies, however, with the Commission.

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INTRODUCTION

A Background to this project

1. This Report forms part of the Commission's *Third Programme of Law Reform*, which includes a project to review the law on domestic violence.¹ After 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 of this area of law by examining two specific aspects in relation to which the question of reform had been raised by the Legal Issues Sub-Committee (LISC) of the National Steering Committee on Violence against Women (NSCVAW). The first issue concerns whether breach of a domestic violence order should be made a serious offence for the purposes of bail law and the second issue concerns the relationship between the offence of harassment and domestic violence.

2. In July 2013 the Commission published two Issues Papers² which provided the public with an outline of the project and gave readers an opportunity to express views on the two issues and particular questions listed in the Issues Papers. These Issues Papers were distributed to members of both legal professions and to others who were considered likely to have a particular interest in, or specialist knowledge of, the relevant topic and they were also made available to the public on the Commission's website.

3. The Commission received helpful responses to the questions raised in the Issues Papers. These have been taken into account in this Report which sets out the Commission's conclusions and recommendations on these two aspects of the law on domestic violence. It therefore completes the Commission's project which complements the general review of the law being undertaken by the Department of Justice and Equality.

B The two issues examined in this project

4. The first issue which the Commission has examined in this project is whether it should be made possible to refuse bail for preventative reasons where a person has been charged with the offence of breach of a domestic

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

² *Issues Paper on Domestic Violence: Bail* (LRC IP 1-2013) and *Issues Paper on Domestic Violence: Harassment* (LRC IP 2-2013), both available at www.lawreform.ie/issues-papers.409.html.

violence order under section 17 of the *Domestic Violence Act 1996*. Breach of a domestic violence order is a summary offence punishable by a maximum of 12 months imprisonment. As discussed in Chapter 1, below, Article 40.4.6^o of the Constitution of Ireland states that legislation may be enacted providing that bail may be refused by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person and the *Bail Act 1997* was enacted to give effect to this amendment (and also to address other matters relating to bail). As breach of a domestic violence order is a summary offence it is not a “serious offence” for the purposes of refusal of bail under Article 40.4.6^o.

5. It has been suggested by LISC that victims of domestic violence may be put at risk of future acts of domestic abuse because bail cannot be refused for preventative reasons. A solution that has been suggested to address this perceived problem would be to convert breach of a domestic violence order into a “serious offence” for the purposes of the Constitution and the *Bail Act 1997* by making it punishable by up to five years imprisonment and listing it in the Schedule to the 1997 Act. This would allow a defendant who has been charged with breach of a domestic violence order to be refused bail for preventative reasons in appropriate cases.

6. An alternative view is that to make breach of a domestic violence order a “serious offence” would fail to take account of the general objective of the *Domestic Violence Act 1996* which, as discussed in Chapter 1, is to ensure that victims of domestic violence have effective access to preventative civil orders. This preventative objective of the 1996 Act might be put at risk if breach of a domestic violence order were made a “serious offence” punishable by up to five years imprisonment. The Commission considers in detail in Chapter 1 of this Report the arguments for and against the proposal.

7. The second issue which the Commission has examined in this project relates to two elements of the offence of harassment in section 10 of the *Non-Fatal Offences Against the Person Act 1997*. The first element is whether the requirement under section 10 of the 1997 Act that the conduct of the defendant involve “following, watching, pestering, besetting or communicating” hinders prosecution of the types of harassment common in a domestic violence setting. The second element examined is whether the requirement that the conduct be performed “persistently” for it to amount to harassment allows unacceptable conduct to be prosecuted whilst also ensuring that individuals can behave in unpleasant but permissible ways. The Commission considers these aspects of the second issue in Chapter 2 of this Report.

8. Chapter 3 of the Report contains a summary of the Commission’s recommendations.

CHAPTER 1 BAIL AND DOMESTIC VIOLENCE ORDERS

A Introduction

1.01 In this Chapter the Commission discusses whether it should be possible to refuse bail for preventative reasons under Article 40.4.6° of the Constitution and section 2 of the *Bail Act 1997* where a person has been charged with the offence of breaching a domestic violence order. As discussed below, in order for section 2 of the *Bail Act 1997* to apply the offence must be a “serious offence” which is defined by reference to a two part-test: (a) it must be an offence that carries, on conviction, a possible sentence of 5 years or more and (b) it must be one of the offences listed in the Schedule of the 1997 Act. Section 17 of the *Domestic Violence Act 1996* provides that breach of a domestic violence order is only triable summarily and is punishable by a maximum of 12 months imprisonment. In Part B the Commission discusses the background to Article 40.4.6° of the Constitution and the basis on which the *Bail Act 1997* provides for refusal of bail on preventative grounds. The Commission then discusses the general purpose of the *Domestic Violence Act 1996* and the protection it affords to victims of domestic violence. In Part C the Commission examines the protection under comparable legislation in other jurisdictions and the consequences of breaching a domestic violence order in those jurisdictions. In Part D the Commission summarises the discussion and sets out its recommendations.

B Bail Law and Domestic Violence Law in Ireland

1.02 The Commission begins this Part with a discussion of the background to the insertion of Article 40.4.6° into the Constitution in 1996, and then proceeds to an analysis of the limited circumstances in which Article 40.4.6° and the related provisions of the *Bail Act 1997* provide that bail may be refused for preventative reasons. The Commission then discusses the conditions that may be attached where bail is granted under the 1997 Act, in particular those relevant to a domestic violence setting, and the circumstances in which bail may be revoked for breach of those conditions. The Commission then discusses the purpose of and relevant provisions in the *Domestic Violence Act 1996* and the Commission concludes this Part with a summary of the relationship between the purpose of the 1996 Act and the question whether breach of a domestic violence order should be made a serious offence for the

purpose of Article 40.4.6°. The discussion at the end of this Part provides important context for the comparative analysis contained in Part C and also provides a reference point for the Commission's conclusions and recommendations in Part D.

(1) *The O'Callaghan case and the background to Article 40.4.6°*

1.03 The circumstances in which it was constitutionally permissible to refuse bail prior to 1997 were elaborated in the decision of the Supreme Court in *The People (Attorney General) v O'Callaghan*.¹ The Supreme Court reiterated that the fundamental test in deciding whether to allow bail or not is the probability of the applicant evading justice. The Supreme Court noted that bail could be refused in circumstances where it was likely that the accused would attempt to evade justice, for example by absconding, interfering with witnesses or jurors or destroying evidence. The Supreme Court held that bail could not be refused because of the likelihood that the accused would commit further offences whilst on bail which Walsh J described as "a form of preventative justice which has no place in our legal system and is quite alien to the true purposes of bail."² Following a constitutional referendum in 1996, what is now Article 40.4.6°³ was inserted into the Constitution. This provides:

"Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person."

1.04 This amendment thus specifically reversed, in relation to serious offences only, that element of the decision in *O'Callaghan* which held that bail could not be refused for the preventative reason that the accused might commit further offences on bail. Section 2 of the *Bail Act 1997* was enacted to give effect to this constitutional amendment. Section 2 provides:

"(1) Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.

¹ *The People (Attorney General) v O'Callaghan* [1966] IR 501.

² *Ibid.* at 516.

³ It was originally inserted into the Constitution as Article 40.4.7°. The *Twenty-First Amendment of the Constitution Act 2001*, which inserted a prohibition on the death penalty into the Constitution and also removed all references in the Constitution to the death penalty, provided for the deletion of Article 40.4.5° and the consequent renumbering of Article 40.4.7° as Article 40.4.6°.

(2) In exercising its jurisdiction under *subsection (1)*, a court shall take into account and may, where necessary, receive evidence or submissions concerning—

(a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,

(b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,

(c) the nature and strength of the evidence in support of the charge,

(d) any conviction of the accused person for an offence committed while he or she was on bail,

(e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,

(f) any other offence in respect of which the accused person is charged and is awaiting trial,

and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977.

(3) In determining whether the refusal of an application for bail is reasonably considered necessary to prevent the commission of a serious offence by a person, it shall not be necessary for a court to be satisfied that the commission of a specific offence by that person is apprehended.”

1.05 Thus, in accordance with Article 40.4.6°, section 2 of the 1997 Act requires that two conditions must be fulfilled before bail can be refused for preventative reasons. Firstly the accused must be charged with a “serious offence”. Secondly the refusal of bail must be “reasonably considered necessary” to prevent the commission of another “serious offence”. This means that the refusal of bail must be necessary to prevent the commission of another “serious offence” and a decision on the existence of such a necessity must be reasonably made.

(2) Article 40.4. 6° and the concept of “serious offence”

1.06 Article 40.4.6° of the Constitution introduced into Irish law the concept of “serious offence” but did not define it. Nonetheless, as discussed by

the Commission in its 1995 *Report on an Examination of the Law on Bail*⁴ the use of that term can be traced to the case law that preceded the Supreme Court decision in *O'Callaghan*⁵ and to comparable bail law in other jurisdictions.⁶ The Commission's 1995 Report contained a review of bail law in Ireland at that time as well as a comparative analysis of bail law in other jurisdictions. As the Commission noted, until the Supreme Court decision in *O'Callaghan* a court could refuse bail where the offence with which the accused was charged was regarded as serious.⁷ The Supreme Court in *O'Callaghan* also expressly disapproved of a practice, which appeared to have emerged at that time, in which An Garda Síochána gave accused persons a list of their previous convictions and also put these in evidence to the court in bail applications. It appears that this list of previous convictions was then used in a bail hearing as evidence that the accused might commit further offences if released pending trial.

1.07 This approach was made clear in the High Court in *O'Callaghan* where Murnaghan J had summarised the factors which he thought to be relevant in a bail application:⁸

⁴ *Report on an Examination of the Law on Bail* (LRC 50-1995), Chapter 1.

⁵ *Ibid* at paragraph 1.18, referring to the decision in *The State v Purcell* [1926] IR 207 (the leading case on bail prior to the *O'Callaghan* decision) in which Hanna J stated that the fundamental test in determining whether to grant bail was whether the accused would evade justice and that among 5 factors to be taken into account in this respect was "the seriousness of the crime charged." The test in the *Purcell* case, including the factor concerning "the seriousness of the crime charged," was approved by the Court of Criminal Appeal in *The People (Attorney General) v Kirwan* (1950) 1 Frewen 111, at 113.

⁶ *Report on an Examination of the Law on Bail* (LRC 50-1995), Chapter 4.

⁷ The Supreme Court had also pointed out in *The People (Attorney General) v Crosbie* [1966] IR 426, decided a year before its decision in *O'Callaghan*, that it appeared that too much significance was being attached in High Court bail applications to the issue of the seriousness of the charge, which as already noted (fn 5, above) was one of the factors referred to by Hanna J in *The State v Purcell* [1926] IR 207. The Supreme Court held in *Crosbie* that the guiding overall principle was whether the accused would evade justice, and this was reiterated in more detail in its decision in *O'Callaghan*.

⁸ *The People (Attorney General) v O'Callaghan* [1966] IR 501, at 503-4 (emphasis added). Factors (1)-(3), (9) and (11) were based on the five factors listed by Hanna J in *The State v Purcell* [1926] IR 207.

- “(1) The nature of the accusation or in other words the seriousness of the charge...
- (2) The nature of the evidence in support of the charge...
- (3) The likely sentence to be imposed upon conviction...
- (4) The *likelihood of the commission of further offences while on bail...*(emphasis added)
- (5) The possibility of the disposal of illegally acquired property...
- (6) The possibility of interference with witnesses and jurors...
- (7) The prisoner’s failure to answer bail on a previous occasion...
- (8) The fact that the prisoner was caught red-handed...
- (9) The objection of the [Director of Public Prosecutions] or of the police authorities...
- (10) The substance and reliability of the bailsmen offered...
- (11) The possibility of speedy trial...
- [[12]] In certain cases, the likelihood of personal danger to the prisoner.”

1.08 The Supreme Court in *O’Callaghan* held that the effect in particular of factor (4) of Murnaghan J’s list was that bail could be refused for preventative reasons. The Supreme Court overruled the High Court on this point holding that this was not compatible with the accused’s presumption of innocence.

1.09 As to the approach of the Supreme Court in *O’Callaghan*, the Commission also noted in its 1995 Report that this was shared by some, though not all, courts in other common law jurisdictions at that time. The Report also pointed out that, from the late 1960s in particular, a number of other common law jurisdictions had introduced legislative restrictions on bail in response to the fact that a certain percentage of offenders had committed further crimes while awaiting trial.⁹ The 1995 Report also noted that while it was evident that this occurred, research conducted into whether it was possible to predict, in advance, the “likelihood of the commission [by an accused] of further offences while on bail” (the phrase used by Murnaghan J in *O’Callaghan*) suggested that such predictions were liable to produce many “false positives”, that is, inaccurate predictions.

(3) Bail legislation in other jurisdictions prior to 1997

1.10 The Commission’s 1995 Report also noted that many jurisdictions had enacted legislation to restrict bail in certain defined circumstances. In a number of instances, the legislation provided that bail could be refused where the offence fell within a specified category of offences, for example, homicide, firearms, supply of drugs, theft (in particular, burglary) or fraud. In some legislative schemes the restriction on bail was by reference to a general test of “seriousness” which was sometimes combined with a list of specific offences. In

⁹ *Report on an Examination of the Law on Bail* (LRC 50-1995), Chapter 4.

this respect the 1995 Report had referred,¹⁰ for example, to section 32(2) of the New South Wales *Bail Act 1978*, as amended, which provided that in determining whether to grant bail the court could have regard to the “likelihood” that a person will commit an offence while on bail if it is:

- “(a) satisfied that the person is likely to commit the offence or offences;
- (b) satisfied that the offence or offences is or are *likely to be serious* by reason of their likely consequences; and
- (c) satisfied that the likelihood that the person will commit the offence or offences, together with the likely consequences, outweighs the person’s general right to be at liberty.” (emphasis added)

1.11 The New South Wales 1978 Act also provided that in considering whether an offence or offences was or were “serious” the court should consider the following matters:

- “(a) whether the offence or offences is or are likely to be of a sexual or violent nature;
- (b) the likely effect of the offence or offences on the victim and on the community generally; and
- (c) the number of offences likely to be committed.”

1.12 The relevant provisions are now found in sections 17 and 20 of the New South Wales *Bail Act 2013*. Section 20 provides that bail may be refused if there is an “unacceptable risk” and section 17 of the 2013 Act provides that this includes that the accused:

- “if released from custody, will... commit *a serious offence*.” (emphasis added)

1.13 Section 17 also provides that the following factors may be taken into account in determining whether an offence is a “serious offence”:

- (a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument;
- (b) the likely effect of the offence on any victim and on the community generally; and
- (c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

(4) *The right to liberty under Article 5 of the European Convention on Human Rights*

1.14 The Commission’s 1995 Report also noted in connection with the right to liberty that Article 5 of the European Convention on Human Rights (ECHR) provides that deprivation of liberty is permissible:

¹⁰ *Report on An Examination of the Law on Bail* (LRC 50-1995), at paragraph 4.119.

“when it is reasonably considered necessary to prevent [a person] committing an offence.”

1.15 The 1995 Report also referred to a number of decisions of the European Court of Human Rights (ECtHR) as to whether preventative detention was permissible under Article 5 of the ECHR, including *Toth v Austria*,¹¹ in which the applicant had been detained pending trial for over two years on suspicion of aggravated fraud. The Austrian Government had argued that there was a genuine risk of repetition of offences because the applicant had several previous convictions for offences similar to those which were the subject of the pending proceedings. The ECtHR agreed with this view, noting that the Austrian court decisions that had continued to remand him in custody had taken account of the nature of the earlier offences and the number of sentences imposed as a result. The 1995 Report also noted that the ECtHR had also found that there were sufficient reasons for believing the applicant posed a risk of absconding. Nonetheless, the ECtHR also concluded that while there were sufficient grounds for continued detention there had been a violation of Article 5(3) because there had been unreasonable delay in proceeding to trial, especially having regard to the fact that the applicant had been detained pending trial.

(5) Oireachtas debates on the use of “serious offence” in Article 40.4.6°

1.16 The Commission’s 1995 Report was limited to a review of the law on bail as it then stood in Ireland and in other jurisdictions, and it did not contain any recommendations for reform. Nonetheless, it formed part of the backdrop to the Oireachtas debates in 1996 on the *Sixteenth Amendment of the Constitution Bill 1996* which, following the constitutional referendum, inserted into the Constitution what is now Article 40.4.6°. Introducing the *Sixteenth Amendment Bill*, the then Minister for Justice stated:¹²

“The Law Reform Commission’s report on the law of bail examined the position in many other jurisdictions and found that all of these allowed the question of offending on bail to be taken into account by the courts in deciding whether to refuse bail. It is not, I suggest, a sustainable proposition to argue that our crime problems are so uniquely different from those in other jurisdictions that we need not arm ourselves with provisions in our law to prevent offending while on bail which are readily available in other countries.”

¹¹ *Toth v Austria* (1991) 14 EHRR 551.

¹² Vol. 470 *Dáil Éireann Debates* Sixteenth Amendment of the Constitution Bill 1996, Second Stage (15 October 1996).

1.17 She also referred to the considerations, including Article 5 of the ECHR, which had been taken into account in drafting the proposed constitutional amendment:¹³

“Much consideration went into the task of devising a suitable amendment to the Constitution. On one hand, we did not want to bring about a situation where people would be refused bail in relation to relatively trivial offences. On the other, we wanted to produce a wording that would make a genuine difference in practice to the bail regime where serious offences were at issue. We finally settled on a proposed wording which we believe strikes this balance and has two practical advantages. First, it is relatively straightforward and it will be easily understood by the people. Second, in the longer term it has the advantage that it is based on the relevant part of the European Convention on Human Rights, Article 5(1), which allows for the deprivation of liberty ‘when it is reasonably considered necessary to prevent [a person] committing an offence’.”

1.18 The Minister also noted that the Government had published an outline of the bail legislation that would follow if the proposed amendment was approved. This included the key elements of what was ultimately enacted as the *Bail Act 1997*. The Minister also pointed out in the following passage that there had been a conscious decision *not* to include all arrestable offences within the scope of the outline bail legislation:¹⁴

“A dual approach is taken to specifying the offences to which the new bail regime can apply. First, a ‘serious’ offence is defined as an offence carrying a maximum penalty of five years’ imprisonment or more. Second, a schedule is included setting out the wide range of offences covered by the legislation. *This approach means that, while all offences to which the legislation will apply must carry a maximum penalty of five years or more, not all such offences will be covered by the legislation, primarily on the grounds that some of the offences in our current law carrying such a penalty are archaic or unlikely to be ones where the question of reoffending is relevant.*” (emphasis added)

(6) The definition of “serious offence” in the Bail Act 1997

1.19 Thus, while the term “serious offence” is not defined in Article 40.4.6° of the Constitution, it is clear that this dual approach was present in the mind of

¹³ Vol. 470 *Dáil Éireann Debates* Sixteenth Amendment of the Constitution Bill 1996, Second Stage (15 October 1996).

¹⁴ *Ibid.*

the Oireachtas when the proposal was being put to the people in the referendum that followed in 1996. It was to be expected therefore that the *Bail Act 1997* would also take this dual approach. Thus, the term “serious offence” is defined by section 1 of the *Bail Act 1997* as “an offence specified in the Schedule [of the 1997 Act] for which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of 5 years or by a more severe penalty”. The test of “serious offence” under the 1997 Act is, therefore, twofold: the offence must be a scheduled offence and it must also carry five years imprisonment on conviction. Thus, not all the scheduled offences in the 1997 Act always carry five years imprisonment on conviction and this necessarily excludes some scheduled offences from being “serious offences.” Correspondingly, not all offences that carry five years imprisonment or more on conviction have been scheduled under the 1997 Act and therefore cannot be considered as “serious offences” for the purposes of the 1997 Act merely because they carry that penalty.

(7) Breach of a domestic violence order is currently a summary offence

1.20 The *Domestic Violence Act 1996* provides for civil orders¹⁵ which a court may grant to protect the applicant from domestic violence (a domestic violence order). Breach of a domestic violence order is an offence under section 17 of the 1996 Act which provides:

“(1) A respondent who—

(a) contravenes a safety order, a barring order, an interim barring order or a protection order, or

(b) while a barring order or interim barring order is in force refuses to permit the applicant or any dependent person to enter in and remain in the place to which the order relates or does any act for the purpose of preventing the applicant or such dependent person from so doing,

shall be guilty of an offence and shall be liable on summary conviction to a [Class B fine]¹⁶ or, at the discretion of the court, to imprisonment for a term not exceeding 12 months, or to both.

¹⁵ Civil orders are distinct from criminal orders because they are non-punitive, the standard of proof applied is the balance of probabilities, and the rules of evidence are those of “civil” rather than “criminal” procedure.

¹⁶ This takes account of the effect of section 5 of the *Fines Act 2010* which provides that a person guilty of an offence under section 17 of the 1996 Act is liable to a Class B fine (currently, a fine of up to €4,000).

(2) *Subsection (1)* is without prejudice to the law as to contempt of court or any other liability, whether civil or criminal, that may be incurred by the respondent concerned.”

1.21 As the offences under section 17 of the 1996 Act are summary offences none of them can be regarded as a “serious offence” for the purposes of Article 40.4.6° of the Constitution or the *Bail Act 1997*.

(8) *Bail conditions and consequences of contravening bail conditions*

1.22 Section 6 of the *Bail Act 1997* provides that where a court grants bail it may impose “such conditions as the court considers appropriate having regard to the circumstances of the case.” Section 6 also provides that such conditions may include any one or more of the following:

- “(i) that the accused person resides or remains in a particular district or place in the State,
- (ii) that the accused person reports to a specified Garda Síochána Station at specified intervals,
- (iii) that the accused person surrenders any passport or travel document in his or her possession or, if he or she is not in possession of a passport or travel document, that he or she refrains from applying for a passport or travel document,
- (iv) that the accused person refrains from attending at such premises or other place as the court may specify,
- (v) that the accused person refrains from having any contact with such person or persons as the court may specify.” (emphasis added)

1.23 These conditions apply to any offence for which an accused person is granted bail, including a summary offence, and the Commission notes that the fourth and fifth conditions, under which an accused can be prohibited from being near any premises or from having any contact with a specified person, are particularly relevant in the domestic violence context. The Commission is aware that, where a person has been charged with breach of a domestic violence order under section 17 of the *Domestic Violence Act 1996*, the judge of the District Court will at an initial remand hearing often impose such conditions on the accused when granting bail under the *Bail Act 1997*. In effect, such conditions may prohibit the accused from going near the residence of the person who has obtained the original domestic violence order or making any contact with the person, including at a place of work.

1.24 Section 6(5) of the *Bail Act 1997* provides that, if a member of the Garda Síochána subsequently applies to the court and testifies on oath that the accused “is about to contravene” any of the bail conditions, the court may issue an arrest warrant for the accused to be brought as soon as possible before the

court. Section 6(9) of the 1997 Act provides that the court may then remand the accused in custody, which in effect means that bail is revoked.¹⁷ The Commission is aware that this has occurred in practice, and that the District Court uses this power to remand in custody and if necessary revoke bail in cases where a person has been charged with breach of a domestic violence order and has contravened such bail conditions.

1.25 The Commission understands that the general practice in such a case is for the judge of the District Court to order that the trial of the accused on the charge of breach of a domestic violence order should take place as soon as possible, and that this usually occurs within a matter of weeks. The Commission also understands that the practice is for the trial to take place before a judge of the District Court who has not been involved in the bail proceedings.

1.26 Section 28(3)(a) of the *Criminal Procedure Act 1967*¹⁸ provides that either an applicant for bail or the prosecutor¹⁹ may appeal to the High Court if dissatisfied with a refusal or grant of the application for bail or, where bail is granted, with any matter relating to the bail, such as the conditions imposed.

1.27 Section 11(1) of the *Criminal Justice Act 1984*²⁰ also provides for an important disincentive and penalty where an offence is committed by an accused either (a) while on bail or (b) where the person “is unlawfully at large after the issue of a warrant for his or her arrest for non-compliance with a condition” attaching to bail, including a condition imposed under section 6 of the *Bail Act 1997*. Section 11(1) of the 1984 Act provides that the sentence for any offence committed in either of those two instances “shall be consecutive” on any sentence passed on the accused in respect of the offence for which he had

¹⁷ Section 6(9) of the 1997 Act also provides that the District Court may also grant bail subject to new bail conditions.

¹⁸ As substituted by section 19 of the *Criminal Justice Act 2007*. At the time of writing, this is the only element of the amendments to be inserted into section 28(3) of the 1967 Act by section 19 of the 2007 that have been brought into force: *Criminal Justice Act 2007 (Commencement) Order 2009* (SI No.165 of 2009). The other elements that have yet to be brought into force at the time of writing (section 28(3)(b)-(d)) relate to transfer of certain bail applications from the High Court to the Circuit Court.

¹⁹ Section 28(3) of the 1967 Act, as originally enacted, had limited the power of appeal to the applicant for bail. Section 28(3)(a), as inserted in 2007, extended to the prosecution the power to appeal to the High Court concerning the grant or refusal of bail and the conditions attached to bail.

²⁰ As substituted by section 22 of the *Criminal Justice Act 2007*.

been granted bail. Where the offences are dealt with in the District Court, as is currently the case with charges for breach of a domestic violence order, the maximum aggregate sentence that can be imposed under section 11 of the 1984 Act is 2 years.

(9) Should breach of a domestic violence order be made a serious offence?

1.28 The Legal Issues Sub-Committee (LISC) of the National Steering Committee on Violence against Women (NSCVAW) has suggested that it is problematic that a person charged with breaching a domestic violence order cannot be denied bail on the basis that they might commit further domestic violence offences. LISC further suggested that making breach of a domestic violence order a “serious offence” would remedy this problem and improve the protection that is given to victims of domestic violence.

1.29 Were breach of a domestic violence order made into a “serious offence”, three specific reforms would be required: (a) it would have to be provided that it could be punished by 5 years imprisonment or a more severe penalty; (b) it would have to be added to the list of scheduled offences in the *Bail Act 1997*; and (c) it would have to become triable on indictment because Article 38.2 of the Constitution provides that only “minor offences” can be tried summarily and an offence that carries a punishment of up to 5 years imprisonment is clearly not a “minor offence”.²¹

1.30 It would not be feasible for breach of a domestic violence order only to be tried on indictment and never summarily because many breaches of domestic violence orders are, in relative terms, minor and are therefore suitable to be tried summarily as “minor offences”. To address this, the 1996 Act might be amended to make breach of a domestic violence order a hybrid offence triable either on indictment or summarily depending on the seriousness of the breach. When tried on indictment, it could be provided that on conviction the defendant would be liable to be sentenced to 5 years imprisonment and when tried summarily it could be provided that on conviction the defendant would be liable to be sentenced to a fine or a maximum of 12 months imprisonment. This reform would mean that, whether tried on indictment or summarily, and if it were also made a scheduled offence under the *Bail Act 1997*, breach of a domestic violence order could become a “serious offence” for the purposes of Article

²¹ It is generally accepted that offences carrying a maximum sentence of 12 months imprisonment are minor offences for the purposes of the Constitution: see Hogan & Whyte *JM Kelly: The Irish Constitution* 4th ed (LexisNexis Butterworths, 2003) at 1182. The Commission also took this view in its *Report on Penalties for Minor Offences* (LRC 69-2003).

40.4.6° of the Constitution but could also be tried summarily when the breach was of a less serious or trivial nature.

1.31 Before coming to any conclusion on this question the Commission now discusses the general purpose of the *Domestic Violence Act 1996* and the circumstances in which domestic violence orders can be obtained under the 1996 Act.

(10) General purpose of the Domestic Violence Act 1996

1.32 The purpose of the *Domestic Violence Act 1996* is to provide for the future protection of persons in domestic relationships whose safety and welfare require it because of the conduct of another person in that relationship. To achieve this the 1996 Act provides for the making of a variety of domestic violence orders, outlined below, which prohibit the respondent from behaving in a threatening or abusive way and which may also exclude the respondent from the family home or its vicinity.

1.33 The need for effective protection in this area reflects the fact that domestic violence remains a prevalent problem in Irish society. In 2012 Women's Aid reported receiving 11,729 calls from women, family, friends, and professionals seeking support for experiences of domestic violence. These calls disclosed 14,792 instances of abuse. The charity Amen which provides support for male victims of domestic violence reported 5,225 contacts (helpline calls, one-to-one meetings, court accompaniments, emails, text messages and letters) in 2012.²² For domestic violence orders to be an effective remedy the victims of domestic violence must be able to obtain an order when appropriate.

1.34 It has been pointed out²³ that prior to the enactment of legislation such as the 1996 Act²⁴ it was possible to obtain an injunction in the High Court

²² See O'Regan "Abused men 'forced by partners to live on €30'" *Irish Independent* 4 September 2013.

²³ See generally Shatter, *Family Law in Ireland* 4th ed (Butterworths, 1997), Chapter 16.

²⁴ Prior to the enactment of the 1996 Act, limited provision for domestic violence orders had been included in the *Family Law (Maintenance of Spouses and Children) Act 1976* and these were replaced by more extensive measures in the *Family Law (Protection of Spouses and Children) Act 1981*. A major feature of the 1996 Act, which replaced the 1981 Act, is that it is not confined in its application to spouses and their children but can also be invoked by former spouses, cohabitants and other persons in a domestic relationship such as siblings who are at risk: see Shatter, *Family Law in Ireland* 4th ed (Butterworths, 1997), paragraph 16.03.

to prohibit certain forms of domestic violence such as physical assaults but that the cost involved in such applications meant that this form of legal remedy was not effective nor was it effective against all forms of domestic violence or abuse.²⁵ The 1996 Act deals with both these shortcomings. First, it provides that preventative civil orders, such as barring orders and safety orders, may be granted by the District Court thus improving access to the relevant remedies. Second, the 1996 Act provides that such orders may be made to protect the “safety or welfare” of a person and the 1996 Act defines “welfare” as including “the physical and psychological welfare of the person in question.” Thus the 1996 Act provides for an appropriate range of remedies which deal with the full range of potential domestic violence, whether physical or psychological.

1.35 It is therefore important to note that domestic violence orders protect applicants from misconduct that ranges in severity. Thus the misconduct that can justify an order being made can include conduct that does not amount to a criminal offence, such as conduct that affects an applicant’s psychological well being or the wellbeing of children, and also to conduct that amounts to a significant criminal offence such as assault causing harm. The stated policy of the 1996 Act is that such orders are granted even where the respondent’s misconduct does not involve a significant criminal offence because, if the misconduct has a damaging effect on the victim’s health, the making of a domestic violence order is generally an appropriate remedy for such misconduct. Furthermore, domestic violence orders are themselves preventative in nature and therefore to require an applicant to have suffered, for example, serious violence would undermine this preventative purpose.

1.36 As noted above, breach of a domestic violence order is a criminal offence which is only triable summarily and punishable by a maximum of 12 months imprisonment. The purpose of criminalising breach of a domestic violence order is primarily to deter respondents from acting in breach of the order and also to punish respondents who breach the order. Making breach of a domestic violence order a crime does not replace other criminal offences (such as assault) and the other offences should be prosecuted in addition as separate charges. Thus criminalising breach of a domestic violence order is not for the purpose of punishing serious misconduct such as assault causing harm.

(11) Orders available under the 1996 Act

1.37 The *Domestic Violence Act 1996* provides for four orders that a court, including the District Court, may grant. These can be separated into two categories: first, barring orders which exclude the respondent from the place where the applicant resides and prohibit specified misconduct; second, safety

²⁵ Shatter, *Family Law in Ireland* 4th ed (Butterworths, 1997), paragraph 16.02.

orders which prohibit specified misconduct but do not exclude the respondent from a residence. Both barring orders and safety orders can be granted on an interim basis during the period between the initial application for an order and the final determination of the matter. These interim orders are called interim barring orders and protection orders respectively.

(a) Barring orders and time-limited interim barring orders

1.38 A barring order under section 3 of the 1996 Act directs the respondent, if residing in the same place as the applicant or relevant dependent person, to leave that place and, whether or not the respondent resides there, prohibits him or her from entering that place. If the court thinks fit, a barring order may also prohibit the respondent from attending at or in the vicinity of the place where the applicant or relevant dependent person resides.

1.39 A full barring order may be granted by a court where there are “reasonable grounds for believing that the safety or welfare” of the applicant or a dependent person requires the order be made. Importantly this means that if excluding the respondent from the residence is not required to protect the safety or welfare of the applicant the more appropriate order would be a safety order, discussed below, which does not bar the respondent from the residence.

1.40 An interim barring order under section 4 of the 1996 Act has the same effect as a barring order during the period between the initial application for a barring order and the final determination of the matter. The interim barring order may only be granted where the court finds reasonable grounds for believing that there is an “*immediate risk of significant harm* to the applicant or any dependent person if the order is not made” (emphasis added) and the granting of a protection order under section 5 of the 1996 Act (discussed below) would not be sufficient to protect the applicant or any dependent person. In exceptional circumstances an interim barring order may be made on an *ex parte* basis (that is, on hearing the applicant’s evidence and without hearing the respondent) if the court “considers it necessary or expedient to do so in the interests of justice.” The application for such an order must be grounded on an affidavit or information sworn by the applicant.

1.41 Section 4(4) of the 1996 Act, as originally enacted, had provided that an interim barring order would “cease to have effect on the determination by the court of the application for a barring order.” This meant that section 4(4) of the 1996 Act, as enacted, had not put any defined time limit on the duration of an interim barring order. In *DK v Crowley*,²⁶ DK’s wife had obtained an *ex parte* interim barring order against him on 6 November 1998, which was to continue until the hearing of her application for a barring order on 3 February 1999, that

²⁶ *DK v Crowley* [2002] 2 IR 744.

is, almost 3 months later. He claimed that section 4(4) of the 1996 Act was in breach of the Constitution. His claim was dismissed by the High Court (Kelly J) but, on appeal, the Supreme Court declared section 4(4) of the 1996 Act unconstitutional. The Supreme Court commented that a person against whom such an order is made:

“is unarguably deprived of the protection of one of the two central maxims of natural justice – *audi alteram partem*²⁷ – in proceedings which may have profoundly serious consequences for him in his personal and family life. The issue in this case is not as to whether the Oireachtas was entitled to abridge, even in a relatively drastic fashion, the right of the [respondent] to be heard, in order to protect spouses and dependant children from domestic violence. That the legislature was entitled to effect such an abridgement of the rights of individual citizens in order to deal with the social evil of domestic violence is beyond dispute. The question for resolution in this case is as to whether the manner in which the abridgement of the right to be heard has been effected is proportionate.”²⁸

1.42 When deciding whether the *ex parte* procedure was a proportionate abridgment of the respondent’s rights the Supreme Court noted that the mandatory nature of an interim barring order and the fact that a respondent is not compensated where it emerges that an order should not have been granted are in “sharp contrast” to normal injunctions granted in civil proceedings. The Court also commented on the criminal element of domestic violence orders:

“The interim barring order, moreover, even where obtained on an *ex parte* application, is not merely mandatory in its effect but brings in its wake draconian consequences which are wholly foreign to the concept of the injunction as traditionally understood. A person who fails to comply with such an injunction commits no offence, although the plaintiff may put in train the process of attachment for contempt in order to obtain compliance with the order. In the case of an interim barring order obtained *ex parte* in the absence of the respondent, the latter automatically commits a criminal offence in failing to comply with the order, even if it should subsequently transpire that it should never have been granted. He or she is, moreover, liable to be

²⁷ The *audi alteram partem* rule comprises two elements of fair procedures, that a person who is to be affected by a decision must be given notice of it and must be allowed appropriate facilities to make a case in reply: see Hogan and Morgan *Administrative Law in Ireland* 4th ed (Round Hall, 2010) at para 14-01.

²⁸ *DK v Crowley* [2002] 2 IR 744 at 758.

arrested without warrant by a garda having a reasonable suspicion that he or she is in breach of the order”.²⁹

1.43 The Court held that the procedures prescribed by the Act of 1996, in failing to prescribe a fixed period of relatively short duration during which an interim barring order made *ex parte* was to continue in force, deprived a respondent to such an application the protection of the principle of *audi alteram partem* in a manner and to an extent which was disproportionate, unreasonable and unnecessary. As a result of this decision, section 4(4) of the 1996 Act was amended by section 1 of the *Domestic Violence (Amendment) Act 2002* to provide that an interim barring order obtained *ex parte* can have effect only for a maximum of 8 working days.

1.44 Barring orders and interim barring orders prohibit the respondent from residing with or entering the place where the applicant resides or a relevant dependent person resides and may also prohibit the respondent from attending at or in the vicinity that place. In *L v Ireland*³⁰ the High Court (Charleton J) commented that this is a very significant infringement of a respondent’s rights:

“A person has a right to reside in their own home. This right must include the right to come and go as they please. A person has a right to see their spouse and to see their children and to enjoy their company, engaging in the responsibilities of family life. These rights are entirely removed, as regards access to the home, by a barring order and are also thereby severely restricted, at the least, from the point of view of associating with one’s family.”

1.45 Moreover, in *DK v Crowley* the Supreme Court noted that barring a person from the family home can have adverse consequences for a respondent in other litigation relating to the family.³¹

“It must also be borne in mind that an interim barring order will typically be granted in a case where the relationship between the parties has effectively broken down and disputes have arisen, or will arise, in relation to matters such as custody of children, the payment of maintenance and adjustment of property rights. The granting of an interim order in the absence of the defendant may, in such cases, crucially tilt the balance of the entire litigation against him or her to an extent which may subsequently be difficult to redress. In particular,

²⁹ *DK v Crowley* [2002] 2 IR 744 at 759.

³⁰ *L v Ireland* [2008] IEHC 241 at para 12.

³¹ *DK v Crowley* [2002] 2 IR 744 at 759.

the order ultimately made by the court dealing with the custody of the children of the marriage may necessarily be affected by the absence of one spouse from the family home for a relatively significant period as the result of a barring order: necessarily, because the paramount concern of the court on such an application will be the welfare of the children and the removal of one spouse from the home by legal process for a relatively lengthy period, even though subsequently found to have been wrongful, may be a factor to which the court may have to have regard in determining a custody issue.”

1.46 Barring orders and interim barring orders may also prohibit the respondent from using or threatening to use violence against the applicant or any dependent person, molesting or putting in fear the applicant or any dependent person and watching or besetting the place where the applicant or any dependent person resides.³²

(b) Safety orders and protection orders

1.47 A safety order issued under section 2 of the 1996 Act directs the respondent not to “use or threaten to use violence against” or “molest or put in fear” the applicant or any dependent person and, where the respondent is not residing in the same place as the applicant or dependent person, not to watch or beset that place. A protection order issued under section 5 of the 1996 Act is an interim safety order and may be granted under section 5(4) on an *ex parte* basis. The Court must find reasonable grounds for believing that the safety or welfare of the applicant or a dependent person requires it before a safety or protection order is made.

1.48 Safety and protection orders, and barring and interim barring orders, prohibit the respondent from using or threatening to use violence against the applicant, molesting or putting in fear the applicant, and from watching or besetting the place where the applicant resides. Unlike barring orders, safety and protection orders do not exclude the respondent from a place of residence.

1.49 An assault or a violent threat, whether or not it could be inflicted immediately, would breach these prohibitions. The meaning of the terms “watching or besetting” are established in Irish law and are discussed in Chapter 2 below. “Molesting” and “putting in fear” are the lowest forms of misconduct that can breach an order and, while they are not defined in the 1996 Act, examples of molestation³³ include rifling through a partner’s handbag,

³² This conduct is also prohibited by safety orders and protection orders.

³³ See *Ward Annotation to the Domestic Violence Act 1996* Irish Current Law Statutes Annotated (Round Hall Sweet & Maxwell, 1997).

shouting obscenities, sending abusive letters and giving the press pictures of a former partner.

1.50 The most important point about the prohibited conduct, whether it be using or threatening to use violence, molesting or putting in fear, or watching and besetting, is that it is already unlawful. In *L v Ireland* Charleton J commented:³⁴

“It is never lawful to threaten to use violence against a person, unless one is oneself under attack or one is effecting a lawful arrest. It is not lawful to molest a person or make a person fear for dire consequences. These are all already criminal offences of long standing at common law. It is not lawful to watch a person's premises as other than by passing and re-passing on the highway, for lawful and reasonable purposes, and no one has a right to sit outside another person's home staring in. That is, at the least a trespass against the subsoil under the public road and as an intrusion into privacy it may be subject to injunctive relief. Nor is it lawful to beset a premises, meaning to surround the persons residing there with a feeling of hostile intent.”

1.51 Thus safety and protection orders, which prohibit conduct that is already unlawful, are less significant infringements of the rights of the respondent than barring and interim barring orders which prohibit the respondent from entering his or her place of residence. Charleton J commented in *L v Ireland*:³⁵

“One asks, in those circumstances as to what the applicant loses by a protection order being made against him?³⁶ The answer, it seems to me, is that there is certainly a threat of an especial kind that if he does something that is already unlawful, and which may be merely tortious, depending on the circumstances, he runs the risk of the commission of a criminal offence with subsequent prosecution. That is the worst that can happen. At best, he may merely be annoyed.”

1.52 The differences between the conduct that is prohibited by protection orders and the prohibition contained in interim barring orders was crucial when the High Court and Supreme Court considered and upheld the constitutionality of *ex parte* protection orders in *L v Ireland*³⁷ and *Goold v Collins*³⁸. The

³⁴ *L v Ireland* [2008] IEHC 241 at para 12.

³⁵ *L v Ireland* [2008] IEHC 241 at para 13.

³⁶ The respondent in this case was a man.

³⁷ *L v Ireland* [2008] IEHC 241.

distinction between the effects of the two types of order means that it is permissible for the procedures for obtaining a protection order to abridge the respondent's rights to a greater extent than the procedures for obtaining an interim barring order. Thus compared to the 8 day limit for *ex parte* interim barring orders a return date of 15 days was held to be constitutional in respect of *ex parte* protection orders.³⁹

(12) Requirements for obtaining a domestic violence order: risk to “safety or welfare” of applicant and level of misconduct by respondent

1.53 The Court must find reasonable grounds for believing that the safety or welfare of the applicant or a dependent person requires it before a barring order, safety order, or protection order is granted. In *O'B v O'B* the Supreme Court discussed the criteria that have to be fulfilled before an order is granted.⁴⁰ This decision was made in the context of the *Family Law (Protection of Spouses and Children) Act 1981* but it remains the leading case in the area and most of its principles apply to the 1996 Act.⁴¹

(a) Interpretation of “Safety or Welfare”

1.54 Delivering the majority judgment in *O'B v O'B* O'Higgins CJ stated:⁴²

“The use of the word “safety” probably postulated a necessity to protect from actual or threatened physical violence emanating from the other spouse. The word “welfare” is not so easy to construe. I incline to the view that it was intended to provide for cases of neglect or fear or nervous injury brought about by the other spouse.”

1.55 In his dissenting judgment, Griffin J took a broader view of the terms “safety” and “welfare”. He stated that the word “safety” must be referable to violence or threatened violence whereas the word “welfare” referred to the physical and emotional “health and wellbeing” of the applicant. It is suggested by Shatter that the meaning of “welfare” in the 1996 Act, which defines welfare as including “physical and psychological welfare”, is closer to the interpretation

³⁸ *Goold v Collins* [2004] IESC 38.

³⁹ *L v Ireland* [2008] IEHC 241 at para 13.

⁴⁰ *O'B v O'B* [1984] IR 182.

⁴¹ Shatter *Family Law* 4th ed (Butterworths 1997) at 858.

⁴² *O'B v O'B* [1984] IR182 at 187.

of the term by Griffin J.⁴³ This definition clarifies that the risk to the applicant need not be a physical risk and may be a risk of emotional harm.

(b) Causal connection and level of misconduct by respondent

1.56 The decision in *O'B v O'B* also imposed additional requirements on the applicant seeking a domestic violence order.⁴⁴ First there must be a causal connection between the harm caused or apprehended and the conduct of the respondent. This is not contentious. If there is no causal connection between the harm caused to the applicant and the respondent's conduct then an order would serve no purpose.

1.57 Second is the requirement that the risk to the applicant's safety or welfare cannot arise merely from the irretrievable breakdown of the relationship. The Court held that the respondent's conduct must attain a minimum level of severity before an order is justified. The Court placed particular emphasis on the criminal law consequences for a respondent of breaching an order, O'Higgins CJ noting that, as the respondent could be imprisoned for six months if he or she contravened its terms "[t]hese consequences indicate that the making of such an order requires serious misconduct on the part of the offending spouse."⁴⁵

1.58 What constitutes misconduct that is sufficient to ground an order was explored by the Court. O'Higgins CJ required "serious misconduct" commenting that it should be "wilful and avoidable" and also that it be "continuing and repetitive in nature".⁴⁶ In his view the conduct in the case (financial control, verbal abuse and disparaging remarks) was part of the normal wear and tear of marriage. Griffin J, dissenting, found that the respondent's misconduct was sufficiently serious to justify the granting of a barring order, commenting that the conduct was "abnormal... by any standard".⁴⁷

1.59 It has been observed that the decision in *O'B v O'B* was interpreted by other courts in a manner that struck the wrong balance between protecting victims and ensuring the due process rights of respondents.⁴⁸ For example Shannon comments that some judges interpreted *O'B v O'B* as requiring a pattern of violence even though he notes that "mental cruelty perpetrated by

⁴³ Shatter *Family Law* 4th ed (Butterworths 1997) at 860.

⁴⁴ *O'B v O'B* [1984] IR 182.

⁴⁵ *O'B v O'B* [1984] IR 182 at 189.

⁴⁶ *O'B v O'B* [1984] IR 182 at 188.

⁴⁷ *O'B v O'B* [1984] IR 182 at 193.

⁴⁸ See Ward "Barring Orders: A Need For Change" (1988) 6 ILT 90.

one spouse against the other” clearly invokes the jurisdiction of the court.⁴⁹ The 1996 Act limited the effect of *O’B v O’B* to some extent by clarifying that a domestic violence order can be granted even where there is not a physical risk to the applicant.

1.60 Several commentators note that guidance from the Superior Courts on the interpretation of “welfare” and the conduct requirements would be welcome to clarify outstanding uncertainties.⁵⁰ This view was echoed by some consultees who made submissions in response to the Commission’s Issues Papers and who indicated that it is not clear what behaviour will amount to emotional or psychological abuse. In *L v Ireland* molestation was held to be unlawful conduct in its own right. It could be argued, and indeed is the position in the UK (discussed below), that molestation or some other form of tortious behaviour is the minimum level of misconduct required before an order will be granted.

(13) Analysis

1.61 The Commission concludes this Part with a brief recapitulation of the relationship between the general purposes of the 1996 Act and the question as to whether breach of a domestic violence order should be made a serious offence for the purposes of Article 40.4.6° of the Constitution and the *Bail Act 1997*. This does not include any conclusions on that issue; rather it forms the background to the comparative analysis in Part C, which is followed by the Commission’s conclusions and recommendations in Part D.

(a) The effectiveness of domestic violence orders as remedies against domestic violence

1.62 For domestic violence orders to be an effective remedy the victims of domestic violence must be able to obtain an order when appropriate. In 2012, out of 2,789 applications for barring orders 1,165 (41.8%) were granted by the District Court and out of 5,026 applications for safety orders 2,255 (44.9%) were granted after a full hearing with the respondent present. At first sight this low percentage of orders granted might suggest that the application process is unduly onerous for applicants, but it appears that in the majority of cases the initial application is withdrawn or struck out by agreement before the case comes to a hearing.⁵¹ Often after the initial application to the court the parties

⁴⁹ Shannon *Family Law Practitioner* (Round Hall) at para F - 010.

⁵⁰ Law Society of Ireland, Law Reform Committee *Domestic Violence: The Case for Reform* (May 1999); Shatter *Family Law* 4th ed (Butterworths 1997).

⁵¹ Shannon *Family Law Practitioner* (Round Hall looseleaf), para F-023, notes that in 2000 49.2% of orders were withdrawn or struck out while only 4.1% of

enter a compromised agreement that is tailored to the particular facts of the case; for example an agreement may provide for the split occupation of a family home to facilitate access to children by both parties.⁵²

1.63 Other factors which make *Domestic Violence Act 1996* orders obtainable in appropriate circumstances by the victims of domestic violence include: firstly, that applicants do not need to show that they have been the victim of physical violence or that an order is required to prevent future physical violence as proof of emotional abuse is sufficient where it threatens the applicant's psychological welfare.⁵³ Secondly, applicants can also obtain interim protection in the form of interim barring orders and protection orders which can be granted on an *ex parte* basis. This means that applicants can obtain protection from domestic violence in the period between the initial application for a domestic violence order and the final decision.

1.64 In addition, the overwhelming majority of breaches of domestic violence orders lead to criminal prosecutions, indicating that domestic violence orders are strictly policed. In 2011 out of 1,082 recorded breaches, 936 (86.5%) led to criminal prosecutions. These facts would indicate that domestic violence orders are a broadly effective remedy for victims of domestic violence. Consultees did not express disagreement with the Commission's observation in the Issues Paper on this aspect of the project⁵⁴ that the 1996 Act is broadly effective in protecting applicants from domestic violence.

1.65 The rights of the respondent are also taken into account in the 1996 Act. First, the respondent's conduct must attain a minimum level of severity before an order is granted and an order cannot be granted merely because of

applicants were refused relief by the court. The Commission understands that these figures continue to represent the current general position.

⁵² These compromised agreements are often made "without prejudice" to other proceedings that the parties may be involved in such as judicial separation or divorce proceedings, or child custody proceedings: see also paragraph 1.88, below.

⁵³ Nonetheless it has also been observed that the lack of guidance as to when an order should be granted has led to discrepancies in how the 1996 Act is applied in practice: see Law Society of Ireland, Law Reform Committee *Domestic Violence: The Case for Reform* (1999). This has meant that some victims of domestic violence have found it difficult to obtain protection from emotional, as opposed to physical, violence: see Women's Aid *Recommendations for the Review of the Domestic Violence Legislation* (November 2012).

⁵⁴ *Issues Paper on Domestic Violence: Bail* (LRC IP 1-2013), available at www.lawreform.ie/issues-papers.409.html.

the irretrievable breakdown of the relationship.⁵⁵ Second, the period for which *ex parte* orders are valid is limited,⁵⁶ although there are outstanding concerns about the length of time that interim orders remain in force when they are granted after hearing both the applicant and respondent.⁵⁷ Some consultees suggested that in certain cases the application process as it currently stands is too favourable for applicants and should become more onerous to ensure that orders are only granted in cases where they are justified.

(b) Interim and ex parte orders

1.66 The Commission has been informed that interim orders, and interim orders obtained *ex parte*, often provide essential protection for victims of domestic violence in times of crisis and vulnerability. In 2012 out of 4,192 applications for protection orders, 3,849 (91.8%) were granted by the District Court and out of 648 applications for interim barring orders, 520 (80.2%) were granted by the District Court.

1.67 However interim orders, particularly those granted on an *ex parte* basis, are a more substantial interference with the respondent's rights than a full order because interim orders are granted without a full review of the evidence and *ex parte* orders are granted without hearing evidence from the respondent. The fact that an order is granted without a full hearing of the facts and that it is a criminal offence to breach such order has been acknowledged by the Supreme Court as "draconian".⁵⁸ Some consultees were also aware of the interim and *ex parte* procedure being abused by applicants where the applicant applied for and obtained an order in circumstances where the true facts of the case did not merit an order being granted. Thus there is a real danger of the procedure producing a result that is unfair to respondents especially as a barring order can often amount to a *de facto* award of custody of children.

⁵⁵ *O'B v O'B* [1984] IR 182.

⁵⁶ *DK v Crowley* [2002] 2 IR 744. As already noted, this decision led to the amendment of section 4 of the 1996 Act by section 1 of the *Domestic Violence (Amendment) Act 2002* which limits to 8 days the period that *ex parte* interim barring orders can remain in force.

⁵⁷ Law Society of Ireland, Law Reform Committee *Domestic Violence: The Case for Reform* (1999); Horgan & Martin *Domestic Violence and Abuse in 2008 – What Has Been Done to Tackle the Problem?* (2008) 11(3) IJFL 66.

⁵⁸ *DK v Crowley* [2002] 2 IR 744 at 750.

(c) Breach of domestic violence order may separately constitute a serious offence

1.68 The Commission also notes that in some instances the conduct that amounts to a breach of a domestic violence order under the 1996 Act may constitute a serious offence under the *Bail Act 1997*. This means that a prosecution could be brought for the “underlying offence” as well as for breach of the domestic violence order.⁵⁹ For example assault causing harm under section 3 of the *Non-Fatal Offences Against the Person Act 1997* which carries a maximum sentence on conviction on indictment of 5 years imprisonment, and harassment under section 10 of the *Non-Fatal Offences Against the Person Act 1997* which carries a maximum sentence on conviction on indictment of 7 years imprisonment, are also scheduled offences under the *Bail Act 1997*. Therefore bail might be refused pursuant to the *Bail Act 1997* for preventative reasons in an appropriate case where breach of a domestic violence order was accompanied by such an underlying offence. In addition, the Schedule to the 1997 Act, as amended by the *Criminal Justice Act 2007*, provides that “attempting or conspiring to commit, or inciting the commission” of any serious offence that is listed in the Schedule to the 1997 Act is itself a scheduled offence for the purposes of the 1997 Act. Thus if the conduct that breaches a domestic violence order involves an attempt to commit assault causing harm, a person charged with that serious offence could be refused bail under the 1997 Act for preventative reasons provided the circumstances meet the other requirements set out in the *Bail Act 1997*.

(d) Bail conditions in domestic violence cases and consequences for non-compliance with conditions

1.69 The Commission has also referred in this Part to section 6 of the *Bail Act 1997* which provides that conditions may be imposed on the granting of bail in all cases, including summary cases such as the charge of breach of a domestic violence order. In addition, section 11(1) of the *Criminal Justice Act 1984*⁶⁰ also provides for consecutive sentences where an offence is committed by an accused while on bail or where the accused is unlawfully at large after the issue of a warrant for his or her arrest for non-compliance with a bail condition. The Commission considers that these provisions, namely the power to impose suitable bail conditions, the facility for An Garda Síochána to apply for the arrest of an accused who breaches such conditions, the power to revoke bail and remand in custody in such cases, followed by the trial on the charge as soon as possible after remand and before a different judge, together with the provision

⁵⁹ See paragraph 1.36, above.

⁶⁰ As substituted by section 22 of the *Criminal Justice Act 2007*.

for consecutive sentences for offences committed while on bail, are also relevant to the consideration of whether breach of a domestic violence order should be made a serious offence.

C Comparative Analysis

1.70 In this Part, the Commission discusses similar domestic violence legislation in England and Wales and in Australia.

1.71 It is relevant to compare the severity of the criminal sanction for a breach of a domestic violence order or its equivalent in the various jurisdictions where the other jurisdiction allows an applicant to obtain an order in largely the same circumstances as in Ireland, and the respondent can breach an order through largely the same conduct as in Ireland. It is of interest to examine why the breach in another jurisdiction can be punished by a considerably longer sentence of imprisonment than in Ireland. However the Commission notes that this comparative analysis must take account of Ireland's constitutional requirements and in particular Article 40.4.6^o. This provides that bail may be refused only in respect of a "serious offence" which the Oireachtas debates suggested involved a two part test, namely, that the offence involved a level of harm carrying a sentence of at least five years on conviction and other criteria, such as a demonstrable risk of reoffending, in order to be scheduled under the *Bail Act 1997*. Secondly, the Supreme Court has noted that the current law under which orders may be obtained *ex parte* under the *Domestic Violence Act 1996* constitutes an exception to the ordinary requirement that both parties be heard before any adverse legal effect is imposed on another person and therefore that such orders must be time-limited in their effect. Thus, any further adverse effect, such as making breach of such an order a "serious offence" might lead to a conclusion that *ex parte* orders should no longer be permissible. This would undermine the efficacy of the *Domestic Violence Act 1996* and the Commission has had regard to these considerations in the comparative analysis that follows.

(1) England and Wales

(a) Bail

1.72 In England and Wales where a defendant is accused or convicted of an "imprisonable offence", section 2 of the Schedule of the *Bail Act 1976* provides:

"The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—

(a) fail to surrender to custody, or

(b) commit an offence while on bail, or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person”.

1.73 There is no requirement that the offence be an indictable, still less an arrestable, offence for bail to be refused on preventative grounds.⁶¹ Bail may be refused in appropriate circumstances once the offence is punishable by a sentence of imprisonment.⁶²

(b) Protection under the Family Law Act 1996

1.74 The *Family Law Act 1996* of England and Wales makes provision for occupation orders (similar to barring orders) and non-molestation orders (similar to safety orders).⁶³ The aim of the *Family Law Act 1996* is to provide victims of domestic violence with an effective civil remedy. In England and Wales non-molestation orders have been supplemented by criminal enforcement powers since 2007⁶⁴ and breach is punishable by up to five years imprisonment.⁶⁵

(i) Occupation Orders

1.75 Occupation orders may declare a right to occupy a dwelling or regulate the right to occupy a dwelling. Occupation orders do not regulate behaviour that does not relate to the dwelling. This is unlike barring orders under Ireland’s Domestic Violence Act 1996 which may also prohibit using or threatening to use violence, molesting or putting in fear and attending at or in the vicinity or watching or besetting the place where the applicant resides.

1.76 Breach of an occupation order is not a criminal offence in England and Wales,⁶⁶ although the Court must attach a power of arrest to the order if the respondent has “used or threatened violence against the applicant or a relevant

⁶¹ Bail may be refused on other grounds, provided for in Schedule 1 of the 1976 Act, which are not relevant to this discussion.

⁶² Where a defendant is charged with a non-imprisonable offence they may only be refused bail if they have previously failed to surrender to custody while on bail and in view of that previous failure the defendant would again fail to surrender: Schedule 1, Part II, paragraph 2 of the *Bail Act 1976*.

⁶³ Part IV of the *Family Law Act 1996*.

⁶⁴ Section 1 of the *Domestic Violence, Crime and Victims Act 2004* inserted section 42A into the *Family Law Act 1996* which provides for the criminal offence of breaching a non-molestation order. The 2004 Act came into force in 2007.

⁶⁵ Section 1 of the *Domestic Violence, Crime and Victims Act 2004*.

⁶⁶ Breaching an occupation order is a criminal offence in Northern Ireland.

child”.⁶⁷ Breach of an occupation order is a civil contempt of court in England and Wales. In the circumstances the differences between occupation orders available in England and Wales and barring orders available in Ireland do not make for any direct comparison for the purposes of this discussion except to note that breach of a barring order in Ireland is treated more severely than breach of an occupation order in England and Wales.

(ii) Non-Molestation Orders

1.77 Section 42 of the *Family Law Act 1996* defines a non-molestation order as an order containing either or both of the following provisions:

“(i) provision prohibiting a person (“the respondent”) from molesting another person who is associated [⁶⁸] with the respondent

(ii) provision prohibiting the respondent from molesting a relevant child.”⁶⁹

1.78 The term “molestation” has not been defined by legislation. In its 1992 Report the Law Commission of England and Wales stated that it saw no need for the term to be defined as to do so could render it too restrictive.⁷⁰ The Law Commission made the following remarks:

“Molestation is an umbrella term which covers a wide range of behaviour. Although there is no statutory definition of molestation the concept is well established and recognised by the courts. Molestation includes, but is wider than violence. It encompasses any form of serious pestering or harassment and applies to any conduct which could properly be regarded as such a degree of harassment as to call for the intervention of the court.”⁷¹

1.79 In *Johnson v Walton*, Stephenson LJ stated that:

“Molest” is a wide plain word which I should be reluctant to define or para-phrase. If I had to find one synonym for it I should select “pester”⁷²

⁶⁷ Section 47(2) of the *Family Law Act 1996*.

⁶⁸ Section 62(3) of the *Family Law Act 1996*.

⁶⁹ Section 42 of the *Family Law Act 1996*.

⁷⁰ Law Commission *Family Law Domestic Violence and Occupation of the Family Home* (207-1992) at 20.

⁷¹ *Ibid* at 19.

⁷² *Johnson v Walton* [1990] 1 FLR 350 at 354.

1.80 There does not appear to be a significant difference between the minimum level of conduct which might breach a safety order in Ireland and its approximate equivalent non-molestation order in England and Wales. Thus behaviour such as rifling through a partner's handbag,⁷³ shouting obscenities,⁷⁴ sending abusive letters and giving the press pictures of a former partner has constituted molestation in England and Wales.⁷⁵ This behaviour would also breach an order in Ireland.⁷⁶

(c) Requirements for obtaining a Non-Molestation Order

1.81 In deciding whether to grant a non-molestation order the Court "shall have regard to all the circumstances including the need to secure the health, safety and well-being" of the applicant and any relevant child.⁷⁷ However a prerequisite to granting a non-molestation order is that there must be molestation in the first place.⁷⁸ This means that the respondent's misconduct must have been sufficiently serious to constitute molestation.

1.82 There does not appear to be a significant difference between the requirement in the Irish 1996 Act for the respondent's misconduct to attain a minimum level of severity⁷⁹ before a domestic violence order is justified and the requirement for "molestation" in England and Wales.

(d) Analysis of the protection in England and Wales

1.83 Although bail law in England and Wales differs in a number of respects from bail law in Ireland, it is nonetheless important to consider the consequences that arise on conviction for breach of a non-molestation order. Breach of a non-molestation order was made a criminal offence in 2007 punishable by a maximum sentence of five years imprisonment. If a five year maximum sentence were introduced in Ireland the offence of breaching a safety or protection order could be classified as a "serious offence" for the purposes of the Constitution and the *Bail Act 1997*.

1.84 When the sentence of five years imprisonment was introduced for breach of a non-molestation order molestation continued to be the minimum

⁷³ *Spencer v Camacho* (1984) 4 FLR 662.

⁷⁴ *George v George* [1986] 2 FLR 347.

⁷⁵ *Johnson v Walton* [1990] 1 FLR 350.

⁷⁶ See paragraph 1.48, above.

⁷⁷ Section 42(5) of the *Family Law Act 1996*.

⁷⁸ *C v C (Non-Molestation Order: Jurisdiction)* [1998] Fam 70.

⁷⁹ See paragraph 1.57, above.

level of misconduct required to justify an order and no increase in the severity of the misconduct was required despite the punishment for breach of a non-molestation order being significantly increased. Molestation in England and Wales is the equivalent of the minimum level of severity required for the grant of a safety or protection order in Ireland.⁸⁰ The fact that in England and Wales breach of a non-molestation order is punishable by five years imprisonment might therefore suggest that the punishment for breach of a domestic violence order in Ireland is too low and that in certain cases a five year sentence would be necessary to reflect the seriousness of a breach and such a sentence should be introduced in Ireland. Were this done breach of a domestic violence order would become a “serious offence” (if scheduled in the *Bail Act 1997*) for which bail could be denied for preventative reasons.

1.85 However, despite the potentially more severe punishment in England and Wales the sentencing guidelines for breach of a non-molestation order state that only a breach involving “significant violence” and “significant harm” to the victim should be punished by more than 12 months imprisonment.⁸¹ For example in *Robinson v Murray* the English Court of Appeal indicated that where a breach of a non-molestation order is sufficiently serious to warrant a sentence at the upper end of the scale, a prosecution for harassment should often be brought under the *Protection from Harassment Act 1997*.⁸²

1.86 It must also be remembered that in Ireland when an offence is punishable by up to five years imprisonment and scheduled in the *Bail Act 1997* this has effects that are not present in England and Wales. In England and Wales bail can be denied for any imprisonable offence. However in Ireland there is a constitutional requirement that it is only in respect of “serious offences” i.e. when an offence is punishable by up to five years imprisonment and scheduled in the *Bail Act 1997*, that bail may be denied for preventative reasons. Thus a distinction between the two jurisdictions must be drawn. The fact that in England and Wales breach of a non-molestation order can be punished by up to five years imprisonment does not necessarily mean that this would be an appropriate reform to introduce to Ireland or that the effects of such a reform upon the application process for a domestic violence order would be the same.

(2) Australia

⁸⁰ See paragraph 1.58, above.

⁸¹ Sentencing Guidelines Council *Breach of a Protective Order, Definitive Guideline* (December 2006).

⁸² *Robinson v Murray* [2005] EWCA Civ 935.

1.87 All Australian States and territories have legislated in relation to domestic violence by providing for civil orders, breach of which is a criminal offence. The maximum sentences on conviction for breach of an order in Australia range from five years imprisonment in Australian Capital Territory to two years imprisonment in Queensland, New South Wales, Northern Territory, South Australia, Western Australia and Victoria. Tasmania uses a tiered system of sentencing whereby the first breach of a protective order is punishable by one years imprisonment rising to a term of imprisonment of up to five years for fourth and subsequent breaches.

1.88 As already noted in the discussion above of the Commission's 1995 *Report on an Examination of the Law on Bail*, in Australia it has been provided in many states and territories since the 1970s that bail can be denied for any offence on the ground that it is likely the accused will commit further offences. The primary consideration is whether the accused will answer his or her bail. Protecting the community from further offences is a consideration that is taken into account when deciding whether bail should be granted or not.⁸³ However in some states bail for domestic violence related offences is treated differently from other offences. For most other offences there is a presumption in favour of bail and this is retained in Queensland for breach of a domestic violence order. In New South Wales, Victoria, Australian Capital Territory and the Northern Territory where a domestic violence order has been breached and the accused has a history of violence no such presumption applies. In Tasmania the presumption is reversed in domestic violence cases and bail is not granted "unless a judge, court or police officer is satisfied that release of the person on bail would not be likely to adversely affect the safety, wellbeing and interests of an affected person or affected child".⁸⁴

(a) Protection under Australian Legislation

1.89 In Australia the protection offered by domestic violence orders is generally more specifically defined than Ireland. For example in the Australian Capital Territory, where breaching an order is punishable by up to five years imprisonment, a domestic violence order may contain prohibitions or conditions as the Court considers necessary. The order may:

"(a) prohibit the respondent from being on premises where the aggrieved person lives;

⁸³ Australian Law Reform Commission *Family Violence - A National Legal Response Report* (114 2010) at 412.

⁸⁴ Section 12(1) *Family Violence Act 2004*.

- (b) prohibit the respondent from being on premises where the aggrieved person works;
- (c) prohibit the respondent from being on premises where the aggrieved person is likely to be;
- (d) prohibit the respondent from being in a particular place;
- (e) prohibit the respondent from being within a particular distance from the aggrieved person;
- (f) prohibit the respondent from contacting, harassing, threatening or intimidating the aggrieved person;
- (g) prohibit the respondent from damaging the aggrieved person's property;
- (h) prohibit the respondent from doing anything mentioned in paragraphs (a) to (g) in relation to—
 - (i) a child of the aggrieved person; or
 - (ii) any other child if the Magistrates Court is satisfied that there is an unacceptable risk of the child being exposed to domestic violence;
- (i) prohibit the respondent from causing someone else to do something mentioned in paragraph (f) or (g) or subsection (3) (a);
- (j) state the conditions on which the respondent may—
 - (i) be on particular premises; or
 - (ii) be in a particular place; or
 - (iii) approach or contact a particular person.”⁸⁵

1.90 The Commission notes therefore that while the majority of Australian states allow for a longer term of imprisonment for breach of a domestic violence order than Ireland, this arises in relation to orders that define prohibited conduct more specifically than in Ireland. The problem with making the terms of an order very specific is that there is a risk of creating borderline disputes thereby undermining the protection granted to the applicant. For example if an order prohibited a respondent from coming within 50 yards of the applicant the respondent could still pester and intimidate the applicant by staying over 50 yards away. The risk of undermining the protection provided by a domestic violence order is the primary reason why the term “molestation” has not been

⁸⁵ Section 48 *Domestic Violence and Protection Orders Act 2008*.

specifically defined in the UK or Ireland. The Law Commission of England and Wales commented:

“[A] definition might become over restrictive or... could lead to borderline disputes. Consequently, we *recommend* that the courts should continue to have the power to grant protection against all forms of molestation, including violence, and we further *recommend* that there should be no statutory definition of molestation”.⁸⁶

1.91 The Commission considers that it is preferable to have less specifically defined orders in the context of domestic violence orders for the above reasons. It also appears, from the above, that the minimum level of misconduct that will breach an order is higher in Australia than Ireland, thus justifying a longer maximum term of imprisonment.

(b) Requirements for obtaining an order

1.92 In Australia, the states and territories have chosen an approach where they have defined domestic violence and have based the requirements for obtaining an order around this definition. As individual states have defined domestic violence slightly differently it is best to take the model provision provided by the Australian Law Reform Commission which generally reflects the law in the various jurisdictions:⁸⁷

“State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;

⁸⁶ Law Commission *Family Law Domestic Violence and Occupation of the Family Home* (207-1992) at 19.

⁸⁷ Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), cited in Australian Law Reform Commission *Family Violence - A National Legal Response Report* (114 of 2010) at 234.

(g) damage to property, irrespective of whether the victim owns the property;

(h) causing injury or death to an animal irrespective of whether the victim owns the animal; and

(i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.”⁸⁸

The Australian Law Reform Commission emphasises that the definition goes beyond purely criminal conduct.⁸⁹

1.93 The Commission notes that if such a definition were introduced in Ireland it is likely that it would raise the threshold for the required minimum level of misconduct that justifies an order above the threshold that currently exists. For example the applicant would have to show that the respondent’s misconduct is such that it “coerces or controls a family member or causes that family member to be fearful” whereas at present in Ireland molestation is the lowest form of conduct that would merit a domestic violence order and whilst the respondent’s conduct, which can take the form of physical or emotional violence, must attain a minimum level of severity before an order is granted.

(c) Analysis of the protection in Australia

1.94 The differences between the schemes of protection available in Australia and Ireland, and the differences between their respective bail laws, undermine any direct comparison on the specific question of whether breach of a domestic violence order should be an offence for which bail can be denied for preventative reasons. However, as with the comparison made with England and Wales, looking at the severity of the criminal sanction for breach of an order might suggest that the criminal sanction in Ireland is too low and should be increased.

1.95 While breach of a domestic violence can be punished by longer terms of imprisonment in Australia than in Ireland the majority of states and territories provide that the maximum sentence is two years imprisonment (Queensland, New South Wales, Northern Territory, South Australia, Western Australia and Victoria). Thus even if a two-year maximum sentence were introduced in Ireland breach of a domestic violence order would not constitute a “serious offence” for the purposes of Article 40.4.6^o of the Constitution or the *Bail Act 1997*. Moreover, even though longer sentences of imprisonment are

⁸⁸ Australian Law Reform Commission *Family Violence - A National Legal Response* Report (114 of 2010) at 246.

⁸⁹ *Ibid* at 156.

provided for in Australia the terms of an order are generally more specifically defined. The Commission observes that this risks undermining the protection that a domestic violence order provides.

1.96 The Australian Law Reform Commission noted that there was no consensus as to what the maximum penalty should be for breach of a domestic violence order.⁹⁰ Nonetheless the Australian Law Reform Commission commented that the maximum penalty only really becomes significant when an underlying criminal offence is not charged and the practice of not charging the underlying criminal offence is criticised.⁹¹ This would again indicate that longer prison sentences are rarely necessary to reflect the seriousness of the breach.

D Conclusions and Recommendations

1.97 The issue being discussed in this chapter 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*. This would require breach of a domestic violence order to be made a “serious offence” for the purposes of the Constitution and the *Bail Act 1997* by providing that it would be punishable by up to five years imprisonment and listed in the Schedule to the 1997 Act.

1.98 The Commission considers that it is particularly significant that none of the groups consulted, including practitioners and other people who have specialist knowledge of the area who made submissions in response to the Issues Paper on this matter,⁹² considered that breach of a domestic violence order should be made an offence punishable by five years imprisonment. Moreover none of the consultees indicated that there is a particular problem because the preventative detention provisions of the *Bail Act 1997* do not apply to breach of a domestic violence order.

1.99 In addition to the general view of consultees the Commission has considers that the following are particularly relevant when looking at this issue.

⁹⁰ Australian Law Reform Commission *Family Violence - A National Legal Response* Report (114 of 2010) at 547 (the majority of respondents favoured a 2 year sentence).

⁹¹ Australian Law Reform Commission *Family Violence - A National Legal Response* Report (114 of 2010) at 547.

⁹² *Issues Paper on Domestic Violence: Bail* (LRC IP 1-2013), available at www.lawreform.ie/issues-papers.409.html.

(1) *The Domestic Violence Act 1996 as a remedy against domestic violence*

1.100 It appears that the 1996 Act is generally effective at providing protection for the victims of domestic violence who apply for a domestic violence order. Despite what appears at first sight to be a low percentage of orders being granted, this arises as discussed above from applications being withdrawn or struck out before the matter comes to a full hearing. Applicants can obtain protection from emotional and psychological abuse as well as physical abuse. Applicants can also obtain interim protection which provides protection even where a case has not been proven against the respondent. Finally where a domestic violence order is breached it leads to prosecution in the overwhelming majority of cases. Thus it appears that domestic violence orders are being strictly policed by the Gardaí and the courts.

1.101 Consultees did not express disagreement with the view expressed in the Commission's Issues Paper⁹³ that the 1996 Act is broadly effective in protecting applicants from domestic violence. Indeed one consultee indicated that at times the application process, which initially often involves an *ex parte* application, may be perceived as being too favourable to applicants at the expense of properly observing the rights of the respondent.

1.102 Domestic violence orders often arise in the context of a wider dispute between the parties, notably in separation or divorce proceedings or in child custody proceedings. One court may grant the domestic violence order and another rule on the other proceedings. In separation, divorce or child custody proceedings the parties will often enter into a settlement that includes all elements on which the parties are in dispute. So in addition to dealing with details of separation, divorce and custody, some aspects of which may be subject to court approval, such a settlement may include an undertaking which in effect extends an interim domestic violence order on the condition that this element of the settlement will not be disclosed to the court dealing with the separation, divorce or custody proceedings. Another common situation is that after an initial application for a domestic violence order the parties will come to a settlement which include a range of elements such as an agreement to share occupation of a family home to facilitate child custody or an agreement that a respondent may return to the applicant's residence but only when another person is present. These settlements are generally made without prejudice to the final determination of other proceedings in which the parties may also be engaged. The Commission considers that these types of undertaking and agreements, used appropriately and in a cooperative and collaborative manner

⁹³ *Issues Paper on Domestic Violence: Bail* (LRC IP 1-2013), available at www.lawreform.ie/issues-papers.409.html.

to resolve a multi-faceted and complex family law dispute, are generally beneficial and should not be discouraged.

1.103 If breach of a domestic violence order were made a “serious offence” it is possible that the balance that is currently struck between providing effective protection and observing the respondent’s rights under the 1996 Act would be put at risk. The threshold of misconduct required to obtain a domestic violence order would probably be raised to reflect the more serious consequences of breach thereby inhibiting the ability of applicants to obtain the protection that is currently afforded. In *O’B v O’B* the Supreme Court imposed a requirement on the applicant for a domestic violence order (under the pre-1996 Act legislation in this area) that the conduct attain a minimum level of severity⁹⁴ and in doing so the Court placed particular emphasis on the criminal law consequences of breaching an order for a respondent. O’Higgins CJ noted that as the respondent could be imprisoned for six months if he or she contravened its terms “[t]hese consequences indicate that the making of such an order requires serious misconduct on the part of the offending spouse.”⁹⁵

1.104 Thus if the criminal punishment for breach of an order were increased to five years imprisonment it is likely, in light of *O’B v O’B*, that the misconduct required to justify an order being granted would have to attain a greater level of severity than currently required. If the respondent’s misconduct were required to attain a greater level of severity than is currently required the 1996 Act might be less effective at providing protection for applicants who are the victims of emotional abuse. The Commission considers that this would fundamentally undermine the objective of the *Domestic Violence Act 1996* which is to provide protection from misconduct that includes relatively minor misconduct albeit of a minimum level of severity.

1.105 The Commission notes that in England and Wales the threshold of misconduct required to obtain a non-molestation order was not changed when it was provided in legislation in 2004 that breach of such an order was a criminal offence punishable by up to five years imprisonment. The Commission also notes that the substance of the protection offered by non-molestation orders is the same as the protection offered by safety and protection orders in Ireland. However, in light of Irish case law, notably *O’B v O’B*, and also the constitutional and legal significance of making an offence punishable by five years imprisonment, the Commission is satisfied that making breach of a domestic violence order a “serious offence” would risk making it more difficult to obtain one. This view was also expressed by some consultees who were concerned

⁹⁴ *O’B v O’B* [1984] IR 182.

⁹⁵ *O’B v O’B* [1984] IR 182 at 189.

that making breach of a domestic violence a “serious offence” would risk raising the threshold of misconduct required. These consultees felt this could mean that victims of domestic violence could be in danger because they might be unable to obtain a domestic violence order.

1.106 Another view expressed by some consultees was that it would be inappropriate to label breach of a domestic violence order a “serious offence” because it would affect the rights of the respondent in a disproportionate manner. Where a domestic violence order is granted and the respondent breaches its terms, he or she is already liable to be arrested and prosecuted. This may happen in front of children causing disproportionate adverse consequences for the respondent. The danger of disproportionate adverse consequences for the respondent would clearly be even greater if breach of a domestic violence order could be punished by a maximum of five years imprisonment.

1.107 In any event, the Commission has also noted that, under section 6 of the *Bail Act 1997*, conditions may be imposed on the granting of bail in all cases, including summary cases such as the charge of breach of a domestic violence order. These can include conditions prohibiting the accused from going near the residence of the person who obtained a domestic violence order. If it comes to the attention of An Garda Síochána that an accused is even about to contravene such a condition, an application may be made to the District Court under section 6 of the 1997 Act to arrest the accused and the District Court may then remand the accused in custody in such cases. The Commission considers that the deprivation of liberty involved in such an instance is tempered by what the Commission understands is the general practice followed in such a case, namely, that the trial on the charge of breach of the domestic violence order occurs as soon as possible after remand and before a different judge.

1.108 The Commission considers that the imposition of such conditions and the consequences for the accused of contravening them, including the imposition of consecutive sentences under section 11 of the *Criminal Justice Act 1984* for offences committed while on bail, therefore already provides a significant further layer of protection in the context of domestic violence, even where the risk involved does not include, for example, assault causing harm, which is already a serious offence for the purposes of the *Bail Act 1997*. The Commission therefore considers that the ability to impose such bail conditions in the context of a domestic violence case, and the consequences in terms of consecutive sentencing for offences committed on bail, supports the conclusion that it would not be appropriate, and that it is not in practice necessary, to make breach of a domestic violence order a serious offence.

1.109 The Commission has also taken into account that domestic violence orders arise out of domestic relationships where there are often no witnesses

from outside the family to the conduct which the respondent is alleged to have committed. The Commission has been informed of cases where applicants abused the process by misrepresenting the facts of the case to obtain a domestic violence order and then engineered a circumstance whereby the respondent breached the order, for example by deliberately starting a heated row and then contacting the Gardaí alleging that a domestic violence order has been breached. The Commission is not in a position to quantify the number of such cases but even if they represent a low percentage it would not be appropriate to make the breach a “serious offence” so that the respondent might be refused bail in these circumstances.

1.110 Moreover, because of the pro-arrest policy of the Garda Síochána, if the holder of a domestic violence order complains to the Gardaí about a breach the respondent will generally be arrested, with the consequent withdrawal of bail, and then charged, with the consequent potential for consecutive sentences if convicted on both charges. The pro-arrest policy is viewed as an important protection for the victims of domestic violence, but if breach of a domestic violence order were punishable by five years imprisonment it would allow the Gardaí to detain a person for investigative reasons under the *Criminal Justice Act 1984*, rather than simply to secure their attendance in Court. This could also result in disproportionate adverse consequences for a respondent who is accused of breaching an order, thus running the risk that it may be regarded as a disproportionate interference with the respondent’s constitutional rights as described by the Supreme Court in *O’B v O’B*.

1.111 The Commission is also concerned that making breach of a domestic violence order a “serious offence” would effectively end the prospect of co-operation between the parties. This would endanger the flexible arrangements, described above, that are currently effective at protecting the interests of both the applicant and the respondent in the unique situations that arise in domestic relationships. For example it is more likely that a respondent would vigorously contest an application for a domestic violence order if breach of that order was a “serious offence” and could possibly lead to bail being refused for preventative reasons.

(2) *Interim and ex parte orders*

1.112 The validity of interim orders issued under the 1996 Act might also be open to question if breach of a domestic violence order were a criminal offence punishable by up to five years imprisonment. Interim and *ex parte* orders are a substantial interference with the respondent’s rights because interim orders are granted without a full review of the evidence and *ex parte* orders are granted without hearing evidence from the respondent. To ensure that the respondent’s rights are not disproportionately abridged the Supreme Court held in *DK v Crowley* that the period that *ex parte* interim barring orders can remain in force

must be limited and this is now set at eight days.⁹⁶ While the courts have allowed for a somewhat greater abridgment of the respondent's rights in relation to protection orders, so that 15 days has been held to be an acceptable period for which an *ex parte* protection order may remain in force,⁹⁷ this takes account of the current limited criminal law consequences for breaching an order.⁹⁸ It might not be the case that the interim and *ex parte* procedure would continue to be regarded as a proportionate abridgment of the respondent's rights if breach of an order carried a possible sentence of five years imprisonment.

1.113 The interim and *ex parte* procedure can provide essential and immediate protection for victims of domestic violence. However this must be balanced against the rights of the respondent. The Commission is concerned that making breach of an interim order a "serious offence", especially where obtained on an *ex parte* basis, would be fundamentally inappropriate. As already noted, the Commission was informed that in certain cases the process is open to abuse by applicants who obtain orders in circumstances where the true facts of the case do not merit an order. Even if these represent a low percentage of applications, the respondent's rights are already significantly curtailed by this procedure and should not be further undermined by making breach of an order a "serious offence".

(3) Other criminal offences

1.114 The Commission takes the view that where a breach of a domestic violence order would be sufficiently serious to merit being tried on indictment and punished by a sentence of five years or more imprisonment, the conduct that breaches the order will in any event constitute an underlying offence that is a "serious offence" for the purposes of the 1997 Act. Where this is so bail can be denied for preventative reasons whether or not breach of a domestic violence order is made into a "serious offence".

1.115 The Commission notes that the Sentencing Guidelines in England and Wales state that only a breach involving significant violence and significant harm will merit a sentence of over one years imprisonment.⁹⁹ Furthermore in Australia, where there is no consensus regarding what the maximum sentence

⁹⁶ *DK v Crowley* [2002] 2 IR 744. As already noted, this decision led to the enactment of the *Domestic Violence (Amendment) Act 2002* which limits the period that *ex parte* interim barring orders can remain in force to 8 days.

⁹⁷ *L v Ireland* [2008] IEHC 241 at para 13.

⁹⁸ *Goold v Collins* [2004] IESC 38 and *L v Ireland* [2008] IEHC 241.

⁹⁹ Sentencing Guidelines Council *Breach of a Protective Order, Definitive Guideline* (December 2006).

for breach of an order should be, the Australian Law Reform Commission stated that the maximum sentence for a breach is generally only relevant where an underlying offence is not charged. This would also indicate that where a breach of a domestic violence order is sufficiently serious to warrant a sentence of more than one year imprisonment there will have been an underlying “serious offence”.

1.116 The Commission also notes that an attempt to commit any “serious offence” that is listed in the Schedule to the 1997 Act is also a “serious offence” for the purposes of the Constitution and the 1997 Act. Thus if the conduct that breaches a domestic violence order discloses an attempt to commit a “serious offence” that is listed in the Schedule of the 1997 Act then bail can be refused for preventative reasons. This could be used in appropriate cases to deny bail to a respondent who poses a particular danger to an applicant.

1.117 The Commission recognises that a domestic violence order can be breached in ways which, while not amounting to a “serious offence”, engender severe fear in the applicant. The breach might disclose an underlying offence, albeit not a “serious offence”, or there might be repeated breaches of a domestic violence order by a respondent who had no intention of abiding by the order. The Commission is aware that in addition to the fear that these types of breaches can cause to an applicant there is a danger, particular in a domestic violence context, of violence escalating with serious consequences for the applicant. Despite these considerations, the Commission does not consider that making breach of a domestic violence order a “serious offence” would be an appropriate reform.

1.118 Where there is not an underlying “serious offence” it would appear disproportionate if bail could be refused for preventative reasons under the *Bail Act 1997*. Thus assault under section 2 of the *Non-Fatal Offences Against the Person Act 1997*, which cannot give rise to a prosecution on indictment and can only be tried summarily, carries a maximum sentence of six months imprisonment. It would be inconsistent, and disproportionate, if a breach of a domestic violence order by conduct that would otherwise amount only to an assault could be tried on indictment and punished by up to five years imprisonment. It would also be contrary to the spirit and purpose of Article 40.4.6° of the Constitution if these types of breach resulted in a denial of bail for preventative reasons. The Constitution is clear that both the offence charged and the offence apprehended must be “serious offences”. Providing that breach of a domestic violence order is a “serious offence” would be an attempt to circumvent the general constitutional prohibition on preventative detention, to which 40.4.6° is an important but limited exception, in the context of domestic violence orders.

1.119 There was support for this proposition from consultees who also agreed with the Commission’s comment in the Issues Paper that the

O'Callaghan grounds for refusing bail, namely the likelihood of interfering with witnesses, which remain available as an alternative ground for refusing bail under the *Bail Act 1997* in respect of any offence with which an accused has been charged, could be used to object to and in appropriate cases, refuse, bail where there is a likelihood of the accused continuing to commit domestic violence in breach of a domestic violence order.

1.120 Under this ground a person charged with breach of a domestic violence order might be refused bail under the 1997 Act where there is likelihood that he or she will evade justice by intimidating witnesses if released. Where there has been a breach of a domestic violence order the applicant will generally be a witness. Thus if there is a risk of continued domestic violence bail might be denied in appropriate circumstances on the ground that it is likely that the accused would intimidate the applicant.

1.121 The Commission observes that any perceived problems arising from breach of a domestic violence order not being a "serious offence" for the purposes of the Constitution or the *Bail Act 1997* can be addressed by firstly ensuring that where there is an underlying "serious offence" it is prosecuted as a separate charge. In these circumstances preventative detention under the 1997 Act may be permissible for the underlying offence. Secondly, where there is not an underlying "serious offence" the alternative grounds for refusing bail should be fully considered. Thirdly, it should be considered whether the breach of a domestic violence order amounts to an attempt to commit a "serious offence" because, as noted above in these circumstances bail can be refused for preventative reasons under the 1997 Act.

1.122 The Commission also reiterates that, under current law, a person charged with breach of a domestic violence order may be granted bail subject to conditions under section 6 of the *Bail Act 1997*, such as requiring the accused to stay away from the alleged victim's home. As already discussed above, if the accused were to breach such a condition, bail may be revoked and the accused will be tried within a short time.

1.123 For all these reasons the Commission has concluded that breach of a domestic violence order should not be made a "serious offence."

1.124 *The Commission recommends that breach of a domestic violence order made under the Domestic Violence Act 1996 should not be made a "serious offence" for the purposes of Article 40.4.6^o of the Constitution or the Bail Act 1997.*

1.125 *The Commission also recommends that where breach of a domestic violence order is accompanied by a serious offence within the meaning of the Bail Act 1997, such as assault causing harm, there should continue to be a clear policy to the effect that such an offence is prosecuted in accordance with*

the general approach to the prosecution of such offences, including the application of the relevant provisions of the Bail Act 1997.

CHAPTER 2 HARASSMENT AND DOMESTIC VIOLENCE

A Introduction

2.01 In this Chapter the Commission discusses whether the offence 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. Within this wider area two aspects of section 10 are examined and analysed. Firstly whether the list of harassing behaviour specified in section 10, “following, watching, pestering, besetting or communicating”, is sufficient to encompass the types of harassment that should be criminalised. The second aspect is whether it should continue to be a requirement of the offence to prove that the harassing behaviour has been “persistently” performed.

2.02 The Commission begins this discussion in Part B by examining the law under section 10 of the *Non-Fatal Offences Against the Person Act 1997*. In Part C the Commission discusses how other jurisdictions have legislated against harassment. The Chapter concludes in Part D with a summary of the discussion and recommendations.

B Overview of the Law in Ireland

2.03 Behaviour that affects a person’s right to a peaceful and private life has been regulated by the law for centuries. Thus the common law offence of breach of the peace criminalises behaviour in a public place that would cause a reasonable person to fear that he or she will be subject to violence if they do not withdraw from the situation quickly.¹ This has been used to deal with harassment and other improper behaviour such as indecent exposure in public, “peeping Tom” incidents and loud and unruly behaviour in public (often associated with late night shouting after pubs have closed).² The common law

¹ *Clifford v DPP* [2008] IEHC 322.

² The behaviour must have occurred in a public place. In *Clifford v DPP* [2008] IEHC 322 Charleton J described this as a place which the public use as a right or to which they habitually have resort.

offence has been supplemented by the offences contained in the *Criminal Justice (Public Order) Act 1994*.³

2.04 Other offences have been created to criminalise specific types of harassing behaviour. Section 7 of the *Conspiracy and Protection of Property Act 1875* was aimed primarily at preventing coercion, intimidation and harassment in the context of trade disputes and criminalised the use of violence to intimidate another person. Section 7 specifically addressed the situation where a person “[p]ersistently follows [another] person about from place to place”, hides any tools or clothes of the other person or “[w]atches or besets the house or other place where such other person resides, or works, or carries on business”. In its 1994 *Report on Non-Fatal Offences Against the Person*⁴ the Commission recommended that section 7 of the 1875 Act be replaced with a more generally applicable offence that would be “shorn of unnecessary specificity, such as the reference to hiding tools or clothes.” This was implemented by the enactment of section 9 of the *Non-Fatal Offences Against the Person Act 1997* which replaced section 7 of the 1875 Act.⁵ While section 9 of the 1997 Act provided for a general offence of coercion and intimidation it also restates a number of features of section 7 of the 1875 Act including that the offence is committed only where a person acts “without lawful authority” and where the person:

“(c) persistently follows [another person] about from place to place, or

(d) watches or besets the premises or other place where that other [person] resides, works or carries on business...”⁶

2.05 The Commission also recommended the creation of a separate offence of harassment in addition to the offence of coercion.⁷ This recommendation was implemented by the enactment of section 10 of the *Non-Fatal Offences Against the Person Act 1997*. As discussed in detail below, section 10 of the 1997 Act also uses the terms “persistently” and “watching and

³ The 1994 Act largely implemented the recommendations in the Commission’s *Report on Offences under the Dublin Police Acts and Related Offences* (LRC 14-1985).

⁴ Law Reform Commission *Report on Non-Fatal Offences Against the Person* (LRC 45-1994), at paragraphs 9.75-9.76.

⁵ Section 7 of the 1875 Act was formally repealed by section 31 of the *Non-Fatal Offences Against the Person Act 1997*.

⁶ Section 9(1)(c) and (d) of the *Non-Fatal Offences Against the Person Act 1997*.

⁷ Law Reform Commission *Report on Non-Fatal Offences Against the Person* (LRC 45-1994), at paragraphs 9.77-9.80.

besetting” which were found in section 7 of the 1875 Act and which are now also found in the coercion offence in section 9 of the 1997 Act.

2.06 Two other offences that deal with behaviour intended to disturb a person’s peaceful and private life are relevant. Section 13 of the *Post Office (Amendment) Act 1951*, as amended,⁸ criminalises grossly offensive, indecent, obscene, menacing or false messages sent by telephone and includes text messages. Section 2 of the *Criminal Justice (Public Order) Act 2011* provides that any person who “harasses, intimidates, assaults or threatens any other person or persons” while begging is guilty of an offence.

2.07 Despite the existence of these offences, prior to the enactment of section 10 of the *Non-Fatal Offences Against the Person Act 1997* harassment in the form of behaviour that accumulated over an extended period of time to cause harm to the victim was not criminalised.⁹ Public order offences are defined in terms of a single incident although this may be protracted; they do not deal with behaviour that accumulates over time to interfere with the rights of another.¹⁰ The more specific offences under the 1951 and 2011 Acts noted in the preceding paragraph concern specific types of harassing behaviour and do not include other common forms of harassment. As a result of this the criminal law did not contain an offence which criminalised situations where the harassing behaviour did not form a separate and discrete criminal offence such as a public order offence, or where the harassing behaviour did not relate to a specific type of harassment such as harassing behaviour using the telephone. This gap in the criminal law can be seen in *Royal Dublin Society v Yates*.¹¹ The defendant was attending a trade fair organised by the plaintiff society during which some of his property disappeared. He then sent a female employee of the plaintiff society a bunch of flowers and a bizarre poem, as well as other letters and poems sent both to the woman and her family. These ranged from professing undying admiration for the woman to suggesting that she needed a “good spanking”, and advertising an art exhibition with the woman’s name in the title and a representation of the woman in the pictures. The plaintiff company was granted an injunction “restraining [the defendant], his servants or agents from attending at or entering upon the exhibition grounds and premises maintained by the Plaintiff Society”. The High Court also granted an order restraining the

⁸ Section 31 of the 1951 Act, as substituted by Schedule 1, Part 2, item 1 of the *Communications Regulation (Amendment) Act 2007*.

⁹ Allen “*Look Who’s stalking: Seeking a Solution to the Problem of Stalking*” [1996] 4 Web JCLI

¹⁰ *Ibid.*

¹¹ *Royal Dublin Society v Yates* [1997] IEHC 144.

defendant from “communicating or attempting to communicate with the staff and or employees” of the plaintiff society which included the victim of the harassing conduct. It has been pointed out that “[i]f the same conduct occurred today, a criminal prosecution could be brought under the 1997 Act, rather than relying on old tortious principles which were clearly not created to deal with stalking or the appalling treatment to which the victim in the *Yates* case was subjected”.¹²

2.08 Against this background the Commission’s 1994 *Report on Non-Fatal Offences Against the Person* recommended that a specific offence of harassment be enacted to criminalise acts of harassment that interfere seriously with a person’s right to a peaceful and private life and that this offence be separate from the offence of intimidation, which carries a threat of violence, previously criminalised by section 7 of the *Conspiracy and Protection of Property Act 1875* and now by section 9 of the *Non-Fatal Offences Against the Person Act 1997*. This recommendation to create a specific offence of harassment was implemented by section 10 of the *Non-Fatal Offences Against the Person Act 1997*. The Commission now discusses the detailed elements of section 10 of the 1997 Act.

(1) Section 10 of the Non-Fatal Offences Against the Person Act 1997

2.09 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.”¹³

¹² Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 655.

¹³ The Commission notes that the Criminal Law Codification Advisory Committee recommended that the fault element (*mens rea*) for this offence should be clarified to ensure that a self-deluded stalker cannot escape criminal liability for

2.10 Harassment is punishable by an unlimited fine or imprisonment of up to seven 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.¹⁴ 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*. Whether or not a person is convicted of harassment, section 10(5) of the 1997 Act provides that 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 the place of residence or employment of the other person. Breach of a restraining order is itself a criminal offence punishable by the same penalties as the principal offence of harassment.

2.11 While section 10 does not use the term “stalking” it is clear that it was intended that stalking be one of the types of harassment to be criminalised. During the Oireachtas debates 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”.¹⁵ It is therefore important that “stalking” behaviour be criminalised by section 10.

behaviour which is objectively unreasonable: 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. In *The People (DPP) v Ramachchandran*, Court of Criminal Appeal, 27 January 2000 (which the Court stated was the first prosecution under section 10), the defendant had been convicted of harassment arising from a series of verbal and written exchanges with the complainant (his former girlfriend) and her mother. The defendant’s conviction was overturned on a number of grounds, including having regard to the trial judge’s directions to the jury. The Court of Criminal Appeal also noted that the defendant may have been somewhat deluded and did not appreciate that his communications with the complainant and her mother had caused them distress which failure was in part attributable to his lack of fluency in the English language.

¹⁴ 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*.

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

(2) Defining harassing behaviour

2.12 Section 10 defines the behaviour that can amount to harassment as “following, watching, pestering, besetting or communicating”. Although they are not more specifically defined in the 1997 Act, these terms have the following meanings:

- i) “Following” is understood in ordinary language and does not have any particular meaning within the context of section 10.
- ii) “Watching” is also commonly understood. In *Attorney General v O'Brien* it was held that “[watching] does not necessarily connote or involve long duration or, in fact, any specific duration of time”.¹⁶
- iii) “Communicating” is also well understood and *Black’s Law Dictionary* defines communication as “[t]he expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception”.¹⁷
- iv) “Besetting” has been interpreted as meaning to “surround the persons residing there [in a premises] with a feeling of hostile intent”.¹⁸
- v) “Pestering” has been interpreted in English and Irish case law in the context of civil injunctions to prevent unwanted and unsolicited contact between persons.¹⁹

2.13 These terms are used disjunctively (“or”) so that any individual behaviour or combination of these behaviours may amount to harassment if they are performed persistently and cause serious interference with another’s “peace and privacy” or cause “alarm, distress or harm” and the “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”. This is an exhaustive list and the behaviour must fall under one of these categories in order for it to constitute harassment for the purposes of section 10.

2.14 The first question addressed in this project and this Report is whether this list encompasses all the types of harassing behaviour, including “stalking”,

¹⁶ *Attorney General v O'Brien* (1936) 70 ILTR 101 at 103.

¹⁷ Garner *Black’s Law Dictionary* 8th ed (Thomson West 2007).

¹⁸ *L v Ireland* [2008] IEHC 241 at para 12.

¹⁹ *Khorasandjian v Bush* [1993] QB 727, a decision of the English Court of Appeal, which was cited with approval in *Royal Dublin Society v Yates* [1997] IEHC 144, discussed above, paragraph 2.07.

that should be criminalised. In comparable legislation enacted in other jurisdictions, discussed in Part C below, the definitions of harassment and stalking are sometimes more, and sometimes less, descriptive than in section 10 of the 1997 Act when listing the type of conduct that may constitute the offences. There are broadly three ways in which the behaviour that can amount to harassment can be described: generally, specifically or not at all.

- (a) A general description of harassing behaviour, such as in section 10, describes the behaviour using broad terms that encompass a wide range of behaviour. Thus “watching” encompasses a range of activity and is not limited to watching a person in a particular place or in a particular manner and this meant that watching persons through a surreptitiously placed mobile phone resulted in a conviction under section 10.²⁰
- (b) A specific description describes harassing behaviour more particularly than a general description such as ‘watching a place where a person lives or works’.
- (c) Where harassing behaviour is not described at all there is no limitation on what behaviour might amount to harassment and therefore any behaviour might amount to harassment provided it is accompanied by the necessary *mens rea* and causes a sufficient level of harm to the complainant.

2.15 It has been suggested by the Legal Issues Sub-Committee (LISC) of the National Steering Committee on Violence against Women (NSCVAW) that it should not be necessary in order to prove the offence under section 10 to show that the behaviour is “following, watching, pestering, besetting or communicating” or any one or combination of these activities. This suggests that there should be no description of harassing conduct in section 10 and that, as described in option (c) above, any behaviour that intentionally or recklessly “seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other” should be criminalised.

2.16 The rationale for this suggestion is that it is not appropriate that only these types of conduct be made criminal while other conduct which does not fit into one of these categories but causes the same harm is not. The Commission notes that in the English case *R v Debnath*²¹ the accused was convicted of harassment under the English *Protection from Harassment Act 1997* which, as

²⁰ See “Man hid camera to spy on women in shower” *Irish Independent* 18 December 2012.

²¹ *R v Debnath* [2005] EWCA Crim 3472.

discussed below in Part C, does not define harassment. In *Debnath* the defendant registered the complainant on a homosexual dating website for people with HIV and sent the complainant's fiancée emails purporting to be from one of his friends informing her of alleged sexual indiscretions by the complainant. The Commission is not aware of a case with similar facts having been prosecuted in Ireland but it would appear that this type of conduct would not breach section 10 because it would not amount to any of the terms "following, watching, pestering, besetting or communicating with" the complainant.

2.17 The concerns raised by LISC were set out by the Commission in its Issues Paper on this aspect of the project.²² In submissions received by the Commission, most consultees considered that the current formulation of the offence satisfactorily encompasses the types of harassing behaviour, such as "stalking", which are common in a domestic violence setting. The Commission has been informed by the Office of the Director of Public Prosecutions that the majority of section 10 prosecutions arise in a domestic violence context and typically involve a person being harassed by a former partner where he or she persistently waits outside the complainant's home or place of work, such as in *The People (DPP) v Quirke*,²³ discussed below. The Commission notes that this behaviour would colloquially be considered to be "stalking". Other examples of behaviour which have resulted in convictions under section 10 include where a man used his mobile phone to record co-workers²⁴ and where a father sent his son 37 unwanted emails.²⁵ Therefore it appears, and the Commission has been so informed, that a wide range of conduct including "stalking" has been prosecuted to conviction under section 10.

2.18 It was nonetheless suggested by one consultee that section 10 is rarely used to "protect" women who are being stalked. The consultee suggested that there should be a specific "stalking offence" which would provide a specific definition of stalking behaviour and which would include examples of the behaviour that can amount to stalking, such as "publishing any material purporting to originate from another". (The Commission discusses below the merits or otherwise of having a specific stalking offence separate from the

²² *Issues Paper on Domestic Violence: Harassment* (LRC IP 2-2013), available at www.lawreform.ie/issues-papers.409.html.

²³ *The People (DPP) v Quirke* [2010] IECCA 98.

²⁴ See "Man hid camera to spy on women in shower" *Irish Independent* 18 December 2012.

²⁵ <http://www.joe.ie/news/current-affairs/dublin-man-found-guilty-of-harassing-his-son>.

offence of harassment.) The Commission notes however that where the types of behaviour that can amount to harassment are specifically listed and narrowly described there is the possibility that not all circumstances will be covered giving rise to “loopholes” which would allow a determined harasser to act within the law.

2.19 It has been noted in this regard that “it is not unknown for stalkers deliberately to remain within the boundaries of the law, deriving satisfaction from the knowledge that they cannot be arrested.”²⁶ An example of this type of novel harassment can be found in a report where a man ordered hundreds of unwanted taxis, takeaways and two tons of coal to be delivered to the home of his victim.²⁷ Since almost any type of behaviour whereby a person “intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other” has the potential to harass, the Commission considers that it would not be possible to create a complete list of such behaviours and therefore a general description of harassing behaviour, such as in section 10, which describes the behaviour using broad terms that encompass a wide range of behaviour is appropriate.

2.20 In this regard the consultee suggested, as is the case in some comparative jurisdictions discussed below, that the list of behaviour that can amount to harassment should be non-exhaustive so that novel types of harassment would be encompassed by including a general “catch-all” provision. This is similar to the suggestion by LISC that there should be no list of harassing conduct but differs in another respect in that it includes a list of harassing behaviour that is quite specifically described and is broadened by a “catch-all” provision. While this may appear to alleviate problems with an overly specific list of harassing behaviour, the relevant rule of statutory interpretation, known as the *ejusdem generis* rule, would require that if a general word (such as harassment) follows particular and specific words of the same nature (such as watching, following or pestering) that general word is presumed to be restricted to the same type of matter as those specific words.²⁸ Such an

²⁶ Finch “Contingent Criminality and the Inadvertent Stalker” [2000] 5 J CL 273.

²⁷ See “Neighbour from hell spent ten years ordering hundreds of taxis and takeaways and two tons of coal to victim's home” *The Daily Mail* 23 April 2012. In this English case, the defendant was the subject of an Anti-Social Behaviour Order (ASBO) which was breached as a result of the conduct described in the title of this article, and he was sentenced to 14 months imprisonment for breach of the ASBO. It would also appear that the seriousness of the behaviour could have led to a prosecution for harassment under the English 1997 Act.

²⁸ Carroll J summarised the rule in *Cronin v Lunham Brothers Ltd* [1986] ILRM 415 as follows: “The *ejusdem generis* rule as applied to the interpretation of statutes

approach might also have a limiting effect on the scope of the law and there would be a danger of many legal arguments arising out of the exact scope of the law. So, even if a “catch-all” provision were included to encompass behaviour that might not have been expressly listed or might have been inadvertently omitted from the preceding list of specified behaviour, the application of the relevant rules of interpretation would nonetheless mean that only behaviour falling into the same general type will actually be caught. The meaning of the “catch-all” provision would therefore be restricted.

2.21 It was also suggested that a stalking offence should include incidents where the behaviour of the defendant is directed towards a person other than the complainant but concerning the complainant, for example where the defendant spreads harmful information, whether true or false, about the complainant to the complainant’s friends and family. The Commission notes in this respect that it will examine this type of behaviour, which occurred in the English case *R v Debnath* discussed above, in its *Fourth Programme of Law Reform* which includes a project on cyber-bullying.²⁹

(3) The “persistently” requirement

2.22 The most complete judicial statement on the interpretation of the term “persistently” in section 10 of the 1997 Act comes from *Director of Public Prosecutions (O’Dowd) v Lynch*.³⁰ In this case the complainants, a sister and brother aged 11 and 14 respectively, were in their sitting room watching television. The accused, who was in the complainants’ home to install a kitchen, exposed himself masturbating to the 11-year-old girl. This behaviour was repeated on at least two further separate incidents over a short period of time. The girl alerted her brother to the behaviour who 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. Over the next three hours, the accused repeatedly looked 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 and this incident was witnessed by both complainants. The boy then approached the front of the

means that where a general word follows particular and specific words of the same nature as itself, it takes its meaning from them and is presumed to be restricted to the same genus as those words.”

²⁹ See *Report on Fourth Programme of Law Reform* (LRC 110-2013), p.3: project 6 in the *Fourth Programme* concerns crime affecting personal safety, privacy and reputation, including cyber-bullying.

³⁰ *Director of Public Prosecutions (O’Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434.

house and saw the accused repeating similar behaviour. One further incident was witnessed through the window by both complainants three hours after the first incident.

2.23 The defendant was charged in the District Court with harassment pursuant to section 10 and the trial judge stated a case to the High Court to determine if the facts disclosed persistence for the purposes of section 10. In the High Court McCarthy J cited English case law on the interpretation of the English *Protection from Harassment Act 1997*³¹ although, as he noted (and as the Commission further discusses below), the English Act does not use the term “persistently” but rather the term “course of conduct” which “must involve conduct on at least two occasions.” McCarthy J held that the requirement of persistence might be fulfilled by “incidents which are separated by intervening lapses of time” (the facts of *Lynch* falling into this category); and secondly, “incidents capable of being severed even if they are not so separated or, to put the matter another way, immediately succeed each other.”³² McCarthy J stated that these two categories clearly fall within the concept of “persistence” but that a remaining question was whether “one unambiguously continuous act”, that is “an action which could not sensibly be broken down into a succession of actions” could have the quality of persistence. McCarthy J gave as an example “the following of a person on one continuous and unbroken journey over a prolonged distance” and concluded that this would constitute persistent behaviour because “the core element of continuity in such a course of action is fulfilled.”³³ McCarthy J added that the concept of persistence was, on this analysis, a clear one but that it was ultimately a matter for the trier of fact whether a judge of the District Court (as in that case) or a jury (if the prosecution was on indictment). In that context, he stated that the offence of harassment was not subject to criticism on grounds of vagueness.

2.24 The term “persistently” is not necessarily dependant on there being a long or short time period between the incidents. In *Lynch* the incidents which

³¹ He discussed *Kelly v Director of Public Prosecutions* [2002] EWHC 1428, [2003] Crim LR 45 (which McCarthy J described as the leading English authority), *Pratt v Director of Public Prosecutions* [2001] EWHC Admin 483, [2001] All ER (D) 215 (Jun), *R v Hills* [2001] FLR 580, *R v Miah* [2000] All ER (D) 367 and *Wass v Director of Public Prosecutions* unreported, High Court of England and Wales (Crown Office List), 11 May 2000. See the discussion of English case law at paragraphs 2.48ff, below.

³² *Director of Public Prosecutions (O’Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434, at 443, paragraph 18.

³³ [2008] IEHC 183, [2010] 3 IR 434, at 443, paragraph 18.

were found to amount to harassment occurred over approximately three hours. By contrast in *The People (DPP) v Quirke*³⁴ the defendant had been charged with four separate counts of harassment of his former girlfriend, each of the four counts involving a series of incidents that occurred over a period of months within a calendar year. The first count involved incidents in 2005, the second in 2006, the third in 2007 and the fourth in 2008. The particulars in the second count were indicative of the particulars of each count and stated that the defendant had on various dates and occasions between 1 February 2006 and 31 August 2006 harassed the complainant. It was alleged: that on one occasion he had passed the complainant going in the opposite direction and had turned around and driven his car and travelled behind her; that later on the same date he had driven up and down past her in the estate where she lived looking at her and laughing as he did so; that when she bought a new house in a different estate he had bought a house in the same estate which overlooked her new house; and that on another occasion he had followed the complainant and had driven past the entrance to the school where she worked, had seen her, had driven slowly past her, looked in at her and had smirked.

2.25 The defendant was convicted under section 10 and appealed the conviction to the Court of Criminal Appeal. The appeal focused on the manner in which the trial judge had directed the jury concerning the “particular dangers inherent in the nature of the offences which cover a protracted period of time.” The Court accepted that there could indeed be a risk that the jury might have regarded the events within one count as corroborative of events in another count but having reviewed the trial judge’s direction, which included clear instructions that each count was to be treated entirely separately, the Court concluded that the trial judge had ensured that there had been “no cross-contamination of one charge or one count by another count.” The Court noted that “[w]ithin the scheme of the offence persistence is an essential ingredient and it does appear to be the case that the only manner in which that can be done is to list the incidents which are relied on to show a persistent pattern of behaviour.” The Court also stated:

“It is evident that this manner of setting out particulars derives from the requirement within the offence of persistence. An isolated event while it is possible that it might amount to harassment if it was of considerable duration it is not certain that that is indeed so. A sequence of events is, having regard to the terms of the statute, generally required.”

³⁴ *The People (DPP) v Quirke* [2010] IECCA 98.

2.26 It appears that the Court of Criminal Appeal in *Quirke* was not referred to the 2008 decision of McCarthy J in *Lynch*,³⁵ discussed above. It is notable that despite this the Court in *Quirke* held that while a “sequence of events is... generally required” to constitute persistence, it is possible that an “isolated event... if it was of considerable duration” might amount to harassment. This, albeit more tentative view on the matter, is consistent with the view of McCarthy J in *Lynch* that a single protracted incident, such as following a person on a car journey for a prolonged period of time, could satisfy the quality of persistence necessary to prove harassment.

2.27 Another case of persistent harassment arose in a High Court civil claim, *Sullivan v Boylan and Ors*³⁶ and *Sullivan v Boylan and Ors (No.2)*.³⁷ The plaintiff had entered into a building contract with the first two defendants and she paid €84,000 of the initial contract sum of €91,250. A dispute then arose as to the work carried out and as to whether the plaintiff owed the defendants for further work. The first defendant then engaged a debt collector, the third defendant, who phoned the plaintiff and identified himself as someone who worked for a financial institution. He later sent the plaintiff an email demanding payment. The plaintiff then instructed a solicitor who wrote to the debt collector stating that he should cease contacting the plaintiff. The debt collector nonetheless continued to contact the plaintiff in a series of emails, texts and telephone calls over the following weeks even after he had received a further letter from the plaintiff’s solicitor repeating the request that he cease contacting her and drawing his attention to section 10 of the 1997 Act. One of the emails from the debt collector stated that he would sit outside the plaintiff’s home in a van with the words “Debt Collector” on it unless the plaintiff paid €25,000 into a named bank account. One of the text messages stated: “We are sitting outside till you come out with payment €25,000 or we start knocking on doors and telling the neighbours.” Against this background, Hogan J stated that:³⁸

“there can be little doubt but that [the debt collector] has harassed [the plaintiff] by ‘persistently following, watching, pestering, besetting or communicating with her’ within the meaning of s.10(1) of the Act of 1997, not least when she made it perfectly clear to him that such conduct was to stop.”

³⁵ *Director of Public Prosecutions (O’Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434.

³⁶ *Sullivan v Boylan and Ors* [2012] IEHC 389.

³⁷ *Sullivan v Boylan and Ors (No.2)* [2013] IEHC 104.

³⁸ [2013] IEHC 104, at paragraph 21.

2.28 Accordingly, Hogan J initially granted the plaintiff an interim injunction against the debt collector, followed by an interlocutory injunction and ultimately a perpetual injunction. He also awarded her €15,000 general damages and €7,500 exemplary damages because the debt collector had breached her right under Article 40.3 of the Constitution to the integrity of her person and her right under Article 40.5 of the Constitution to the inviolability of her dwelling.

2.29 The Commission notes that the interpretation of “persistently” in these cases concerning section 10 of the 1997 Act is similar to the interpretation of the term in other legislation. For example, section 1(1) of the *Vagrancy Act 1898*³⁹ provided that it was an offence for any male who “in any public place persistently solicits or importunes for immoral purposes.” The term “persistently” in the corresponding provision⁴⁰ in England and Wales was interpreted in *Dale v Smith* as meaning: “a degree of repetition, of either more than one invitation to one person or a series of invitations to different people”.⁴¹ This case was noted by the High Court in *Lynch* but McCarthy J commented that it was of “limited assistance” in relation to the matter being decided. The requirement for persistence was also held to be satisfied by a single but protracted act in *R v Burge*⁴² where it was held that displaying a card, which advertised the defendant as a person “prepared to indulge in such [homosexual] practices with anyone who wished to visit him at his house for that purpose”, in a shop window could amount to “persistently” soliciting even if the card was only displayed for a short period of time. The conviction was successfully appealed on the basis that the card did not amount to soliciting because soliciting “must involve the physical presence of the alleged offender” and not on the basis of the interpretation of “persistently”.

2.30 Section 160 of the *Companies Act 1990* provides that a company director may be disqualified where he or she has been “persistently in default” in relation to filing documents under the *Companies Acts*. Section 160(3)(a) of the 1990 Act provides:

“[T]he fact that a person has been persistently in default in relation to the relevant requirements may (without prejudice to its proof in any other manner) be conclusively proved by showing that in the five years ending with the date of the application he has been adjudged

³⁹ The 1898 Act was repealed in Ireland by section 14 of the *Criminal Law (Sexual Offences) Act 1993*.

⁴⁰ Section 32 of the *Sexual Offences Act 1956*.

⁴¹ *Dale v Smith* [1967] 2 All ER 1133 at 1136.

⁴² *R v Burge* [1961] Crim LR 412

guilty (whether or not on the same occasion) of three or more defaults in relation to those requirements”.

2.31 In *Director of Corporate Enforcement v McGowan*⁴³ the Supreme Court held that a company director’s failure to file prescribed annual returns over a period of 13 years “amply meets the requirement of persistent failure.” In interpreting the term “persistently” in section 160 of the *Companies Act 1990*, the Supreme Court stated:⁴⁴

“The *Oxford English Dictionary* definition of “persist” is “to continue firmly or obstinately in a state, opinion, purpose, or course of action esp. against opposition”. To persist is to do more than to continue, although repetition is involved. It implies an element of determination. The dictionary offers “firmly”. It also often suggests opposition to something, whether an idea, a rule, advice or disadvantage. Paragraph (f) uses simple everyday language. Its terms are capable of application directly to the facts of a particular case. No elaborate citation of authority is needed. The Director has cited the judgment of Hoffmann J. in *Re Arctic Engineering* [1986] 1 W.L.R. 686. He interpreted the corresponding term in English legislation at p.692:

“‘Persistently’ connotes some degree of continuance or repetition. A person may persist in the same default or persistently commit a series of defaults.”

In so far as that sentence seems to require no more than mere continuance or repetition, it suggests too low a standard. The word, “persistently,” as ordinarily understood and as confirmed by the *Oxford English Dictionary*, envisages some additional element, whether of opposition or determination”.

2.32 This view, drawing on the dictionary definition, takes the approach that “persistence” is not to be equated with continuance or repetition alone and that it also involves a degree of opposition to something or determination. It appears that this matter was not considered in *Lynch* or *Quirke*. In neither case, however, was there a definitive view expressed that repeated incidents whether or not separated by intervening lapses of time, or a single protracted incident, will always satisfy the requirement for persistence. In both cases, the incidents involved appear to fit the requirement in *McGowan* that they involve determined activity that was directed in opposition to the respective complainants. In

⁴³ *Director of Corporate Enforcement v McGowan* [2008] IESC 28, [2008] 4 IR 598.

⁴⁴ [2008] IESC 28, at paragraph 37 of the judgment; [2008] 4 IR 598, at 609, at paragraph [39] of the report.

addition, in *Lynch McCarthy J* also stated that whether or not the requirement for persistence is satisfied is a matter for the judgement of the trier of fact.

2.33 The Legal Issues Sub-Committee (LISC) of the National Steering Committee on Violence against Women (NSCVAW) has suggested that it should not be necessary to prove persistence. However, as harassment can be committed by conduct that is otherwise not criminal, removing the requirement that conduct be “persistently” performed would mean that one act could become a criminal offence because it intentionally or recklessly 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. For example one unpleasant but non-threatening, communication by a jilted ex-partner might constitute harassment if there were no requirement to 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”.

2.34 Furthermore, in discussions with the Commission regarding the “persistently” requirement the Office of the Director of Public Prosecutions indicated that the term “persistently” did not present prosecutors with a difficulty in bringing prosecutions under section 10 of the 1997 Act. It was considered that section 10 allowed effective prosecutions of the types of harassing behaviour that prosecutors encounter.

2.35 In discussions between the Commission and An Garda Síochána, it was stated that when harassment takes the form of “stalking” such as where the accused has followed the complainant for a considerable amount of time, it is generally clear that the behaviour has been persistently performed for the purposes of section 10. The Gardaí were of the view that the term “persistently” was particularly useful because it allows circumstances where harassing behaviour is made up of one protracted incident to be encompassed. However the Gardaí also stated that while the term “persistently” can encompass one protracted incident it can, at times, be difficult to determine there is a sufficient amount of continuity to amount to persistence.

C Comparative Analysis

2.36 Legislation has been enacted in many other jurisdictions to deal with harassment and in some jurisdictions to deal specifically with “stalking”. In this Part the Commission discusses the law in England and Wales, Canada and Australia. The Commission firstly examines how each jurisdiction defines harassing conduct and then whether there is a corresponding requirement for persistence and how this is prescribed.

2.37 While some jurisdictions, discussed below, define harassing behaviour more specifically than Ireland, often the legislation will combine specific descriptions of harassing behaviour with a “catch-all” provision. An example of such a “catch-all” provision comes from the legislation in Queensland where harassing behaviour is described as “consisting of 1 or more acts of the following [a specific list follows], or a similar, type”. Moreover, in other jurisdictions when describing harassing behaviour the legislation often combines specific terms, with broad terms such as those used in section 10 of the 1997 Act. For example in the UK, section 2A of the *Protection from Harassment Act 1997*, inserted into the 1997 Act in 2012, lists: “watching or spying on a person” – a broad description similar to section 10 – and “interfering with any property in the possession of a person” – a more specific description than used in section 10.

(1) England and Wales

2.38 The England and Wales *Protection from Harassment Act 1997* provides for two harassment offences. The “standard” harassment offence in section 2 of the 1997 Act is committed where the defendant pursues a “course of conduct” which causes alarm or distress to a person. This offence is punishable by up to six months imprisonment. Section 4 of the 1997 Act provides for a more serious offence where the defendant’s “course of conduct” has put a person in fear of violence. This offence is triable on indictment and punishable by up to five years imprisonment. The *mens rea* for both offences is knowledge that the “course of conduct” amounts to harassment. The standard of knowledge is objective so that the mental element of the offence is satisfied if a reasonable person would have realised that the “course of conduct” amounted to harassment.⁴⁵

2.39 This offence of harassment is replicated in Northern Ireland by the *Protection from Harassment (Northern Ireland) Order 1997*. Under the Northern Ireland Order, a person may be sentenced on conviction to up to two years imprisonment for the “standard” harassment offence, as opposed to six months under the comparable English Act. Other than this the law in Northern Ireland is virtually identical to that in England and Wales.

(a) Defining Harassing Behaviour

2.40 Section 1 of the *Protection from Harassment Act 1997* provides:

“(1) A person must not pursue a course of conduct—

⁴⁵ *R v Colohan* [2001] EWCA Crim 1251 where the accused’s schizophrenia could not be taken into account when deciding if a reasonable person would have known that the “course of conduct” was harassing.

- (a) which amounts to harassment of another, and
- (b) which he knows or ought to know amounts to harassment of the other.

(1A) A person must not pursue a course of conduct —

- (a) which involves harassment of two or more persons, and
- (b) which he knows or ought to know involves harassment of those persons, and
- (c) by which he intends to persuade any person (whether or not one of those mentioned above)—
 - (i) not to do something that he is entitled or required to do, or
 - (ii) to do something that he is not under any obligation to do.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.”⁴⁶

2.41 Section 7 of the English 1997 Act provides that harassment includes “alarming the person or causing the person distress”. Unlike section 10 of the *Non-Fatal Offences Against the Person Act 1997* there is no definition of the type of behaviour which might amount to harassment if accompanied by the necessary *mens rea*.

2.42 During the enactment of the *Protection from Harassment Act 1997* concern was expressed that the lack of defined proscribed conduct meant that there was insufficient clarity about the circumstances in which a person might find himself or herself liable to criminal prosecution and conviction. This absence has been criticised as “deplorably vague”.⁴⁷ On the other hand, there were also concerns that if the legislation specifically defined proscribed conduct, determined harassers would find and exploit any loopholes in the definition.⁴⁸

⁴⁶ As amended by section 125 of the *Serious Organised Crime and Police Act 2005*.

⁴⁷ *Blackstone’s Statutes on Criminal Law* 10th ed (Blackstone Press Ltd 2000) at xiii.

⁴⁸ *Stalking, harassment and intimidation and the Protection from Harassment Bill* (House of Commons Library, Research Paper 96/115) at 22.

2.43 Despite the apparently broad scope of the *Protection from Harassment Act 1997* the courts have at times interpreted the 1997 Act in a restrictive manner. Thus in *Tuppen v Microsoft Corporation Ltd*⁴⁹ the English High Court commented that because the word harassment can have such a far-reaching scope and is not clearly defined it is legitimate to refer to parliamentary papers when ascertaining the scope of the term.⁵⁰ Having done so, the Court held that the behaviour sought to be controlled was “stalking, anti-social behaviour by neighbours and racial harassment”. In *Thomas v News Group Newspapers Ltd*⁵¹ the English Court of Appeal held that while there are “many actions that could foreseeably alarm or cause a person distress that could not possibly be described as harassment” the conduct itself must be “oppressive and unreasonable.”

2.44 The lack of defined proscribed conduct was also criticised on the basis that it has inhibited the successful prosecution of stalking. In 2012 the *Independent Parliamentary Inquiry into Stalking Law Reform*,⁵² published by the UK Parliament’s Justice Unions’ Parliamentary Group,⁵³ expressed the view that not defining the behaviour which can amount to stalking, as opposed to harassment, inhibited effective prosecutions of stalking under the 1997 Act. The Report quoted a UK Home Office Research Study which found that “[t]he [1997] Act is being used to deal with a variety of behaviour other than stalking including domestic and inter-neighbour disputes and rarely for stalking itself.”⁵⁴

⁴⁹ *Tuppen v Microsoft Corporation Ltd* *The Times*, 15 November 2000 (English High Court, Queen’s Bench Division).

⁵⁰ The Court referred to the speeches of the Home Secretary at the time (HC Debates, December 17, 1996, cols 781, 783 and 784) and Lord Mackay of Clashfern, Lord Chancellor (HL Debates, January 24, 1997, col 917) to determine what kind of behaviour was sought to be controlled.

⁵¹ *Thomas v News Group Newspapers Ltd & Anor* [2001] EWCA Civ 1233.

⁵² *Independent Parliamentary Inquiry into Stalking Law Reform, Main Recommendations and Findings* (Justice Unions’ Parliamentary Group, 2012).

⁵³ 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.

⁵⁴ *Independent Parliamentary Inquiry into Stalking Law Reform, Main Recommendations and Findings* (Justice Unions’ Parliamentary Group, 2012),

These findings led to the amendment of the 1997 Act by the insertion of specific stalking offences in new sections 2A and 4A (by section 111 of the *Protection of Freedoms Act 2012*).⁵⁵ Section 2A(3) of the 1997 Act now provides a non-exhaustive list of examples of acts that are associated with stalking:

“The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking—

- (a) following a person,
- (b) contacting, or attempting to contact, a person by any means,
- (c) publishing any statement or other material
 - (i) relating or purporting to relate to a person, or
 - (ii) purporting to originate from a person,
- (d) monitoring the use by a person of the internet, email or any other form of electronic communication,
- (e) loitering in any place (whether public or private),
- (f) interfering with any property in the possession of a person,
- (g) watching or spying on a person.”

2.45 As this is a non-exhaustive list of examples, other types of behaviour may also amount to stalking depending on the facts of the case.

2.46 To prove the offence of stalking the prosecution must first prove that the defendant is guilty of harassment by following a “course of conduct” that amounts to harassment of another and that he or she knew or ought to know it amounted to harassment. In addition to proving the harassment offence the prosecution must also prove that the “course of conduct” which amounted to harassment also involved acts or omissions associated with stalking. Since any behaviour that can amount to stalking must also amount to harassment it has been said that the offence of harassment was already “sufficiently wide to encompass stalking” without the addition of the specific stalking offences.⁵⁶

p.21, citing Harris “An evaluation of the use and effectiveness of the Protection from Harassment Act 1997” (Home Office Research Study No.203 (2003)).

⁵⁵ Commenced on 25 November 2012 by the *Protection of Freedoms Act 2012 (Commencement No.2) Order 2012* (SI 2075/2012).

⁵⁶ Lawson-Cruttenden “Tackling Stalking: The Way Forward” (2012) 176 JPN 495.

(b) The “Course of conduct” Requirement

2.47 The *Protection from Harassment Act 1997* requires the prosecution to prove that the accused engaged in a “course of conduct” and section 7(3) of the 1997 Act provides that this “must involve conduct on at least two occasions.” The Government Consultation Paper that preceded the *Protection from Harassment Act 1997* had originally recommended that the term “persistent” be used to modify the *actus reus* of the crime.⁵⁷ The General Council of the Bar of England and Wales considered “that the word ‘persistent’ would serve to deal with the different factual situations with which a court might be faced” and also that “[persistent] need not be defined, but could be left as a question of fact to be determined” at trial.⁵⁸ It is uncertain why the term “course of conduct” was preferred to “persistent” but a possible explanation is that the police faced difficulties when interpreting “persistently” in section 1 of the *Sexual Offences Act 1985* which provided for the offence of “kerb-crawling”.⁵⁹

2.48 In *Kelly v Director of Public Prosecutions*⁶⁰ the defendant had previously been convicted under the English 1997 Act of harassment of a woman who was a former girlfriend and sentenced to a term of imprisonment. He was released from prison on licence and ten days later he made three telephone calls between 2.57 am and 3.02 am to the same woman. The calls were of an abusive and threatening nature and included threats to the complainant’s sister. He was charged with harassment under the 1997 Act. The trial court concluded that the calls were separate and distinct incidents and convicted the defendant. On the defendant’s appeal against his conviction, Burton J stated that the purpose of the English 1997 Act was “to prevent repetitious conduct, in a situation in which the conduct complained of might not be a separate offence if committed once; it could and would become an offence if committed more than once.”⁶¹ He concluded that the defendant’s three

⁵⁷ *Stalking – The Solutions: A Consultation Paper* (Home Office, Government Publications July 1996) at 3.4.

⁵⁸ *Stalking, harassment and intimidation and the Protection from Harassment Bill* (House of Commons Library, Research Paper 96/115) at 21

⁵⁹ *Stalking, harassment and intimidation and the Protection from Harassment Bill* (House of Commons Library, Research Paper 96/115) at 21

⁶⁰ [2002] EWHC 1428 (Admin), [2003] Crim LR 45. The *Kelly* case was described by McCarthy J in *Director of Public Prosecutions (O’Dowd) v Lynch* (discussed above, paragraphs 2.22ff) as “the leading English authority”: [2008] IEHC 183, [2010] 3 IR 434, at 439, paragraph 9.

⁶¹ Quoted by McCarthy J in *Director of Public Prosecutions (O’Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434, at 440, paragraph 12.

telephone calls over a five minute period were not one continuous incidents but constituted “conduct on at least two occasions” and thus involved a “course of conduct” for the purposes of the 1997 Act. Burton J therefore upheld the defendant’s conviction and dismissed the appeal.

2.49 While a “course of conduct” is defined as involving at least two acts it has been consistently emphasised by the courts that two incidents will not always amount to a “course of conduct”. In *Lau v DPP*⁶² and *R v Hills*⁶³ it was held that the incidents must be sufficiently connected to make them more than isolated events. For example, in *R v Curtis*⁶⁴ the English Court of Appeal held that six incidents of violence over a nine month period were sporadic outbursts and not a “course of conduct”. The reason for the Court’s decision was that the incidents were separated by periods of reconciliation. In *Pratt v DPP* two incidents separated by three months were held to constitute a course of conduct because they occurred within the context of a deteriorating relationship and this was held to be a sufficient connection between the incidents.⁶⁵

2.50 Given the requirement in section 7(3) of the 1997 Act that a “course of conduct” must involve conduct on at least two occasions a problem arises where a case involves a single protracted incident. Thus in *Wass v DPP*⁶⁶ the accused continuously followed the complainant over the course of a day. The High Court held that the requirement that there be at least two incidents was fulfilled by separating the following of the complainant up to the point at which she entered a shop from the following of the complainant after she left the shop.

2.51 In *Director of Public Prosecutions (O’Dowd) v Lynch*,⁶⁷ discussed above,⁶⁸ McCarthy J commented as follows on the *Wass* case:⁶⁹

⁶² *Lau v DPP* [2000] 1 FLR 799.

⁶³ *R v Hills* [2001] 1 FCR 569.

⁶⁴ *R v Curtis* [2010] EWCA Crim 123.

⁶⁵ *Pratt v DPP* [2001] All ER (D) 215.

⁶⁶ *Wass v DPP* High Court of England and Wales (Crown Office List) 11 May 2000.

⁶⁷ *Director of Public Prosecutions (O’Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434, at 440.

⁶⁸ See paragraphs 2.22ff, above.

⁶⁹ *Director of Public Prosecutions (O’Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434, at 440.

“One might, frankly, regard the accused’s conduct in that case as constituting one transaction or incident and the breakdown of the sequence into separate incidents as artificial.”

In *Lynch* McCarthy J also noted that the behaviour of the defendant in *Wass* would probably satisfy the requirement for persistence under section 10 of the *Non-Fatal Offences Against the Person Act 1997* without having to distinguish the incidents in this manner. Therefore in this respect at least, the offence under section 10 of the Irish 1997 Act appears to be wider in scope than the offence under the English 1997 Act because the possibility of one protracted incident amounting to harassment is not excluded by the Irish legislation. Nor does the Irish 1997 Act require what McCarthy J accurately described as the somewhat artificial approach taken in *Wass*.

2.52 In the circumstances therefore, there does not appear to be a significant difference between the interpretation of “course of conduct” in the courts of England and Wales and the Irish courts’ interpretation of the term “persistently”. Thus in *Lynch* the High Court cited several authorities from England and Wales, including the *Kelly* and *Wass* cases, when interpreting the term “persistently” in the Irish 1997 Act. Decisions from England and Wales have also referred to the concept of persistence when determining if there has been a course of conduct.⁷⁰

(2) Canada

(a) Defining Harassing Behaviour

2.53 Section 264 of the *Criminal Code of Canada*, enacted in 1993, contains the offence of criminal harassment. It provides:

“(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

- (a) Repeatedly following from place to place the other person or anyone known to them;
- (b) Repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

⁷⁰ See *R v Smith* [2012] EWCA Crim 2566.

(c) Besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or

(d) Engaging in threatening conduct directed at the other person or any member of their family”.

2.54 In *R v Downey*⁷¹ the accused was charged with criminal harassment. In a separate incident in 2009 the complainant had allegedly been abducted by a group of men including the accused and at the time of the trial for criminal harassment the abduction charges were still before the courts. Between 27 June and 17 August 2011 the accused visited the restaurant four times where the complainant worked. On two occasions the accused ordered food through a “drive through” facility and on two occasions he entered the restaurant. On all four occasions the accused engaged in “customary” transactions and maintained that he was not aware who the complainant was or that she worked in the restaurant. There was no contrary evidence. The Court found that the accused’s behaviour did not come within the definition of “harassment” in section 264. The main discussion in the judgment was whether this behaviour constituted “besetting” and the Court held that it did not because, even though the behaviour disclosed the physical element of “besetting”, it did not disclose any form of direct or indirect communication.

2.55 Notwithstanding *R v Downey*, it does not appear that the definition of harassment has the effect that obtaining convictions for criminal harassment are particularly problematic in Canada.⁷² The Canadian definition of harassing conduct is similar to that in the Irish 1997 Act although it is slightly more specifically described in Canada. The Canadian legislation adds limitations to the terms and “following” in section 10 of the 1997 Act is “following from place to place” in section 264 of the *Criminal Code of Canada*. Indirect harassment of one person by targeting behaviour at another is criminalised by section 264 but is not criminalised in the 1997 Act. It appears that section 264 is an effective means for the prosecution and conviction of harassment and of harassment in the form of stalking as there have been convictions under section 264 for a wide range of behaviour. However, as in Ireland, behaviour such as impersonating the complainant or publishing information relating to him or her has not been directly tested by the courts under section 264. In *R v Desilva*⁷³ the accused had surreptitiously made explicit videos of his girlfriend without her knowledge

⁷¹ *R v Downey* [2012] NSJ No 500.

⁷² Grant, Grant & Bone “*Canada’s Criminal Harassment Provisions: A Review of the First Ten Years*” (2003-2004) 29 Queen’s LJ 175 at 190

⁷³ *R v Desilva* 2011 Carswell Ont 2024, 2011 ONCJ 133.

when they were a couple. After the breakup of their relationship he posted the videos on Facebook and sent 13 emails to mutual friends and the complainant's family inviting them to view the videos. The accused was convicted of voyeurism⁷⁴ rather than harassment in respect of distributing the videos to the complainant's friends and family. He was convicted of harassment in relation to direct threats that he made against the complainant. The Commission notes that it will examine this type of behaviour, which also occurred in the English case *R v Debnath* discussed above,⁷⁵ in its *Fourth Programme of Law Reform* which includes a project on cyber-bullying.⁷⁶

(b) The “repeatedly” Requirement

2.56 Section 264 requires that harassing conduct be performed “repeatedly”. While Section 264 does not explicitly require that “engaging in threatening conduct” or “besetting or watching” be repeated, such a requirement has been implied. For example in *R v Geller*⁷⁷ a single threat was insufficient because, in the Court's view, the term harassment implied conduct on more than one occasion.

2.57 The term “repeatedly” is not defined in section 264 but it has been interpreted as having the same quality as persistence. In one case five communications over the course of five months was held not to be “repeatedly communicating” with the complainant. The Court's reasoning was that this behaviour was not persistent.⁷⁸ In another case, six different acts of following within one hour were held to be repeated following, the Court holding:

“[“repeatedly”] in this context ... equates to “persistently” ... one can guard against the criminalizing of innocuous behaviour by assessing the persistence of the behaviour”.⁷⁹

2.58 This quotation illustrates why, in an Irish context, “persistently” is an appropriate term which balances the criminalisation of unacceptable conduct without over-criminalising. Grant and Bone regard favourably the “repeatedly”

⁷⁴ Section 162 of the *Criminal Code of Canada* provides for the offence of voyeurism.

⁷⁵ See paragraph 2.21, above.

⁷⁶ See *Report on Fourth Programme of Law Reform* (LRC 110-2013), p.3: project 6 in the *Fourth Programme* concerns crime affecting personal safety, privacy and reputation, including cyber-bullying.

⁷⁷ *R v Geller* [1994] OJ No 2961.

⁷⁸ *R v Browning* (1995) 42 CR (4th) 170 (Ont. Ct. J. (Prov Div)).

⁷⁹ *R v Belcher* [1998] OJ No 137 (Ct. J. (Gen Div)).

requirement in section 264 expressing the view that the requirement for repetition, and implicitly persistence, allows for the effective prosecution of unacceptable harassing behaviour whilst also allowing individuals to behave in unpleasant but permissible ways.⁸⁰ In addition, a review of section 264 by the Canadian Department of Justice made the following favourable comments:⁸¹

“Section 264 itself is generally viewed as being a major improvement over previously existing mechanisms for prosecuting harassers – it has the potential to be effective because it encompasses largely the range of behaviours of concern to victims.”

(3) Australia

2.59 All Australian states and territories enacted legislation in the 1990s to deal specifically with stalking rather than harassment.

2.60 The differences between the terms used in the various Australian statutes illustrate the problems that arise when drafting harassment or stalking legislation. The fact that a more uniform legislative approach has not developed in Australia indicates that the different approaches have benefits and weaknesses.

(a) Defining Harassing Behaviour

2.61 All of the states and territories in Australia have defined the conduct which may amount to “stalking” if the necessary level of harm to the complainant and the requisite *mens rea* of the defendant are met.

(i) Queensland

2.62 Section 359B of the Queensland *Criminal Code Act 1899* (inserted into the Code in 1993) defines “stalking” behaviour as follows:

“Unlawful stalking is conduct—

(a) intentionally directed at a person (the stalked person); and

(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and

(c) consisting of 1 or more acts of the following, or a similar, type—

“(i) following, loitering near, watching or approaching a person;

⁸⁰ Grant, Grant & Bone “*Canada’s Criminal Harassment Provisions: A Review of the First Ten Years*” (2003-2004) 29 Queen’s LJ 175.

⁸¹ *A Review of section 264 (Criminal Harassment) of the Criminal Code of Canada* (Department of Justice Canada October 1996) at 68

(ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;

(iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;

(iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;

(v) giving offensive material to a person, directly or indirectly;

(vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;

(vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant”.

2.63 The Queensland legislation describes in an exhaustive list the behaviour that may amount to stalking more specifically that section 10 of 1997 Act. Nonetheless, it would also appear that, when directed at the complainant, all of the types of harassing behaviour listed in section 359B are encompassed by the terms used in section 10 of the 1997 Act i.e. “following, watching, pestering, besetting or communicating”.

(ii) Western Australia

2.64 In Western Australia section 338E of the *Criminal Code Act Compilation Act 1913* states that “[a] person who pursues another person with intent to intimidate that person or a third person” is guilty of stalking. “Pursue” is defined as follows:

“(a) to repeatedly communicate with the person, whether directly or indirectly and whether in words or otherwise;

(b) to repeatedly follow the person;

(c) to repeatedly cause the person to receive unsolicited items;

(d) to watch or beset the place where the person lives or works or happens to be, or the approaches to such a place”.

2.65 The terms used are similar to those in section 10 of the *Non-Fatal Offences Against the Person Act 1997*. For example the terms “communicate”, “follow” and “watch or beset” are used. This can be contrasted with the legislation in Queensland where “contacting a person in any way”, “leaving offensive material where it will be found by, given to or brought to the attention of, a person” and “giving offensive material to a person” are used in place of broad term “communicate”. It has been observed that the Western Australian

legislation “encompass[es] most of the conduct which falls within this field”⁸² so that the broad nature of the terms encompasses the types of harassment, including stalking, that should be criminalised.

(iii) New South Wales

2.66 In New South Wales section 8 of the *Crimes (Domestic and Personal Violence) Act 2007* (which replaced a stalking offence originally enacted in the 1990s) defines stalking as “following of a person about or the watching or frequenting of the vicinity of, or an approach to, a person’s place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity”.⁸³ In New South Wales the offence of stalking is accompanied by the offence of intimidation which is defined as:

“(a) conduct amounting to harassment or molestation of the person,
or

(b) an approach made to the person by any means (including by telephone, telephone text messaging, e-mailing and other technologically assisted means) that causes the person to fear for his or her safety, or

(c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.”⁸⁴

2.67 The 2007 Act implemented recommendations made in 2003 by the New South Wales Law Commission which favoured a broad definition, that is to say a definition which uses general terms rather than a list of different activities. This is because it considered the offences of stalking and intimidation as being dependant not on the conduct involved but on the context of the conduct and the intentions of the perpetrator. Thus in the view of the New South Wales Commission “the inclusion of such an expansive list [that other jurisdictions in Australia have used⁸⁵] in NSW is unnecessary.”⁸⁶ It also noted that the offence of intimidation could be constituted through “technology assisted” means and

⁸² Whitney “Western Australia’s New Stalking Legislation: Will it Fill the Gap?” (1999) 28 U.W. Austl. L. Rev. 293 at 313.

⁸³ Section 8 of the *Crimes (Domestic and Personal Violence) Act 2007*.

⁸⁴ Section 7 of the *Crimes (Domestic and Personal Violence) Act 2007*.

⁸⁵ See paragraph 2.59ff, above.

⁸⁶ Law Reform Commission of New South Wales *Report on Apprehended Violence Orders* (2003 R 103) at para 12.27.

this should be explicitly referred to in order to make sure that such methods of intimidation are encompassed by the legislation.⁸⁷

(b) Variations on the requirement for persistence

(i) Queensland

2.68 Queensland was the first jurisdiction in Australia to enact anti-stalking legislation in the form of section 359B of the Queensland *Criminal Code Act 1899*.⁸⁸ Despite many prosecutions being brought under section 359B it was criticised as being too complex and was completely redrafted in 1998.⁸⁹ In the amended section 359B “unlawful stalking” is now defined in Queensland as conduct “intentionally directed at a person” and engaged in on more than one occasion or on any one occasion “if the conduct is protracted” which would cause a reasonable person to apprehend violence or suffer detriment.

2.69 The 1998 amendments abolished the previous requirement for a “course of conduct” in order to remove the difficulties in establishing a course of conduct where there is only one act committed over an extended period of time.⁹⁰

(ii) New South Wales

2.70 In New South Wales stalking is defined as “the following of a person about or the watching or frequenting of the vicinity of, or an approach to, a person’s place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity”.⁹¹ In this definition there is no requirement for repetition or persistence so it is possible that the crime could be committed by just one act (such as approaching a person’s home).⁹² The New South Wales Law Commission noted that the offences of

⁸⁷ Law Reform Commission of New South Wales *Report on Apprehended Violence Orders* (2003 R 103) at para 12.28.

⁸⁸ Swanwick “Stalkers Strike Back – the Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland” (1996-1997) 19 U Queensland LJ 26.

⁸⁹ Kift “Stalking in Queensland: From the Nineties to Y2K” (1999) Bond Law Review: Vol 11: Iss 1.

⁹⁰ *Ibid.*

⁹¹ Section 8 of the *Crimes (Domestic and Personal Violence) Act 2007*.

⁹² Mullen, Pathe & Purcell *Stalkers and their victims* 1st ed, (Cambridge University Press 2000) cited in McEwan, Mullen & MacKenzie “Anti-Stalking Legislation in Practice: Are We Meeting Community Needs?” (2007) 14 Psychiatry Psychol. & L 207.

stalking and intimidation will rarely be committed by one single act but opined that the number of incidents should not be determinative.⁹³ Thus in the view of the Law Commission there may be circumstances where one incident will be sufficient to constitute the offence. This approach differs from other jurisdictions but it should also be noted that in New South Wales the accused must have the “intention of causing the other person to fear physical or mental harm” and this requirement negates the problem of over-criminalisation. The Commission does not consider that this would be an appropriate reform to introduce to Ireland because requiring the accused to have intended the victim to fear physical or mental harm is a significantly higher threshold than required under section 10 and would exclude most delusional stalkers from criminal liability. Moreover, this would be contrary to the objective behind the enactment of section 10, namely, to criminalise behaviour even if this did not give rise to a fear of violence, which is dealt with separately in the offence of intimidation in section 9 of the 1997 Act.⁹⁴

(iii) Western Australia

2.71 In 1994 Western Australia defined stalking as:

- “(a) persistently following or telephoning that person;
- (b) depriving that person of possession of any property or hindering that person in the use of any property; or
- (c) watching or besetting —
 - (i) that person’s dwelling-house, or the approaches to it;
 - (ii) that person’s place of employment or business, or the approaches to it; or
 - (iii) a place where that person happens to be, or the approaches to it”.⁹⁵

2.72 As in Ireland the term “persistently” was left undefined. This was amended in 1998 because the law was deemed to be ineffective. “Stalking” is now defined as a person pursuing another. “Pursue” is defined as:

- “(a) to repeatedly communicate with the person, whether directly or indirectly and whether in words or otherwise;

⁹³ Law Reform Commission of New South Wales *Report on Apprehended Violence Orders* (2003 R 103) at para 12.33.

⁹⁴ See paragraph 2.08, above.

⁹⁵ Section 9 of the *Criminal Law Amendment Act 1994*

- (b) to repeatedly follow the person;
- (c) to repeatedly cause the person to receive unsolicited items;
- (d) to watch or beset the place where the person lives or works or happens to be, or the approaches to such a place;
- (e) whether or not repeatedly, to do any of the foregoing in breach of a restraining order or bail condition.”⁹⁶

2.73 The *actus reus* is now modified by the term “repeatedly” rather than “persistently”. The rationale for this reform was to “emphasise that there is no need for any mental element, on the part of the defendant, in the action itself”.⁹⁷ In other words there is no need for the prosecution to prove that the defendant was aware that his actions were unwanted. The fact of repetition is sufficient.

2.74 It was argued in the Western Australia Parliament that the term “repeatedly” is uncertain, particularly because the Government did not prescribe a set number of incidents or a time-frame within which they must occur.⁹⁸ It was also pointed out that the term “repeatedly” would not cover one protracted act.⁹⁹ Despite these criticisms the Government declined to define the term “repeatedly” stating: “[i]f you try to describe it more prescriptively, it might exclude some people”.¹⁰⁰

(iv) Summary of the Australian jurisdictions

2.75 While most states require an element of repetition, Queensland and Victoria have both recognised the problems this can cause in circumstances involving one protracted act.¹⁰¹ The Commission considers, in light of this, that the *actus reus* of the offence of harassment should be more than an isolated

⁹⁶ Section 338E of Appendix B of the *Criminal Code Act Compilation Act 1913*

⁹⁷ Mr. K Prince, Criminal Law Amendment Bill (No 1) – Second Reading, Hansard (LA) 25 Jun 1998, 4777

⁹⁸ Dr E Constable, Criminal Law Amendment Bill (No 1) – Second Reading, Hansard (LA) 8 Sept 1998, 822

⁹⁹ Dr E Constable, Criminal Law Amendment Bill (No 1) – Second Reading, Hansard (LA) 8 Sept 1998, 822; the member supported the use of the terminology of a “course of conduct”, and cited with support the provisions of the State of Victoria and the prior provisions of the State of Queensland.

¹⁰⁰ Mr K Prince, Criminal Law Amendment Bill (No 1) – Second Reading, Hansard (LA) 8 Sept 1998, 822.

¹⁰¹ In Queensland through legislative amendment. In Victoria through case law: *Gunes v Pearson* (1996) 89 A Crim 297.

act. However the *actus reus* should also encompass single protracted acts as in certain cases these can clearly be sufficiently persistent in their nature to constitute an unacceptable interference with the rights of another. The Commission notes that the interpretation and application of the term “persistently” in section 10 of the 1997 Act, as discussed in the Irish case law above, would satisfy these requirements.

2.76 Despite the differences that exist in the Australian jurisdictions regarding how harassing behaviour in the form of stalking is defined and the how the requirement to have an element of repetition or persistence is prescribed, the most significant difference between the states and territories regarding what behaviour is criminalised by the respective stalking statutes is the required mental element. Even though whether or not the offence of harassment should be limited to circumstances where the accused intended the consequences of his or her actions is outside the scope of this Report the Commission notes that requiring intention on the part of the accused would cause significant difficulties in circumstances where the accused is delusional about his or her relationship with the complainant. The Commission also notes the comments of the Criminal Law Codification Advisory Committee regarding the fault element (*mens rea*) of the offence of harassment, particularly in relation to the advantages of clarifying this.¹⁰²

D Conclusions

2.77 The issue being discussed in this chapter is whether the offence of harassment in section 10 of the *Non-Fatal Offences Against the Person Act 1997* allows for effective prosecution of the types of harassing behaviour that are common in a domestic violence setting. Two aspects of section 10 were examined in this regard. Firstly, whether the list of harassing behaviour, “following, watching, pestering, besetting or communicating”, encompasses the types of harassment that should be criminalised. Secondly, whether it should be a requirement of the offence to prove that the harassing conduct has been “persistently” performed.

(a) Defining harassing behaviour

2.78 Section 10 of the 1997 Act defines the behaviour that can amount to harassment as “following, watching, pestering, besetting or communicating”.

¹⁰² See the discussion in fn13, above, of the 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.

This is an exhaustive list so the behaviour must fall under one of these categories in order for it to constitute harassment for the purposes of section 10.

2.79 LISC has suggested that it is not appropriate that only persistent “following, watching, pestering, besetting or communicating” are currently capable of constituting harassment while other types of conduct which do not fit into one of these categories but cause the same harm do not. This view suggests that the behaviour that can amount to harassment should be left undefined so that any behaviour which “intentionally or recklessly, seriously interferes with the other’s peace and privacy or causes alarm, distress or harm to the other” can constitute harassment if it is “persistently” performed and is “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.”

2.80 The Commission notes however that this approach is not taken in the majority of comparative jurisdictions discussed above, where the behaviour that may amount to harassment, or more specifically “stalking” as the case may be, is defined at least to some extent. The Commission also considers that defining the behaviour which may amount to harassment adds greater certainty to the offence. The difficulties in leaving the behaviour which might amount to harassment undefined is illustrated by *Tuppen v Microsoft Corporation Ltd*¹⁰³ where the English High Court commented that because the word harassment can have such a far reaching scope and is not clearly defined it is legitimate to refer to parliamentary papers when ascertaining the scope of the term. The Court held that the behaviour sought to be controlled was “stalking, anti-social behaviour by neighbours and racial harassment”. Further in *Thomas v News Group Newspapers Ltd*¹⁰⁴ the English Court of Appeal held that while there are “many actions that could foreseeably alarm or cause a person distress that could not possibly be described as harassment” the conduct itself must be “oppressive and unreasonable”.

2.81 In Ireland, because the behaviour that may amount to harassment is defined generally, the position is clearer. If the prosecution can prove that the behaviour of the accused was “persistently following, watching, pestering, besetting or communicating” then the behaviour may amount to harassment provided it is accompanied by the necessary intention or recklessness and it seriously interferes with the other’s peace and privacy or causes alarm distress or harm. Thus determining whether behaviour crosses the line and becomes

¹⁰³ *Tuppen v Microsoft Corporation Ltd* The Times, 15 November 2000: see paragraph 2.43, above.

¹⁰⁴ *Thomas v News Group Newspapers Ltd & Anor* [2001] EWCA Civ 1233: see paragraph 2.43, above.

criminal is determined by whether it is persistent and accompanied by the necessary *mens rea*, rather than by whether it was oppressive and unreasonable.

2.82 *The Commission recommends that the types of behaviour that can amount to harassment should continue to be defined as is currently the position in section 10 of the Non-Fatal Offences Against the Person Act 1997.*

2.83 It was also suggested to the Commission that a more specific definition of harassing behaviour be included in section 10. This specific definition would include a “catch all” provision to encompass novel types of harassing behaviour and ensure that the legislation encompassed the types of behaviour that should be criminalised.

2.84 In the course of its consultations, the general view expressed to the Commission is that the current formulation of the offence in section 10 strikes a good balance between the need to have a broadly drafted offence whilst also ensuring that the offence is sufficiently certain. The wide range of conduct in respect of which the Director of Public Prosecutions has prosecuted to conviction indicates that the current scope of section 10 is sufficiently broad to encompass all relevant behaviour in the domestic violence setting.

2.85 There is no international consensus in relation to how to define harassment although the conduct that can sustain a prosecution for harassment does not differ significantly across the jurisdictions. Moreover, there is not a significant divergence between the behaviour that can, and has, been prosecuted to conviction in Ireland and behaviour that amounts to harassment in other jurisdictions. The Commission therefore considers that the current definition of harassing conduct in section 10 is as effective at criminalising harassing conduct as the other jurisdictions examined. The Commission is concerned that by specifically defining the types of behaviour that can amount to harassment, as opposed to using the general terms in section 10, other types of behaviour which should be criminalised might fall outside this definition. Even if an approach is taken whereby a non-exhaustive list of examples is provided by the legislation there is a risk that some types of behaviour, such as the masturbating behaviour in *Director of Public Prosecutions (O’Dowd) v Lynch*,¹⁰⁵ might be deemed not to constitute harassment because of the application of the relevant rules of statutory interpretation.¹⁰⁶

2.86 The Commission also considers that a general definition of harassing conduct better reflects the contextual nature of the offence of harassment.

¹⁰⁵ [2008] IEHC 183, [2010] 3 IR 434, discussed above, at paragraphs 2.22ff.

¹⁰⁶ Including the *eiusdem generis* rule, discussed at paragraph 2.20, above.

While some behaviour which seriously interferes with another person's peace and privacy or causes him or her alarm, distress or harm is clearly unacceptable, such as sending threatening letters or making obscene telephone calls, other behaviour may appear innocent but cause the same result because of the context in which it is performed such as persistently sending gifts or flowers. Since the conduct that should be criminalised by the offence is so varied and dependant on the context in which it is performed, the Commission is of the view that the definition of harassing behaviour should continue to be general rather than specific.

2.87 In any event, the Commission considers that the terms used in section 10 of the 1997 Act – “following, watching, pestering, besetting or communicating” – cover such a wide range of behaviour that almost any interaction between two people is encompassed. The Commission does not consider that it would be beneficial in the context of domestic violence to attempt to define harassing behaviour any more specifically than is currently done by section 10. The Commission also considers that where other jurisdictions have prescribed more specific examples of harassing conduct directed against the complainant this does little more than provide a synonym for one of “following, watching, pestering, besetting or communicating”.

2.88 *The Commission recommends that the current list of harassing behaviour in section 10 of the Non-Fatal Offences Against the Person Act 1997 be retained without amendment.*

2.89 It has been suggested to the Commission that there should be a specific “stalking” offence which provides examples of the types of behaviour that can amount to stalking. An example of this approach can be taken from the specific stalking offences in the *Protection from Harassment Act 1997* in England and Wales which provide a non-exhaustive list of acts that are associated with stalking:

- “(a) following a person,
- (b) contacting, or attempting to contact, a person by any means,
- (c) publishing any statement or other material
 - (i) relating or purporting to relate to a person, or
 - (ii) purporting to originate from a person,
- (d) monitoring the use by a person of the internet, email or any other form of electronic communication,
- (e) loitering in any place (whether public or private),
- (f) interfering with any property in the possession of a person,

(g) watching or spying on a person”¹⁰⁷

2.90 The Commission considers that the offence of harassment is sufficiently broad in scope to encompass behaviour that is colloquially known as “stalking”. In this regard the Commission considers it particularly relevant that the Director of Public Prosecutions and the Gardaí indicated that the majority of prosecutions under section 10 involve behaviour that would colloquially be referred to as “stalking”.

2.91 The Commission considers that “stalking” is already included as a type of harassment rather than a discrete offence. Moreover, while several comparative jurisdictions have specifically criminalised “stalking” rather than harassment, the substance of those “stalking” offences is broadly the same as the offence of harassment in Ireland. Thus any specific “stalking” offence would be a duplication of the offence of harassment under section 10 of the 1997 Act. The Commission also has regard to the experience in England and Wales where the addition of a specific stalking offence has created a situation where the offence of harassment and the offence of stalking are made up the same elements.

2.92 *The Commission recommends that there should not be a specific stalking offence introduced into Irish law as the offence of harassment is sufficiently broad to encompass behaviour that is colloquially referred to as “stalking” and that separating the offences of harassment and stalking would be unnecessarily complicating and would result in a duplication of the criminal law.*

2.93 One consultee expressed the view that modern technologies such as social media are frequently being used to harass people and suggested that harassment through the use of such technology should be explicitly referred to by section 10. Section 10 has been used successfully to prosecute harassment using modern technology such as communications sent by email. The topic of *Cyber-bullying, including cyber-crime affecting personal safety, privacy and reputation* is included in the Commission’s *Fourth Programme of Law Reform* and the Commission will therefore be examining further the application of section 10 to this type of behaviour in that project.

2.94 In this regard the Commission also notes that the consultee commented that section 10 should not be limited to behaviour that is directly targeted against the accused. The conclusion from this submission is that section 10 should be reformed to include the persistent “following, watching, pestering, besetting or communicating with” anyone, rather than just the complainant. While outside the scope of this Report, the Commission considers that requiring the accused to have been “persistently following, watching,

¹⁰⁷ Section 2A(3) of the *Protection from Harassment Act 1997*

pestering, besetting or communicating” with the complainant could be problematic in certain cases, for example where a person persistently communicates his or her ex-partner’s family and friends and causes distress to the complainant. As this issue appears to be directly relevant to the issue of cyber-crime affecting personal safety, because it has been suggested that indirect harassment is most frequently conducted through online means, the Commission does not make any recommendation on this issue in this Report and will examine it in the context of the project on cyber-bullying in the *Fourth Programme of Law Reform*.¹⁰⁸

(b) The requirement to show persistence

2.95 Harassing conduct is defined by section 10 of the 1997 Act as “following, watching, pestering, besetting or communicating”. This behaviour is not generally criminal; for example communicating with another person is, without more, not a criminal offence.

2.96 As harassment can be committed by conduct that is otherwise not criminal, removing the requirement that conduct be “persistently” performed would mean that one act could become a criminal offence because it intentionally or recklessly 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. For example one unpleasant but non-threatening, communication by a jilted ex-partner might constitute harassment if there were no requirement to 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”. The Commission does not believe that single incidents of this type should be captured by the offence.

2.97 *The Commission recommends that one isolated incident which is not protracted should not give rise to criminal liability for harassment under section 10 of the Non-Fatal Offences Against the Person Act 1997.*

2.98 The requirement to have more than one isolated incident 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 to the requirement for persistence. Other jurisdictions,

¹⁰⁸ *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 6 (crime affecting personal safety, privacy and reputation, including cyber-bullying).

notably Canada and Western Australia, use the term “repeatedly” to prescribe the requirement to have more than one incident.

2.99 The most complete judicial statement on the interpretation of the term “persistently” in section 10 comes from *Director of Public Prosecutions (O’Dowd) v Lynch*,¹⁰⁹ discussed above. The High Court held that “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. Thus in the view of the Commission the term “persistently” provides sufficient flexibility to allow for the successful prosecutions of improper conduct while also allowing individuals to engage in permissible, but perhaps unpleasant, conduct.

2.100 The term persistently is well established in Irish law and has been used in a variety of statutory settings such as section 9 of the *Non-Fatal Offences Against the Person Act 1997* (which replaced the comparable offence of intimidation in section 7 of the *Conspiracy and Protection of Property Act 1875* and which, of course, immediately precedes section 10 of the 1997 Act), section 160 of the *Companies Act 1990* and in (the repealed) section 1(1) of the *Vagrancy Act 1898*. In the context of these statutory provisions the term “persistently” has been interpreted in broadly the same manner as in the *Lynch* case.

2.101 Irish case law indicates that the term “persistently” operates in a largely similar manner to the term “course of conduct”. Thus in the *Lynch* case 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.¹¹⁰ Similarly case law from Canada has referenced the term “persistently” when interpreting the “repeatedly” requirement in the Canadian Criminal Code. Thus it appears that the term “persistently” operates in a similar manner to the term “repeatedly. Indeed because the term “persistently” covers harassment in the form of a single protracted incident section 10 is wider in scope than most other jurisdictions. It

¹⁰⁹ *Director of Public Prosecutions (O’Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434, discussed at paragraphs 2.22ff, above.

¹¹⁰ See *R v Smith* [2012] EWCA Crim 2566.

therefore does appear that there is an obvious benefit in reforming the term “persistently” in section 10 as any such reform is unlikely to have a significant effect on what behaviour is encompassed by the offence and might actually make the offence more difficult to prove.

2.102 The Commission recommends that the term “persistently” should be retained in section 10 of the Non-Fatal Offences Against the Person Act 1997.

CHAPTER 3 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report are as follows.

3.01 The Commission recommends that breach of a domestic violence order made under the *Domestic Violence Act 1996* should not be made a “serious offence” for the purposes of Article 40.4.6° of the Constitution or the *Bail Act 1997*. [paragraph 1.124]

3.02 The Commission also recommends that where breach of a domestic violence order is accompanied by a serious offence within the meaning of the *Bail Act 1997*, such as assault causing harm, there should continue to be a clear policy to the effect that such an offence is prosecuted in accordance with the general approach to the prosecution of such offences, including the application of the relevant provisions of the *Bail Act 1997*. [paragraph 1.124]

3.03 The Commission recommends that the types of behaviour that can amount to harassment should continue to be defined as is currently the position in section 10 of the *Non-Fatal Offences Against the Person Act 1997*. [paragraph 2.82]

3.04 The Commission recommends that the current list of harassing behaviour in section 10 of the *Non-Fatal Offences Against the Person Act 1997* be retained without amendment. [paragraph 2.88]

3.05 The Commission recommends that there should not be a specific stalking offence introduced into Irish law as the offence of harassment is sufficiently broad to encompass behaviour that is colloquially referred to as “stalking” and that separating the offences of harassment and stalking would be unnecessarily complicating and would result in a duplication of the criminal law. [paragraph 2.92]

3.06 The Commission recommends that one isolated incident which is not protracted should not give rise to criminal liability for harassment under section 10 of the *Non-Fatal Offences Against the Person Act 1997*. [paragraph 2.97]

3.07 The Commission recommends that the term “persistently” should be retained in section 10 of the *Non-Fatal Offences Against the Person Act 1997*. [paragraph 2.102]