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Protection from Stalking Bill

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The briefing should not be relied upon as legal or professional advice (or as a substitute for these) and a suitably qualified professional should be consulted if specific advice or information is required.

This paper has been prepared to inform consideration of the Protection from Stalking Bill, which completed its second stage on 8th February 2021.

The Bill has 20 clauses and is divided into three parts. Its predominant policy objectives are creating two new offences relating to stalking and introducing provision for Stalking Protection Orders.

1. Introduction

Specific offences relating to stalking exist in England, Wales and Scotland. Currently, there is no specific offence of stalking in Northern Ireland. The Protection from Stalking Bill aims to provide protection from stalking, and from threatening or abusive behaviour. It creates a new standalone offence of stalking which defines the offence of stalking as a course of behaviour which 'causes fear, alarm or substantial distress' to the victim and includes conduct on 'two or more occasions'. The Bill also creates the offence of threatening or abusive behaviour which can be established after a single incident or a course of conduct. This offence can be used as an alternative conviction when the facts do not amount to the offence of stalking in proceedings. These offences largely incorporate elements of the stalking offences introduced in Scotland in 2010.

The Bill also introduces Stalking Protection Orders in Northern Ireland to provide protection to a person at risk from stalking. Stalking Protection Orders were recently introduced by England and Wales and are the subject of a proposed Private Members Bill in the Scottish Parliament. They aim to enable early police intervention pre-conviction to address stalking behaviours before they become entrenched or escalate in severity. They will also be able to be made post-conviction to help to prevent further stalking.

Unlike the process for Non-Molestation Orders which requires the victim to apply to court, the Police Service of Northern Ireland (PSNI) will be able to apply to the court directly for a Stalking Protection Order if it appears that a person poses a risk associated with stalking to another person and there is reasonable cause to believe that an order is necessary to protect that person from such risk. They can be applied for even in circumstances where prosecution is not pursued.

The paper is divided into the following sections:

- Section 1 is a brief introduction;
- Section 2 provides an overview of stalking behaviour;
- Section 3 summarises the current legislation applicable to stalking in Northern Ireland;
- Section 4 provides background and context to the Bill;
- Section 5 looks at comparable arrangements in the other UK jurisdictions; and
- Section 6 provides Bill and clause commentary.

2. Stalking Behaviour

Stalking is generally used to describe obsessive behaviour involving harassment of an individual through unwelcome and repeated behaviour including pursuing a person's physical movements, their on-line media profiles, phone contact, or turning up at a person's home or place of work. When it takes place on the internet, for example on social networking sites, it is generally referred to as cyber stalking. However, there is no strict legal definition of stalking in England & Wales, Scotland or Northern Ireland.

The terms stalking and harassment are often used interchangeably, which can cause some difficulty in identifying and understanding the specific nature of the stalking. The Northern Ireland Justice Minister has highlighted that while '*harassment often presents as a disagreement over a specific issue, stalking is fixated, obsessive, unwanted and repeated behaviour, as represented by the "FOUR" acronym*'.¹

The PSNI describes stalking as follows:

It is generally accepted that it includes repeated attempts to impose unwanted communications and/or contacts on another in a manner that could be expected to cause distress and/or fear in any reasonable person.

Taken in isolation behaviours might seem unremarkable, but in the particular circumstances and with repetition, they take on a more sinister meaning. Unwanted communications may include telephone calls, letter, emails faxes, sms text messages, sending or leaving unsolicited material/gifts, graffiti, and/or messages on social networking sites.

Unwanted intrusions include the following: waiting for, spying on, approaching, accosting and going to a person's home. In addition to the communication and intrusion, the stalker may engage in a number of associated behaviours including ordering or cancelling goods/services, making unwarranted complaints (to legitimate bodies), threats, property damage and violence.

*Stalkers frequently threaten their victims, either directly or indirectly. Examples of indirect threats include sending wreaths or violent images to the victim (often anonymously). Stalkers will often make specific written or verbal threats and have been known to threaten violence months or even years into the future, and have indeed followed through on their threats.*²

¹ NIA OR 8th February 2021:

<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/02/08&docID=325081#3251253>

² PSNI Website accessed Feb 2020: <https://www.psni.police.uk/crime/domestic-abuse/harassment-and-stalking/>

In England and Wales, the police and Crown Prosecution Service have adopted the following description of stalking:

*A pattern of unwanted, fixated and obsessive behaviour which is intrusive. It can include harassment that amounts to stalking or stalking that causes fear of violence or serious alarm or distress in the victim.*³

The Home Office's statutory guidance for Stalking Protection Orders emphasises that stalking 'can affect people of all characteristics, and that although victims are disproportionately female, they come from all walks of life'. It also highlights data from the Crime Survey for England and Wales which indicates that people with a longstanding illness or disability are disproportionately likely to be victims of stalking.⁴

It also advises that:

There is no such thing as a 'typical' stalking perpetrator or a 'typical' stalking victim. This crime disproportionately affects women and girls; however, it is important to recognise that men and boys may be victims too.

Stalking affects people of all ages, and victims come from a wide range of backgrounds - stalking is not restricted to public figures and celebrities.

*Perpetrators will vary in the motivations driving their behaviour, the types of behaviour they engage in, and what they hope to achieve from their pursuit of the victim. The relationship between the perpetrator and the victim, as well as the context in which the stalking behaviour takes place, can also vary significantly.*⁵

³ This is based on a description developed by Paladin, the National Stalking Advocacy Service. Home Office (2021) *Stalking Protection Orders Statutory guidance for the police*, pg 26:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951354/SPOs_statutory_guidance_English_with_changes_002_.pdf

⁴ Ibid, pg 5

⁵ Ibid pg 26

3. Existing legislation applicable to stalking behaviour in Northern Ireland

There is no specific offence of stalking in Northern Ireland. Rather, the Protection from Harassment Order (NI) 1997 prohibits harassment and putting people in fear of violence.

Article 3(1) of the Order prohibits the act of harassment, and provides that a person shall not pursue a course of conduct which amounts to harassment of another and which the perpetrator knows (or ought to know) will cause the victim harassment (including alarming the person or causing them distress).⁶ A course of conduct is defined as occurring on at least two occasions. A person found guilty of this offence on indictment conviction is liable up to 2 years' imprisonment and/or a fine. On summary conviction, the maximum penalty is 6 months' imprisonment.

Article 6 of the Order also provides for the offence of 'putting people in fear of violence' when a person's course of conduct causes another to fear, on at least two occasions, that violence will be used against him/her.⁷ A defendant is liable to be found guilty, if they know or ought to know that this course of conduct would cause the other person to fear on each of those occasions. A person convicted of this offence on indictment conviction is liable to imprisonment for up to seven years, or a fine or both; or on summary conviction, to imprisonment for a term not exceeding six months, or a fine up to £5,000.

The Order also enables a victim to seek an injunction or a restraining order to prevent the defendant from causing further harassment. A restraining order may specify any conduct or act which is prohibited and which amounts to harassment. An order can be applied for once criminal proceedings have concluded in court. They can be imposed where the defendant has been acquitted of an offence, if the court considers it necessary to protect a person from harassment.⁸ Breach of an injunction or a restraining order carries a penalty of up to 5 years' imprisonment and or a fine on indictment or 6 months imprisonment on summary conviction.

Stalking can take many forms and stalkers often use a variety of means to stalk and harass their victims. Other pieces of legislation may be used to deal with stalking in certain circumstances, including:

- The Malicious Communications (NI) Order 1988 makes it an offence to send indecent, offensive, threatening or false letters or articles with intent to cause distress or anxiety.⁹ It attracts a penalty of a fine of up to £2,500.
- The Communications Act 2003 makes it an offence to use public electronic communications networks to send a message or any other matter that is grossly

⁶ Protection from Harassment Order (NI) 1997, Article 3 <https://www.legislation.gov.uk/nisi/1997/1180/article/3>

⁷ Ibid, Article 6 <https://www.legislation.gov.uk/nisi/1997/1180/article/6>

⁸ Ibid, Article 7a: <https://www.legislation.gov.uk/nisi/1997/1180/article/7A>

⁹ Malicious Communications (NI) Order 1988, Article 3: <https://www.legislation.gov.uk/nisi/1988/1849/article/3/made>

offensive or menacing and provides for a penalty of a maximum of six months' imprisonment and/or a fine of £5,000.¹⁰

- The Family Homes and Domestic Violence (NI) Order 1988 enables applications for non-molestation orders to prohibit a person from using or threatening violence, intimidating, harassing or pestering the applicant or encouraging anyone else to do so.¹¹ The court also has the power to attach an 'exclusion zone' to the order which means that an alleged perpetrator can be excluded from certain places such as the street or area in which the victim lives, works, or on occasions, the school which their children attend. In general terms a victim can apply for an order against someone who is a family member or has lived with them in a familial relationship. Breach of an order is a summary offence with a maximum penalty of 6 months' imprisonment and or a fine of £5000.¹²
- The Justice Act (Northern Ireland) 2015 enables a court to make an offender subject to a Violent Offences Prevention Order if there is a risk they could cause serious violent harm.¹³ They are made post-conviction, or where an offender has been found not guilty by reason of insanity or unfit to stand trial. Therefore, an order may only be applicable in the most extreme cases, where a victim of stalking is at risk of serious harm from the perpetrator. An order has effect for a period of not less than 2, nor more than 5 years, unless it is renewed or discharged.
- The Domestic Abuse and Family Proceedings Act (Northern Ireland) 2021 provides for a domestic abuse offence.¹⁴ Where the court is not satisfied that this offence has been committed, it may be possible to convict the defendant of a specified alternative offence. An alternative offence is either an offence of 'harassment' or 'putting people in fear of violence' as cited under the Protection from Harassment (Northern Ireland) Order 1997. It is intended that this may also include any stalking offence that is brought forward.

¹⁰ Communications Act 2003, Section 127: <https://www.legislation.gov.uk/ukpga/2003/21/section/127>

¹¹ Family Homes and Domestic Violence (NI) Order 1988, Article 20:

¹² Judiciary NI *Sentencing Guidelines- Magistrates Court* <https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Breach%20of%20Non-molestation%20Order.pdf>

¹³ Justice Act (Northern Ireland) 2015, Section 55: <https://www.legislation.gov.uk/nia/2015/9/section/55>

¹⁴ Domestic Abuse and Family Proceedings Act (Northern Ireland) 2021, Section 1: <https://www.legislation.gov.uk/nia/2021/2/section/1/enacted>

4. Background and context to the Bill

In 2016, following media reporting of a number of high profile stalking cases, the then Justice Minister, Claire Sugden MLA, commissioned a review of the law relating to stalking in Northern Ireland. The Northern Ireland Assembly subsequently debated the following motion on stalking in September 2016:

*That this Assembly notes with concern that for too long stalking has remained a hidden crime, which is not only insidious and terrifying, but can result in psychological harm and, in the most serious of cases, murder; and calls on the Minister of Justice to examine whether the introduction of new legislation to protect and safeguard victims of stalking is needed in Northern Ireland.*¹⁵

In 2016/2017, the Committee for Justice commenced its own review of the law to determine whether specific stalking offences should be created, which included a Call for Evidence.¹⁶ The Committee was due to conclude its work and publish its findings in April 2017. However, due to the Assembly not sitting from January 2017 to January 2020, the work was not completed.

In the absence of a functioning Assembly, the Department of Justice's review team built on the initial work of the Committee to:

- review the existing legislative framework;
- engage with other jurisdictions on their stalking policies and practices; and
- draw on the responses submitted to the Committee for Justice to develop these proposals.

In particular, the Department's review identified that:

- without a specific offence, stalking can become hidden behind other related offences, and the sinister behaviours can be 'conflated with nuisance crimes and disputes';
- the challenges of stalking legislation implementation are far outweighed by the benefits. Stalking laws better capture the impact the stalking has had on the victim and reinforce that they are believed and that the matter is being taken seriously;
- a consolidated piece of legislation prohibiting stalking would better protect victims of stalking and harassment in line with the Executive's obligations under international human rights standards; and
- the current legislation was letting down victims of stalking in Northern Ireland.¹⁷

¹⁵ NIA OR 16 September 2016: <http://www.niassembly.gov.uk/assembly-business/order-papers/session-2016-2017/12-september-2016/>

¹⁶ NIA Committee for Justice Review of the Need for Stalking Legislation in Northern Ireland <http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice/inquiries--reviews/review-of-the-need-for-stalking-legislation-in-northern-ireland/>

¹⁷ Department of Justice (2018) Stalking a Cause for Concern: A consultation on the creation of a new offence

In 2018, the Department launched the consultation ‘*Stalking - A Serious Concern*’ which focused on the impact of stalking on victims and the wider community. It asked whether the introduction of a specific offence of stalking in Northern Ireland could offer victims better protection. It noted that respondents to the Committee for Justice’s Call for Evidence ‘*felt that a specific offence of stalking would help to readily identify stalkers (as opposed to harassers); and could help to protect victims of stalking behaviour at an earlier stage.*’¹⁸

Similarly, the majority of its respondents strongly supported the introduction of stalking legislation in Northern Ireland. Consequently, the Department stated:

*We will therefore be recommending to an incoming Justice Minister that a stalking bill with legislative provisions to give effect to the introduction of a new specific offence of stalking, and stalking protection orders, be developed for introduction to a future Northern Ireland Assembly.*¹⁹

While the Domestic Abuse and Family Proceedings Act (Northern Ireland) 2021 was conducting its legislative passage through the Northern Ireland Assembly, a number of organisations called for stalking legislation to be brought forward without delay. The Committee for Justice agreed ‘*that the deficit of legislative provision in relation to the offence of stalking must be addressed at the earliest opportunity*’. However, it warned that:

*any amendment to the Domestic Abuse and Family Proceedings Bill could only cover stalking in the context of domestic abuse and while the Committee appreciates that stalking within this context is prevalent the Committee is of the view that it would be preferable to cover all forms of stalking in the same piece of legislation.*²⁰

The Justice Minister, Naomi Long MLA, also indicated that she did not believe it was an appropriate piece of legislation in which to address the issue of stalking:

It is important for us to seek to build the most robust preventions for stalking that we can in legislation, and we do that by comparing what other jurisdictions already have in statute. From our perspective, this is one way of making sure that our provisions will be more robust, but I am also introducing it as significant but stand-alone legislation. There was the option for us to incorporate it, for example, in the Domestic Abuse and Family Proceedings Bill that is going through the House today. However, two issues with that caused me some concern.

The first is that it conflates domestic abuse and stalking. Not everyone who is stalked is a victim of domestic abuse. In fact, often stalkers have got nothing to do with the domestic setting and have no prior relationship with the individual who is stalked. That is a very important in terms of clarity for the public. It also would have risked

of stalking in Northern Ireland, pg 15

¹⁸ Ibid, pg 14

¹⁹ Department of Justice (2019) Stalking a Cause for Concern Consultation Report and summary of Responses, pg 21

²⁰ NIA Committee for Justice (2020) Report on the Domestic Abuse and Family Proceedings Bill, pg 178

<http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/justice/reports/dafp-bill/committee-for-justice-report-on-domestic-abuse-and-family-proceedings-bill.pdf>

stalking not being given the adequate attention that it needs to be given in order to be properly scrutinised by the Committee. Creating a stand-alone offence also allows us time to ensure appropriate training for the justice agencies that will have to implement and deliver it once the offence has been created.²¹

Human Rights Obligations – Istanbul Convention

International human rights law places a number of specific positive obligations on the Northern Ireland Executive to safeguard the rights of individuals who have been a victim of crime. In particular, the Council of Europe Convention on Preventing and Combating Violence against Women (Istanbul Convention) covers various forms of gender based violence, which is defined as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’.²²

Article 34 includes a specific provision to address stalking, requiring States to ‘take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised’.²³

Article 44 requires the UK to be able to prosecute criminal conduct set out in the Istanbul Convention when that conduct is committed outside the UK by a UK national or a person who is habitually resident in the UK. This is known as extraterritorial jurisdiction.²⁴

The Northern Ireland Executive is subject to the obligations contained within these international treaties by virtue of the UK’s ratification of the convention. The Justice Minister has stated:

Importantly, the new offence of stalking will ensure compliance with the Council of Europe convention on preventing and combating violence against women and domestic violence, which is known as the Istanbul convention. That requires extraterritorial jurisdiction to be extended to the stalking offence. Under the legislation, where inappropriate stalking conduct or behaviour occurs outside the UK, it can constitute a stalking offence as if it occurred in Northern Ireland. Provision for special measures covering all victims of stalking is also included in the legislation. That will ensure that all victims of this insidious crime have automatic eligibility for special measures assistance, such as the use of live links or screens in court when giving evidence in proceedings.²⁵

²¹ NIA OR 17th November 2020: <http://data.niassembly.gov.uk/HansardXml/plenary-17-11-2020.pdf>

²² Council of Europe Convention on preventing and combating violence against women and domestic violence, Article 3 <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>

²³ Ibid, Article 34

²⁴ Ibid Article 44

²⁵ NIA OR 8th February 2021

5. Comparable arrangements in other UK Jurisdictions

5.1 England and Wales

In England and Wales, the Protection from Harassment Act 1997 was originally introduced to deal with stalking but it did not specifically name the offence as that. Instead, it introduced two criminal offences of harassment:

- pursuing a course of conduct amounting to harassment; and
- putting a person in fear of violence on at least two occasions.

Due to public pressure and high profile campaigns, the Protection of Freedoms Act 2012 created two new specific stalking offences by inserting new sections (2A and 4A) into the Protection from Harassment Act 1997.

Section 2A of the 1997 Act prohibits a person from pursuing a course of conduct that amounts to stalking.²⁶ The elements of the offence are:

a course of conduct
which is in breach of section 1(1) of the Protection from Harassment Act 1997 (i.e. a course of conduct which amounts to harassment) and
the course of conduct amounts to stalking.

A person's course of conduct amounts to stalking of another person if:

- it amounts to harassment of that person;
- the acts or omissions involved are ones associated with stalking; and
- the person knows, or ought to know that the course of conduct amounts to harassment of the other person.

As a summary only offence, it requires a complaint to be made within 6 months from the time when the offence was committed, or the matter of complaint arose. The 6 months' limitation runs from the last date of the course of conduct alleged. After that the court has no power to deal with the matter.

²⁶ Protection from Harassment Act 1997, Section 2A: <https://www.legislation.gov.uk/ukpga/1997/40/section/2A>

The penalty for stalking is up to 6 months' imprisonment and/or a fine. If the suspect is able to raise any of the defences to harassment under section 1(3) of the Protection from Harassment Act 1997, they cannot be guilty of stalking as without harassment there can be no conviction for stalking:

- (a) that it was pursued for the purpose of preventing or detecting crime,
- (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
- (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Section 4A of the 1997 Act prohibits a course of conduct which amounts to stalking involving fear of violence or serious alarm or distress:

- A person ("A") whose course of conduct—
- (a) amounts to stalking, and
 - (b) either—
 - (i) causes another ("B") to fear, on at least two occasions, that violence will be used against B, or
 - (ii) causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities, is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.
- (2) For the purposes of this section A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause B so to fear on that occasion.
- (3) For the purposes of this section A ought to know that A's course of conduct will cause B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities if a reasonable person in possession of the same information would think the course of conduct would cause B such alarm or distress.

It is an either way offence (triable in either a magistrates' court or the Crown Court) which carries a maximum penalty on indictment conviction of ten years' imprisonment. In 2017, section 4A was amended by the Policing and Crime Act 2017 to increase the original maximum penalty from five years' to ten years' imprisonment.²⁷

²⁷Policing and Crime Act 2017, Section 175: <https://www.legislation.gov.uk/ukpga/2017/3/section/175/enacted>

It is a defence to the offence if the defendant can show that:

- the course of conduct was pursued for the purpose of preventing or detecting crime;
- the course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or
- pursuit of the course of conduct was reasonable for the protection of him or herself or another or for the protection of her, his or another's property.

The 1997 Act does not define stalking, but provides a non-exhaustive list of examples of acts or omissions associated with stalking. These are:

- 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.

Powers of Entry and Seizure

Section 112 of the Protection of Freedoms Act 2012 gave the police additional powers to investigate stalking offences. Police officers have a power of entry in relation to the offence of stalking under section 2A of the Protection from Harassment Act 1997. Until then, the police only had a right of entry in respect of conduct that puts people in fear of violence.²⁸

The power of entry is exercisable by warrant and allows the police to enter and search premises if there are reasonable grounds for believing that an offence under section 2A has been or is being committed. A constable may also seize and retain anything for which the search has been authorised. When introduced, the Crown Prosecution Service stated that these powers:

will aid in investigation and evidential gathering for example in harassment cases that involve cyber stalking. It is sometimes difficult to link the stalking behaviour of the offender to the victim without seizing the equipment used to stalk the victims. A power

²⁸Protection of Freedoms Act 2012 ,Section 122 <https://www.legislation.gov.uk/ukpga/2012/9/section/112>

*to search for and seize computers or other electronic equipment that may have been used to commit the offence would potentially strengthen the prosecution case.*²⁹

Stalking Protection Orders

In December 2015, the Home Office published a consultation to examine whether it would be beneficial to introduce a new civil order to protect victims of stalking. The consultation sought views on:

- the effectiveness of existing interventions;
- the challenges of identifying stalking in its early stages;
- how a stalking protection order might work in practice; and
- what penalty should be imposed for breach of an order.

Responses to the consultation highlighted a gap in the existing protective order framework and the need for earlier intervention in stalking cases, in order to protect victims and to address emerging patterns of behaviour in perpetrators before they become entrenched or escalate in severity. In particular, respondents did not believe that existing protective orders provided sufficient protection to victims of ‘stranger stalking’, as they apply to a domestic abuse context and require that a relationship has existed or still exists. In response, the UK Government committed to legislate to introduce a new civil stalking protection order as soon as Parliamentary time allowed. It stated that:

*Feedback from the pilot of the Domestic Violence Protection Orders for example indicated that it could be helpful that police could apply for them (which in itself may provide an additional layer of protection as the victim would be less likely to be blamed by the perpetrator for an order being put in place), with one officer noting “I thought it was a fantastic tool that didn’t put the onus on the victim and that’s something we get an awful lot where the victim doesn’t want to make that decision” (Police Officer – DVPO pilot evaluation).*³⁰

In July 2017, a Private Members’ Bill to introduce Stalking Protection Orders was published, with Government support. Following its parliamentary passage, the Stalking Protection Act 2019 received Royal Assent in March 2019.³¹ Detailed statutory guidance has been

²⁹ Crown Prosecution Website accessed 31st March 2021: <https://www.cps.gov.uk/legal-guidance/stalking-and-harassment>

³⁰ Home Office (2015) *Introducing a Stalking Protection Order – a consultation*, pg 12-13: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482417/Introducing_a_Stalking_Protection_Order_-_a_consultation.pdf

³¹ Stalking Protection Act 2019: <https://www.legislation.gov.uk/ukpga/2019/9/contents>

developed about when to apply for an order, the application process and how to deal with breach of a full or interim order.³²

Under the Act, a Stalking Protection Order is made on application to the Magistrate's Court by the police. It is a civil order. Applications for full or interim orders can be made:

- where the threshold to commence criminal proceedings for the commission of an offence has not yet or will not be met (this allows for early police intervention in stalking cases); or,
- where of suspect has been charged. A Stalking Protection Order is not an alternative to prosecution for stalking offences under the Protection from Harassment Act 1997. In such circumstances an order can be used to complement the prosecution of a stalking offence.

Within an application for a full or interim order, police can request both prohibitions and/or requirements to protect the victim from the risk of stalking.

A breach of a full or interim order without reasonable excuse is a criminal offence punishable either way on:

- Summary conviction with imprisonment for a term not exceeding 12 months or a fine or both; or
- Indictment, with imprisonment for a term not exceeding 5 years or a fine or both.

When first introduced some experts voiced concern that the powers could be used as an alternative to prosecutions, placing victims at greater risk.³³ As these orders are relatively new, there is not much information available about their impact. However, the Department of Justice has stated:

*England and Wales introduced stalking protection orders at the start of January last year, and they are completing a full-year review of their first year. We have been working very closely with our colleagues — the stalking policy leads — in the Home Office. On the whole, they have found that the stalking protection orders have been welcomed and that they are working. However, [...] England and Wales have 43 different constabularies, and the take-up of stalking protection orders differs from one constabulary to the next. Given that we have one force, and with the appropriate training on how to use the protection orders, the orders will certainly be welcomed.*³⁴

³² Home Office (2021) *Stalking Protection Orders Statutory guidance for the police*:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951354/SPOs_statutory_guidance_English_with_changes_002_.pdf

³³ The Guardian 19th January 2020: <https://www.theguardian.com/uk-news/2020/jan/19/new-stalking-prevention-orders-victims-at-risk>

³⁴NIA OR Committee for Justice 21 January 2021 :<http://data.niassembly.gov.uk/HansardXml/committee-25076.pdf>

5.2 Scotland

Scotland was the first jurisdiction to introduce stalking offences in the United Kingdom. Two stalking offences were created by the Criminal Justice and Licensing (Scotland) Act 2010. Prior to this, stalking was prosecuted under the common law 'breach of the peace' provisions.

It was the campaign of Ann Moulds, a victim of stalking, and others that assisted in realising these new offences. Her campaign also informed the changes under the Protection of Freedoms Act 2012 in England and Wales, outlined above.

The legislation sought to create a specific offence of stalking and a wider offence of threatening, alarming or distressing behaviour. The first offence of stalking requires a course of conduct (over at least 2 occasions or incidents). The second offence of threatening and abusive behaviour does not require a course of conduct and can therefore be made out after a single incident. If the Court is not satisfied that a defendant is guilty of the offence of stalking, it may convict for the alternative offence of threatening and abusive behaviour.

In terms of punishment, a person convicted on indictment of either offence is liable up to 5 years in prison. If on summary conviction, it is a term of imprisonment not exceeding 12 months in prison. In the event of conviction, in either case, the person can also face a fine not exceeding the statutory maximum of £5000.

The component parts of the offences of **stalking** under Section 39³⁵ are:

- A person (A) commits an offence of stalking another person (B) where:
- A engages in a course of conduct which causes B to suffer fear or alarm;
- A engages in the course of conduct with the intention of causing B to suffer fear or alarm; and
- A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm.

³⁵Criminal Justice and Licensing (Scotland) Act 2010, Section 39: <https://www.legislation.gov.uk/asp/2010/13/section/39>

In this section, *a course of conduct* involves conduct on at least two occasions including:

- (a) following B or any other person,
- (b) contacting, or attempting to contact, B or any other person by any means,
- (c) publishing any statement or other material—
 - (i) relating or purporting to relate to B or to any other person,
 - (ii) purporting to originate from B or from any other person,
- (d) monitoring the use by B or by any other person of the internet, email or any other form of electronic communication,
- (e) entering any premises,
- (f) loitering in any place (whether public or private),
- (g) interfering with any property in the possession of B or of any other person,
- (h) giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person,
- (i) watching or spying on B or any other person,
- (j) acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm.

Ann Moulds, in evidence to the Parliamentary Stalking Law Reform Inquiry, said '*that on reflection there ought to have been a catch all inter alia (amongst other things) and an ability of the Secretary of State to add to the list if it became necessary [...] At that time, in Scotland, there was no such crime as stalking. The police did not recognise the seriousness of the crime, the on-going predatory nature of this type of crime, or the increasing danger that I was facing*'.³⁶

It is a defence for a person charged with an offence under this section to show that a course of conduct:

- was authorised by virtue of any enactment or rule of law;
- was engaged in for the purpose of preventing or detecting crime; or
- was in the particular circumstances, reasonable.

³⁶ Independent Parliamentary Inquiry into Stalking Law Reform (2012) Main Findings and Recommendations Justice Unions' Parliamentary Group, pg 23 <https://www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/Stalking-Law-Reform-Findings-Report-2012.pdf>

In 2019-20, 1,145 stalking charges under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 were reported to COPFS. Of these, 744 (65 percent) were identified as domestic abuse.³⁷

The second offence of **threatening or abusive behaviour under Section 38**³⁸ occurs when:

A person (A) commits an offence if A behaves in a threatening or abusive manner; and

- the behaviour would be likely to cause a reasonable person to suffer fear or alarm; and
- A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm;
- "behaviour" includes behaviour of any kind including, in particular things said or otherwise communicated as well as things done, and behaviour consisting of a single act, or a course of conduct;

It is a defence for a person charged with this offence to show that the behaviour was, in the particular circumstances, reasonable. It is up to the courts to decide what amounts to reasonable in the circumstances.

Stalking Protection Orders

In April 2019, Rona Mackay MSP consulted on her draft proposal to introduce a Member's Bill in the Scottish Parliament to increase protection for victims of stalking by giving police the power to apply for stalking protection orders on behalf of victims. Introducing the draft proposal, she stated:

*The UK Parliament has recently passed the Stalking Protection Act 2019, which provides the police with powers to apply for SPOs for victims in England and Wales. It is imperative that victims who are stalked in Scotland have access to a similar level of protection.*³⁹

Ninety-seven percent of the respondents to her consultation were supportive of the proposal. In particular:

There was overwhelming support for the proposal to introduce Stalking Protection Orders (SPOs) which would be applied for by the police, on behalf of a victim. This was seen by all but one respondent as being a significant improvement, in terms of

³⁷Crown Office & Procurator Fiscal Service Domestic Abuse and Stalking charges in Scotland, 2019-20

<https://www.copfs.gov.uk/media-site-news-from-copfs/1902-domestic-abuse-and-stalking-charges-in-scotland-2019-20>

³⁸Criminal Justice and Licensing (Scotland) Act 2010, Section 38: <https://www.legislation.gov.uk/asp/2010/13/section/38>

³⁹ Proposed Stalking Protection (Scotland) Bill, April 2019

https://www.parliament.scot/S5MembersBills/20190425_Final_Consultation_document.pdf

protecting victims of stalking, on the current situation, where victims have the option to seek Non-Harassment Orders (NHOs) through the courts. Most respondents thought that the outlined new process would protect victims more effectively and increase the likelihood of deterring and/or ending stalking behaviour, and would benefit victims by reducing stress, and saving time and money. There was also broad support for other suggested aspects of the new process, including: setting a maximum length of two years for an SPO, with the option to apply to a court for a renewal; making the breach of an SPO a criminal offence; and allowing SPOs to be made against children who are under 16 but above the age of criminal responsibility.

Responding to the analysis of the consultation, the member commented:

My Member's Bill was paused until the effect of the new Domestic Abuse (Scotland) Bill introduced last year could be evaluated in respect of stalking and coercive control offences. Some stakeholders, including the police, wanted to avoid a risk of over-legislating, which could prove confusing for the victim and the authorities.

If I am returned to Parliament in Session 6, I will be following up on the Bill and will restart the discussion about the need for legislation in this area. It is vital that victims are protected at every level from this traumatising crime and that there is no gap in the law.⁴⁰

In order to have the right introduce a Private Members Bill, the final proposal for it must secure the support of at least 18 other MSPs (from at least half of the political parties or groups represented in the Parliamentary Bureau), and the Scottish Government should indicate that it does not intend to legislate in the area. Therefore, at this stage, it is only a draft proposal for legislation.

⁴⁰Proposed Stalking Protection (Scotland) Bill ,Summary of Consultation Responses:https://archive2021.parliament.scot/S5MembersBills/Stalking_Consultation_Summary2.pdf

6. Bill and Clause Commentary

6.1 Analysis of Key Clauses

This section provides short commentary on the key clauses of the Protection from Stalking Bill. This section also draws on the oral evidence briefing given by the Department of Justice, to the Committee for Justice, on 21st January 2021. In exploring legislative options for the Bill, the Department conducted benchmarking with other jurisdictions, in particular England, Wales and Scotland. The offences of stalking and threatening or abusive behaviour largely incorporate elements of the offences available in Scotland. The proposed offence of stalking includes an additional element of suffering ‘substantial distress’. Similarly, the provisions for Stalking Protection Orders largely replicate those available in England and Wales.

Part 1 of the Bill introduces two new stalking related offences.

Clause 1- Offence of Stalking

Clause 1, Subsection (1) creates the offence of stalking where a person (A) engages in a course of conduct that causes another person (B) to suffer fear, alarm or substantial distress or is such that a reasonable person, or a reasonable person who has any particular knowledge of B that A has, would consider to be likely to cause them to suffer fear, alarm or substantial distress

The offence requires at least one of two further conditions being met. That:

- A either intended the conduct to cause fear, alarm or substantial distress, or
- ought in the circumstances to have known that the conduct would have that effect.⁴¹

The meaning of conduct⁴² is defined as follows:

- (a) following B or any other person,
- (b) contacting, or attempting to contact, B or any other person by any means,
- (c) publishing any statement or other material—
 - (i) relating or purporting to relate to B or to any other person, or
 - (ii) purporting to originate from B or from any other person,
- (d) monitoring the use by B or by any other person of the internet, email or

⁴¹ Protection from Stalking Bill, Clause 1 Subsection 2:

<http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/protection-from-stalking/protecton-from-stalking-bill---as-introduced---full-print-version.pdf>

⁴²Ibid, Clause 1 Subsection 4

any other form of electronic communication,

(e) entering any premises,

(f) loitering in any place (whether public or private),

(g) interfering with any property in the possession of B or of any other person,

(h) giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person,

(i) watching or spying on B or any other person, or

(j) acting in any other way that a reasonable person, or a reasonable person who has any particular knowledge of B that A has, would expect would cause B to suffer fear, alarm or substantial distress;

The list of behaviours is not exhaustive and has been described as a 'catch all' by the Justice Minister:

The range of behaviours can be considered illustrative of stalking but is neither exhaustive nor prescriptive, to avoid any gaps or any defences that are based on them; in fact, the format is similar to the approach that we took in the Domestic Abuse and Civil Proceedings Bill...⁴³

In evidence to Committee for Justice, the Department also stated:

The reason for setting out a not exhaustive but fairly comprehensive list of behaviours is to draw a distinction between what might be constituted as harassment behaviour and what we want to have clearly identified as stalking behaviours.⁴⁴

The added reference to reasonable person acting in any other way that a reasonable person, or a reasonable person who has any particular knowledge of B that A has, would expect would cause B to suffer fear, alarm or substantial distress has been explained as follows:

We wanted to spell out what are often the typical behaviours, but, by putting in that reasonableness test at the end, it ensures that, if someone found a new and novel way of stalking or obsessing over an individual, it would not be discounted because it was

⁴³ NIA OR 8th February 2021

<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/02/08&docID=325081#3251253>

⁴⁴ NIA OR Committee for Justice 21st January 2021: <http://data.niassembly.gov.uk/HansardXml/committee-25076.pdf>

*not on the list.*⁴⁵

Following the Department's briefing session with the Committee for Justice in January 2021, it agreed to explain why the term 'whether public or private' is included in Clause 1(4) (f) and why 'loitering in any place' is not sufficient. It subsequently wrote to the Committee with detail as follows:

- The addition of 'whether public or private' at Clause 1(4)(f) was included as the dictionary definition of loitering refers to waiting around without apparent purpose. Some definitions restrict the definition to a 'public' place and others do not.
- We therefore included 'private' to make it clear that for the purposes of the Bill, loitering in a private place as well a public one should be included.
- The inclusion of 'private' is also to ensure there isn't a gap where an offender may claim to be allowed to do, or act as they wish within the property limits of their own home or a private dwelling they have access to, which they then use to stalk their victim.⁴⁶

A **course of conduct** is defined as involving conduct on two or more occasions. The rationale behind this is that:

The number of two was about starting to establish a pattern. In practical terms, it may well be that the capacity of the police to pick up the second offence as being the point at which they come in will depend on how their systems work, but we felt that it was important to see the establishment of the beginning of a pattern. A single incident could still be caught. It would not in itself be stalking, but, if there were two or more offences, you are starting to create a pattern and to see stalking occur. Certainly, it was very much based on taking advice from what was happening elsewhere and how it was defined, and two seemed to be the right number.

*[...] To add to that, the number of two is not new in the stalking sphere. Two instances or more already exists in the protection from harassment order, so it already has a legislative footing in Northern Ireland. We have extracted that from the harassment legislation and included it in the stalking legislation.*⁴⁷

The offences of stalking in Scotland and in England and Wales similarly require that there must be a "course of conduct" on at least two occasions for the offences to be committed.

⁴⁵ Ibid

⁴⁶ Department of Justice correspondence dated 17 February 2021 – Follow-up to Oral Evidence Session on 21 January 2021: <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/justice/primary-legislation/protection-from-stalking-bill/call-for-evidence/>

⁴⁷ NIA OR Committee for Justice 21st January 2021

Substantial distress is described as distress that has a substantial adverse effect on the victim's day to day activities. Unlike with the Protection from Harassment Order (NI) 1997, the victim does not have to suffer fear of violence. It will be an offence if the conduct causes serious alarm or distress and this has a substantial effect on a person's day to day activities. As the clause is not prescriptive, it will be for the courts to decide what amounts to fear, alarm or substantial distress. However, the Home Office considers that evidence of adverse effect may include:

- the victim changing their routes to work, work patterns, or employment
- the victim arranging for friends or family to pick up children from school (to avoid contact with the stalker)
- the victim putting in place additional security measures in their home
- the victim moving home
- physical or mental ill-health
- the victim's deterioration in performance at work due to stress
- the victim stopping /or changing the way they socialise⁴⁸

Although some victims try to continue their existing routines in defiance of a stalker, they may still be able to evidence substantial impact on their usual day to day activities, depending on the individual case.

Subsection (3) gives extra territorial effect to the offence. It provides that a course of conduct occurring outside the United Kingdom, would be treated as if it happened in Northern Ireland. The accused must be a UK national or habitually resident in Northern Ireland.

Clause 10 of the Domestic Abuse and Family Proceedings Bill, which similarly referred to behaviour occurring outside the UK, was examined in detail by the Committee for Justice during its legislative passage. The then Attorney General for Northern Ireland, John Larkin QC, raised concerns to the Committee *'that the Clause appeared to penalise acts occurring outside Northern Ireland that are not criminalised in the country in which they take place and, by virtue of Section 6(2)(a) of the Northern Ireland Act 1998, a provision is outside the Assembly's legislative competence if it would form part of the law of a country or territory other than Northern Ireland.'*

He *'indicated that, in his view, in providing for penal consequences for behaviour, Clause 10 operates to 'form part of the law' of the country in question and 'forming part of the law' is a broad concept, not restricted to formally or explicitly altering that country's statute. By making*

⁴⁸ . Home Office (2021) Stalking Protection Orders Statutory guidance for the police, pg 30

*behaviour criminal in territory where that behaviour is not otherwise criminal offends against the limitation of the Assembly's competence.*⁴⁹

Consequently, the Committee asked the Justice Minister to outline her position on the matter and commissioned its own legal advice from the Northern Ireland Assembly Legal Services. It reported that:

The Minister advised the Committee that she and officials had given extensive consideration to this issue over recent months and had held discussions with both Legislative Counsel and senior legal advisers.

The Minister outlined that the Northern Ireland Act 1998 prohibits an Assembly Act from forming part of the law in another country but does not prohibit extra territorial provision in the sense of application as distinct from extent, so long as such provision sounds only as a matter of Northern Ireland law. The Minister confirmed that she considered that it is within the legislative competence of the NI Assembly to create an offence under Northern Ireland law even where the criminal conduct occurs outside Northern Ireland. In relation to behaviour in another country that contributes to the domestic abuse offence in Northern Ireland, individuals will not be penalised in that country or by its authorities even if they are penalised in Northern Ireland.

The Minister indicated that it is not considered that the Clause forms part of the law of another country or confers functions other than in or as regards Northern Ireland. The Minister also highlighted other pieces of legislation, with a similar construct to this provision, which Ministers, the Executive and the Assembly have approved and which are deemed to be within the legislative competence of the Assembly.

The Committee noted that the issue of Assembly competence had been robustly considered on a number of occasions, in conjunction with legal advisers and Legislative Counsel, who are satisfied that Clause 10, is within the legislative competence of the Assembly.

Taking into consideration the assurances provided by the Justice Minister and its own legal advice on the matter, the Committee was content with the application of Clause 10.⁵⁰

Subsection (5) outlines the defences available to a person charged with the stalking. They must demonstrate that the course of conduct:

- (a) was authorised by virtue of any statutory provision or rule of law,
- (b) was engaged in for the purpose of preventing or detecting crime, or
- (c) was reasonable in the particular circumstances

⁴⁹ NIA Committee for Justice (2020) Report on the Domestic Abuse and Family Proceedings Bill pg 15
<http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/justice/reports/dafp-bill/committee-for-justice-report-on-domestic-abuse-and-family-proceedings-bill.pdf>

⁵⁰ Ibid, pg 14 – 15

The first defence may apply to companies acting within their legal entitlement, for example, a bank manager warning in writing of repossession proceedings because of default in mortgage payments.

The second defence is most obviously available to the police, or other statutory investigating agencies such as HMRC. Whether this would also be applicable to investigative journalism would be a matter for consideration by the courts. In *Hayes v Willoughby*⁵¹, the issue arose as to what behaviour could be defended on the ground that the alleged harasser was engaged in the prevention or detection of crime under section 1 (3)(a) of the Protection from Harassment Act 1997. The Court held that the alleged harasser would have to show that he had acted rationally.

The third defence is that the defendant was acting reasonably in the particular circumstances. This is a wide defence. Ultimately, the decision as to what amounts to reasonable behaviour will rest with the courts.

Subsection (6) outlines the penalties for stalking. The maximum penalty on summary conviction (heard in a magistrates' court) is 12 months' imprisonment or a fine up to the statutory maximum (that is £5,000) or both. The maximum penalty on conviction on indictment (heard in a crown court) is 10 years' imprisonment or a fine, or both. In introducing these sentences, the Department explained that it wanted:

to create a significant uplift from the penalties under the Protection from Harassment Order 1997. A prison term of 10 years is seen as a serious conviction for a serious offence, and it reflects the seriousness that we attach to the offence. We have obviously done our due diligence in analysing not only disposals in other jurisdictions but existing offences in our legislature.⁵²

Subsection (7) provides that if the facts do not amount to the offence of stalking in proceedings but satisfy the offence of threatening or abusive behaviour under clause 2, there can be an alternative conviction:

(7) In proceedings in respect of a charge against a person of the offence of stalking, the person may be convicted of an offence under section 2 if the facts proved against the person—

- (a) do not amount to the offence of stalking, but
- (b) do amount to the offence under section 2.

⁵¹Hayes v Willoughby [2013] UKSC 17 <https://www.supremecourt.uk/cases/docs/uksc-2012-0010-judgment.pdf>

⁵² NIA OR Committee for Justice 21st January 2021

Clause 2 - Threatening or Abusive Behaviour

Clause 2 Subsection (1) creates the new offence of threatening or abusive behaviour where a person (A) behaves in a threatening or abusive manner and the behaviour would be likely to cause a reasonable person to suffer fear and alarm; and (A) intends by the behaviour to cause fear and alarm or is reckless as to whether the behaviour causes fear or alarm.

2.— (1) A person (“A”) commits an offence if—

(a) A behaves in a threatening or abusive manner,

(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour causes fear or alarm.

It is a defence for a person charged with the offence to show that the behaviour was reasonable in the particular circumstances. Again, as this is a wide defence, it will be up to the court to decide what amounts to reasonable.

Subsection (3) describes behaviour being ‘*of any kind including, in particular, things said or otherwise communicated as well as things done*’. Behaviour can consist of a single act or omission, or a course of conduct on two or more occasions.

The penalty for this offence on summary conviction (heard in a magistrates’ court) is 12 months’ imprisonment or a fine not exceeding the statutory maximum (£5,000) or both. The maximum penalty on conviction on indictment (heard in a crown court) is 5 years’ imprisonment or a fine, or both.

Clause 3 – Support for Victims

Subsection 2 of this clause provides that all witnesses of an offence of stalking under clause 1, will have automatic eligibility for assistance with giving evidence in proceedings as provided for by the Criminal Evidence (Northern Ireland) Order 1999, for example, the use of live links or screens at court. However, this automatic assistance does not apply to prosecutions of an offence of threatening or abusive behaviour under clause 2 in the first instance.

Subsection 3 also provides protection for complainants of a stalking offence under clause 1 from cross-examination by a defendant in person (i.e the perpetrator). Similarly, this protection does not extend to prosecutions of an offence of threatening or abusive behaviour under clause 2 in the first instance.

Clause 4 - Alternative to conviction of the domestic abuse offence

This clause adds the offences of stalking and threatening and abusive behaviour, as alternative convictions in a trial of the domestic abuse offence under the Domestic Abuse

and Civil Proceedings Act (NI) 2021. Section 13 of the Act provides that, where a charge is brought for the domestic abuse offence but the court is not satisfied that this has been committed, it is possible to convict the accused of a specified alternative offence if it can be proved. An alternative offence at present is either an offence of 'harassment' or 'putting people in fear of violence' as cited under the Protection from Harassment (Northern Ireland) Order 1997.

Clause 5 - No right to claim trial by jury

This clause amends Article 29(1) of the Magistrate's Courts (NI) Order 1981 to prohibit those, before the Magistrates' Court, accused of either stalking or threatening and abusive behaviour, from electing for trial by jury in the Crown Court. This is a consequential amendment as the maximum sentence of imprisonment that can be imposed without a jury trial is six months. Both offences propose uplifting the maximum penalty on summary conviction to 12 months' imprisonment.

Part 2 of the Bill – Stalking Protection Orders

Part 2 of the Bill makes provision for the introduction of Stalking Protection Orders. A Stalking Protection Order is a preventative order which can impose both prohibitions and requirements on the perpetrator as are necessary for the purpose of preventing them from carrying out acts associated with stalking.

Clause 7 - Applications for orders

This clause sets out what a Stalking Protection Order is and the grounds on which an application for an order may be made:

7.—(1) A stalking protection order is an order which, for the purpose of preventing a person from carrying out acts associated with stalking—

- (a) prohibits the person from doing anything described in the order, or
- (b) requires the person to do anything described in the order.

An order may be made on application to a magistrates' court by the Chief Constable. To make an application, the Chief Constable must be satisfied that the defendant has carried out acts associated with stalking; that they pose a risk of stalking to another person and that the order is necessary in order to protect the other person from that risk. They cannot be applied for by the victim which is a different to the process for Non-Molestation Orders.

The Department has highlighted that many respondents to its 2018 consultation were:

keen to see stalking protection orders introduced because they will take the onus off the victim, whereas, under protection from harassment, as a victim, you have to apply for your own non-molestation order or wait for a conviction of harassment before getting a restraining order. The stalking protection order will put the onus on the

*police. Once they are content that stalking has been committed — that acts have occurred — they can apply to the court for a stalking protection order with immediate effect.*⁵³

An application can only be applied in respect of someone who resides in Northern Ireland or who is coming to Northern Ireland.⁵⁴ Subsection (4) provides that the behaviour considered when making an application for an order can have taken place in any part of the UK, or abroad. It can also include behaviour that took place prior to the Bill coming into force.

Stalking Protection Orders can be applied for even in circumstances where prosecution is not being pursued. The victim may also be able to apply for other similar protective orders, such as injunctions or Non-Molestation Orders in relation to anti-social behaviour, however that will depend on the circumstances of each case.

Clause 8 - Power to Make Orders

This clause sets out the powers of the court to make a Stalking Protection Order; the grounds on which the court may make an order and what may be included in the terms of an order.

In particular, *'the court must be satisfied that the defendant has carried out acts associated with stalking, that they pose a risk of stalking to another person, and that each of the prohibitions and requirements included within the terms of the order is necessary in order to protect another person from that risk'*.

An order prohibiting the defendant from doing something could for example include prohibiting the defendant from:

- entering certain locations or defined areas where the victim resides or frequently visits;
- contacting the victim by any means, including via telephone, post, email, text message or social media;
- physically approaching the victim, at all or within a specified distance.

Requirements under an order could mean that defendants could be asked to go for a mental health assessment or attend a perpetrator programme.

Subsection (2) (c) provides that the individual protected by the order does not have to be the direct victim of stalking. The Explanatory and Financial Memorandum for the Bill explains that this is intended to address situations where, for example, *'a perpetrator is stalking other people connected to that victim such as family members, friends, knowing that this behaviour will impact on the individual who is the principal subject of the stalking acts. This is known as*

⁵³ Ibid

⁵⁴ Protection from Stalking Bill, Clause 7 Subsection 3

‘stalking by proxy’.⁵⁵ This also addresses other situations where, for example, a stalker is known to target victims who fit a particular description or appearance.

Subsection (4) requires that any prohibitions or requirements included within an order should, so far as is practicable, avoid conflict with the defendant’s religious beliefs, or their work or educational obligations. This is intended to ensure that the terms of the order are proportionate and avoid conflict with human rights.

Subsection (5) applies when a defendant is already the subject of another Stalking Protection Order. It provides that the terms of the different orders must not contradict each other. For example, *‘a new order cannot require the defendant to attend a perpetrator intervention programme at a location which an earlier order prohibits them from entering’*.⁵⁶

Clause 9 – Duration of Orders

An order has effect for a fixed period, or until a further order is made. Where a fixed period is specified it must be a duration of at least 2 years. Different periods may be specified in relation to different prohibitions or requirements. As there is no statutory maximum time limit or mechanism for autonomic review, an order could potentially run indefinitely unless it is varied or discharged.

Clause 10 - Variations

The Chief Constable or the defendant against whom a Stalking Protection Order is made may apply for an order varying, renewing or discharging the Stalking Protection Order.

(2) On the application, the court may make any order varying, renewing or discharging the stalking protection order that the court considers appropriate.

(3) But a court may not—

(a) in renewing or varying an order, impose an additional prohibition or requirement unless satisfied that it is necessary to do so in order to protect a person from a risk associated with stalking;

(b) discharge an order before the end of 2 years beginning with the day on which the order was made without the consent of—

(i) the person against whom the order was made, and

(ii) (ii) the Chief Constable.

⁵⁵ Explanatory and Financial Memorandum <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/protection-from-stalking/protection-from-stalking-bill---efm-as-introduced.pdf>

⁵⁶ Ibid

Clause 11- Interim Stalking Protection Orders

Clause 11 provides for interim Stalking Protection Orders. An interim order is a temporary order to protect the victim during any period between the application for a full order and its determination. Breach of any of the conditions of an interim order is a criminal offence which carries the same maximum penalty as breach of a full order.

Interim orders are intended to provide a speedier process to obtain an order when there is an immediate risk of harm, for example in cases where there are factors that include suicidal or homicidal ideation, but where further information or investigation is required to meet the criteria to obtain a full order or when the court is unable to provide the full order in time.

The court can make an interim order '*if it considers it appropriate to do so*'. This is a lower threshold than that required to make a full order, where the court must be '*satisfied*' that an order is '*necessary to protect another person*' from stalking.

An interim order only has effect for a fixed period specified in the order, and ceases to have effect on the determination or withdrawal of the main Stalking Protection Order application.

Clause 12 - Procedure of, and procedure for, orders

Persons under the age of 18 can be protected by an order as well as a respondent to an order. Children and young people, aged from 10 years to 18 years old, who are respondents to an order, will be subject to the same procedure as adults, but their applications will be dealt with similarly by the youth courts.

Clause 13 - Offence of breaching order

This clause provides that it is a criminal offence to breach the terms of an order or an interim order without reasonable excuse. It will be for a court to decide what constitutes a reasonable excuse in each particular case.

The penalty for the offence of breaching a Stalking Protection Order or an Interim Stalking Protection Order. The maximum penalty on summary conviction is 6 months' imprisonment or a fine not exceeding the statutory maximum (£5,000) or both. The maximum penalty on conviction on indictment is 5 years' imprisonment or a fine, or both.

Clause 14 – Notification requirements

A person subject to an order or an interim order is required to provide certain personal details to the PSNI within three days of the order coming into force. Personal details include name, address, change of address and any other information prescribed by regulations made by the Department.

Clause 15 - Method of notification and related matters

This sets out that a defendant must notify the PSNI at a police station and the powers that the PSNI have to verify the identity of the defendant when they attend to notify. Subsections (5) and (6) sets out that fingerprints and/or photographs taken for the purpose of verifying the

identity of the person must be destroyed by the police no later than the date on which the person ceases to be subject to a Stalking Protection Order or an un-replaced Interim Stalking Protection Order

Clause 16- Offences relating to notification

Under this clause, it is a criminal offence to fail to comply with the notification requirements without reasonable excuse, or knowingly to provide the police with false information. It will be for a court to decide what constitutes a reasonable excuse in each particular case.

Subsection (2) provides the penalty for the offence relating to notification requirements. The maximum penalty on summary conviction (heard in a magistrates' court) is 6 months' imprisonment or a fine not exceeding the statutory maximum (£5,000) or both. The maximum penalty on conviction on indictment (heard in a crown court) is 5 years' imprisonment or a fine, or both.

Clause 17 - Guidance

The Department of Justice is required to issue guidance to the Chief Constable about the exercise of the Chief Constable's functions relating to Stalking Protection Orders or Interim Stalking Protection orders. The Department may revise the guidance as required.

6.2 Issues raised during the second reading of the Bill

National Register of stalking

In 2018, the House of Commons Home Affairs Select Committee carried out an inquiry into domestic abuse. Regarding the matter of stalking, it recommended:

Stalking is a serious crime which can have a devastating impact on the lives of victims. Victims of stalking often endure years of abuse before the crime is taken seriously. We were told that existing criminal justice responses were often ineffective in stopping perpetrators. We recommend that a national register of serial stalkers and domestic violence perpetrators, as recommended by Paladin, is introduced as a matter of urgency and that individuals placed on the register should, like registered sex offenders, be managed through multi-agency public protection arrangements (MAPPA).⁵⁷

This recommendation echoed an earlier call made by the Independent Parliamentary Inquiry into Stalking Law Reform in February 2012.⁵⁸ The Inquiry recommended that a national register of serial stalkers and perpetrators of domestic violence be introduced as a matter of

⁵⁷ HOC Home Affairs Select Committee 2018 Domestic Abuse Report

https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1015/101505.htm#_idTextAnchor015

⁵⁸Independent Parliamentary Inquiry into Stalking Law Reform (2012) Main Findings and Recommendations Justice Unions' Parliamentary Group, pg 10 <https://www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/Stalking-Law-Reform-Findings-Report-2012.pdf>

urgency and that individuals placed on that register should, like sex offenders, be managed through multi-agency public protection arrangements.

When asked about introducing a stalking register in Northern Ireland, during the Second Stage of the Bill, the Justice Minister responded:

The Chair and other Members also raised the issue of having a stalking register. At this point, I do not have plans to introduce a register for stalking perpetrators, but I am keeping that position under careful review and will be keen to hear how the views of the Committee pan out as it scrutinises the Bill and takes evidence on it. I want to set out, if I may, my thinking on that. I am aware that our counterparts in England and Wales and Scotland, who have had stalking legislation in place for some years, have no current plans to introduce such a register. My focus is on ensuring that we make better use of our existing systems. The police already maintain databases that hold details of those convicted of harassment and fear-of-violence offences, and they will record the stalking offence once it comes into force. That will enable the police to manage risk and share their details across criminal justice and other relevant agencies. The Bill will also introduce stalking protection orders that will place notification requirements on perpetrators, and that provision will also enable the police to manage any risk.⁵⁹

Powers of Entry and Search

Although the Departmental consultation in 2018 engaged with the question of powers of entry to search premises, the Department does not consider there is a need to adapt or introduce any legislation in respect of police investigatory powers. In evidence to the Committee it confirmed that there are:

standard investigatory powers under the Police and Criminal Evidence Act 1984 (PACE) legislation. We do not need to add them to the stalking legislation. The police clearly have the ability to identify people already. Under the Malicious Communications Act 1988, they can identify people who are using pseudonyms or false identities. When those people are identified, existing PACE legislation allows for the examination of mobile devices, laptops, computers and the types of resource that a person will use to carry out online stalking or online-only stalking.⁶⁰

Additionally, the Justice Minister stated:

We believe that powers of entry and search are in place for the stalking offence and the offence of threatening and abusive behaviour, which are indictable offences. Those powers are contained in Part III of the Police and Criminal Evidence (Northern Ireland) Order 1989, which deals with powers of entry, search and seizure. The consultation document set out a comparison of the powers used in other jurisdictions and asked for

⁵⁹ NIA OR 8th February 2021

⁶⁰ Ibid

views on whether we needed a power of search. The consultation also highlighted that, were we to create a summary-only offence such as they have in England and Wales, our legislation would have to specifically provide that power to enable the police to apply for a warrant to enter and search premises. In Scotland, both offences were indictable, and, therefore, provision for entry and search was automatically provided. That is the case with our offence.⁶¹

6.3 Financial Effects of the Bill

The Explanatory and Financial Memorandum for the Bill suggests that a significant proportion of current offences of harassment and fear of violence are expected to come within the remit of the new stalking offence. It also states that:

the introduction of Stalking Protection Orders will have financial effects for their application by police to the courts and the Department is working closely with criminal justice partners in the assessment of a full financial Business Case to include their provision and training’.

However, the Justice Minister has indicated that she does not expect the introduction of these orders to have a significant financial effect.

There will, of course, be some transfer of responsibility, because the financial obligations of seeking a non-molestation order lie with the person who applies. Whilst applicants may be able to get some assistance through legal aid, depending on their means, this would then fall to the PSNI. That is one of the issues that we will look at when considering how we will budget. We do not anticipate a significant increase in cost.⁶²

⁶¹ NIA OR 8th February 2021

⁶² NIA OR 17th November 2020: <http://data.niassembly.gov.uk/HansardXml/plenary-17-11-2020.pdf>