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Killean, R., Stannard, J., McNaul, G., Beigi, S., Born, A., Johnston, S., O'Malley, G., & Watters, J. (2016). *Review of the Need for Stalking Legislation in Northern Ireland*. Queen's University Belfast. <http://www.niassembly.gov.uk/assembly-business/committees/justice/inquiries--reviews/review-of-the-need-for-stalking-legislation-in-northern-ireland/written-submissions/>

Document Version:

Publisher's PDF, also known as Version of record

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Review of the Need for Stalking Legislation in Northern Ireland.

Submission by Queen's University Belfast School of Law¹

This is a submission to the Committee for Justice, in order to assist their 'Review of the Need for Stalking Legislation in Northern Ireland.' The aim of the Review is:

to assess whether the current legislation in place in Northern Ireland to deal with stalking is appropriate and effective, identify any gaps and consider the need for and potential benefits of introducing specific stalking legislation.

Given the tight deadline, it has not been possible to go into the issues in as much detail as we would have liked. However, in this submission, we consider four of the key Terms of Reference identified by the Committee. The submission will:

1. Examine the key issues relating to stalking offences and the handling of stalking cases by the criminal justice agencies;
2. Consider the effectiveness of the current legislation in dealing with stalking;
3. Consider the need for and potential benefits of having specific stalking legislation for Northern Ireland;
4. Consider examples of stalking legislation in other comparable jurisdictions.

1. Examine the key issues relating to stalking offences and the handling of stalking cases by the criminal justice agencies

In this section we will begin by discussing the definition of stalking, before going on to consider the way in which it has been dealt with.

¹ This submission is a collaboration amongst the Queen's University Law School's staff (Dr Rachel Killean and Dr John Stannard) PhD students (Ms Gillian McNaull) and JD students (Ms Shaghayegh Beigi, Ms Alexandra Born, Ms Stephanie Johnston, Ms Grace O'Malley and Ms Jaclyn Watters).

What is Stalking?

One of the key problems in discussing this area is the lack of any agreed definition of stalking. Indeed, although the terms ‘stalking’ and ‘stalker’ are commonly used, there is a significant lack of understanding as to what constitutes stalking, not only amongst the public but also within the criminal justice system.² This is largely due to the fact that stalking consists of a series of behaviours which may not seem harmful when seen in isolation.³ The lack of agreed definition has been repeatedly flagged as presenting issues in relation to assessing the nature, extent and prevalence of stalking, and in relation to framing appropriate responses.⁴ According to Liz Kelly, stalking constitutes a distinct form of violence, an often hidden type of intrusion and intimidation which exists within the spectrum of gendered and sexualized violence.⁵ The emerging prevalence of stalking behaviour, as a substantial social issue, has internationally resulted in explicit criminal offence classification across numerous western jurisdictions.⁶ In the US, the Department of Justice has defined it as the ‘wilful or intentional commission of a series of acts what would cause a reasonable person to fear death or serious bodily injury’.⁷ In Australia, the Attorney-General of South Australia summarised stalking as ‘intentionally harassing, threatening and/or intimidating a person by following them about, sending them letters or articles, telephoning them, waiting outside their place of abode and the like’.⁸ While there is significant variance in the way stalking is defined, four key elements repeatedly arise: repeated behaviour; threat; the reaction of the victim; and the intention of the perpetrator.⁹

At a national level, increased awareness of this social behaviour has resulted in reform of the law both in England and Wales¹⁰ and in Scotland.¹¹ There is no legal definition of stalking in

² J.H. Kamphuis et al., ‘Stalking-Perceptions and Attitudes Amongst Helping Professions. An EU Cross-National Comparison’ (2005) 12 *Clinical Psychology and Psychotherapy* 215–25; C.E. Jordan, P. Wilcox and A. Pritchard, ‘Stalking Acknowledgement and Reporting Among College Women Experiencing Intrusive Behaviors: Implications for the Emergence of a “Classic Stalking Case”’ (2007) 35 *Journal of Criminal Justice* 556–69; P.G. Tjaden, ‘Stalking Policies and Research in the United States: A Twenty-Year Retrospective’ (2009) 15 *European Journal on Criminal Policy and Research* 261–78.

³ L. Sheridan, G. Davies and J. Boon, ‘The Course and Nature of Stalking: A Victim Perspective’ (2001) 40 *The Howard Journal* 215–34.

⁴ E. Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Cavendish, 2006) Chapter 1.

⁵ L. Kelly, ‘Standing the Test of Time? Reflections on the Concept of the Continuum of Sexual Violence’, in J. M. Brown and S. L. Walklate, eds., *Handbook on Sexual Violence* (Routledge, 2012) xvii–xxvi.

⁶ R. Purcell, M. Pathe and P. Mullen, ‘Stalking: Defining and Prosecuting a New Category of Offending’ (2004) 27 *International Journal of Law and Psychiatry* 157.

⁷ US Department of Justice (2002) *Strengthening Antistalking Statutes, Legal Series Bulletin 1*.

⁸ M. Goode, ‘Stalking: Crime of the Nineties?’ (1995) *Criminal Law Journal* 21.

⁹ S. Morris, S. Anderson and L. Murray, *Stalking and Harassment in Scotland* (Scottish Executive, 2002).

¹⁰ Protection of Freedoms Act 2012.

¹¹ Criminal Justice and Licensing (Scotland) Act 2010.

Northern Ireland, though definitions can be found within Northern Ireland discourse. Thus for instance Stalking NI, an organization which was established by a survivor of stalking, describes stalking as occurring when ‘an individual becomes excessively obsessed with another, and starts a relentless campaign of following and intimidation, for no reason other than their need to be close to their victim’.¹² In the same vein, the Police Service of Northern Ireland (PSNI) have described stalking as including ‘repeated attempts to impose unwanted communications and/or contacts...that...cause distress and/or fear in any reasonable person.’¹³ The PSNI definition emphasises several important features of stalking: (1) that an individual has engaged in a series of acts (2) that has caused a reasonable person (3) to feel intimidated, frightened, terrorized, harassed, or fearful for their safety, or the safety of family or household members.

How are stalking cases handled by criminal justice agencies?

Stalking can be life-changing, and can injure victims’ psychological, physical and social functioning. The majority of victims suffer a deterioration in physical and mental health, and a small number are eventually killed.¹⁴ Unfortunately, the crime is often characterized by underreporting, and by a lack of understanding and effective responses from the police and the criminal justice system.¹⁵ Research has repeatedly demonstrated that victims of gendered and sexualised violence often choose not to report their experiences due to a fear of not being believed, and it is estimated that the average victim experiences over 100 incidences of stalking behaviour before they report it to police.¹⁶ Such fears are not unfounded. Victims who report being subjected to such forms of violence have often been treated with disbelief and a general lack of sympathy and understanding,¹⁷ with 72% of victims reporting dissatisfaction with the overall response they received from the criminal justice system.¹⁸ Victims have identified

¹² Stalking NI, ‘What is Stalking? (2016) www.stalkingni.com/what-is-stalking/, Accessed 15 December 2016.

¹³ PSNI, ‘Harassment and Stalking’ www.psni.police.uk/crime/domestic-abuse/harassment-and-stalking/ Accessed 20 December 2016.

¹⁴ As in the case of Marilyn McKenna, see *Drury v HM Advocate* 2001 S.L.T. 1013.

¹⁵ J. Korkodeilou, ‘Stalking Victims, Victims of Sexual Violence and Criminal Justice System Responses: Is there a Difference or Just ‘Business as Usual’?’ (2016) 56 *British Journal of Criminology* 256-273.

¹⁶ A. Groenen and G. Vervaeke, *Characteristics of Reported Stalking Incidents and Guidelines for Police Prevention* (Modena Group on Stalking 2004).

¹⁷ J. Jordan, ‘Worlds Apart? Women, Rape and the Police Reporting Process’ (2001) 41 *British Journal of Criminology* 679–706; A.L. Robinson and M.S. Strohine, ‘The Importance of Expectations Fulfilment on Domestic Violence Victims’ Satisfaction With the Police in the UK’ (2005) 28 *Policing: An International Journal of Police Strategies and Management* 301–20; S. Meyer, ‘Seeking Help for Intimate Partner Violence: Victims’ Experiences When Approaching the Criminal Justice System for IPV-Related Support and Protection in an Australian Jurisdiction’ (2011) 6 *Feminist Criminology* 268–90.

¹⁸ L. Richards *Stalking and Harassment – The Victim’s Voice: A briefing from Protection Against Stalking (PAS) for the independent Parliamentary Inquiry into Stalking Law Reform* (2011) www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/Victim-Survey.pdf Accessed 21 December 2016.

consistent problems with regard to the way the police respond to stalking, including a dismissive attitude, a perception that the conduct is a private matter, a disinclination to intervene, and failure to keep the victim informed of progress of the investigation into the complaint.¹⁹ Stalking has been described as a ‘hidden crime’, a problem exacerbated by victims’ fears over the seriousness given to stalking by criminal justice agencies, whilst many who have reported their experiences claim to have received inadequate support.²⁰ Despite stalking being one of the most frequently experienced forms of abuse across the U.K,²¹ only a small number of cases are recorded by the police, with even less resulting in prosecution and sentence.²² As a result, many victims have complained of the stalker receiving ‘insufficient punishment’ for the harms they have endured,²³ whilst experiencing secondary victimization through the criminal justice responses involved.²⁴

In Northern Ireland, as we shall see in the next section, stalking is mainly dealt with under the Protection from Harassment (Northern Ireland) Order 1997 (the 1997 Order), which corresponds to the un-amended version of the Protection from Harassment Act 1997 used in England and Wales prior to its recent reform. This legislation was heavily criticized for its inability to consistently capture perpetrators of stalking, whilst simultaneously being misdirected towards issues such as domestic and inter-neighbour disputes.²⁵ Problems identified with the implementation of the legislation included accounts of police failure to act on their reports, efforts to make victims responsible for reducing the harm they experience, an inability to act on incidents that do not extend to physical acts, and a tendency on the part of the police to respond to incidents of stalking in isolation rather than as a pattern of events.²⁶ Furthermore, a culture persisted within the criminal justice system which tended to exacerbate the negative experiences of victims by undermining perceptions of the harm they incurred,²⁷ with victims reporting criminal justice responses which diminished the seriousness of actions

¹⁹ Finch, above n.4 at 269; J. Harris, *An evaluation of the use and effectiveness of the Protection from Harassment Act 1997* (Home Office Research Study 203, 2000); N. Thoennes & P. Tjaden, *Stalking in America: Findings from the National Violence Against Women Survey* (US Department of Justice, 1998), at 16-17.

²⁰ Justice Unions Parliamentary Group, *Independent Parliamentary Inquiry into Stalking Law Reform* (2012) www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/Stalking-Law-Reform-Findings-Report-2012.pdf Accessed 21 December 2016.

²¹ National Stalking Advisory Service (‘Paladin’), *Key Facts and Figures* paladinservice.co.uk/key-facts-and-figures/ Accessed 21 December 2016.

²² Richards, above n.18, at 3

²³ Justice Unions Parliamentary Group, above n.20, at 2.

²⁴ Richards, above n.18.

²⁵ Justice Unions Parliamentary Group, above n.20.

²⁶ Richards, above n.18, at 6.

²⁷ Justice Unions Parliamentary Group, above n.20 at 8.

and intentions on the part of the perpetrator.²⁸ In particular, stalking often manifests as an example of gendered violence, with gender and age intersecting to heighten the risk of victimisation.²⁹ As with other forms of gendered violence, victims often reported a police response which evidences a lack of understanding or ability to deal with such harms,³⁰ evidencing a need for not just legislative change, but stalking-specific training for criminal justice agency professionals.³¹

More generally, the continued use in Northern Ireland of the old legislation in this context creates numerous issues across the criminal justice system response to stalking. In particular, there is still a lack of clarity with regard to the boundaries of stalking, given the absence of any legal definition of the concept. Whilst a strategy for the prevention of domestic sexual violence was introduced by the Department of Health in March 2016,³² it encompassed only definitions of physical and digital stalking relating to intimate partner relationships and excluded the high prevalence of ‘stranger’ stalking.³³

Insight into key issues in relation to the criminal justice system’s handling of stalking offences can also be gained from an analysis of the discussions which surrounded the recent reforms in England and Wales. In 2012 the Home Office conducted a review of the Protection from Harassment Act 1997, in which it sought the views of key partners and directly affected parties. The consultation revealed a number of issues. The first was that Police Information Notices or ‘harassment warnings’ (also used in Northern Ireland) were ineffective against repeat or persistent offenders. In particular, it was suggested that they were likely to be ignored by offenders, gave victims a false sense of security and placed victims at risk of further harm through reprisals from perpetrators.³⁴ In relation to how stalking was addressed by the police, criminal justice partners and other police services, many respondents believed that stalking was not taken seriously, and that there was a lack of awareness as to what stalking was, and an

²⁸ Richards, above n.18 at 7.

²⁹ Morris, Anderson and Murray, above n.9 at 1.

³⁰ Richards, above n.18.

³¹ Justice Unions Parliamentary Group, above n.20.

³² *Stopping Domestic and Sexual Violence and Abuse in Northern Ireland*, www.health-ni.gov.uk/publications/stopping-domestic-and-sexual-violence-and-abuse-northern-ireland-strategy Accessed 21 December 2016.

³³ Northern Ireland Executive Debate, 12 September 2016, para 8.

³⁴ Home Office, *Review of the Protection From Harassment Act 1997: Improving Protection for Victims of Stalking Summary of Consultation Responses and Conclusions* (July 2012) at 4.

inability to identify and understand the cycles of abuse associated with it.³⁵ In relation to the restraining orders and injunctions available under the Act, these were seen as failing to deter, and as being frequently breached. In particular, many respondents felt that such measures were only effective in dealing with stalking in the early stages and in dealing with the less determined stalker who was more likely to comply with the law. Doubt was expressed as to whether more determined or persistent stalkers would be deterred. Strong support was also expressed for custodial sentences, curfews, restrictions on behaviour and electronic tags.³⁶ The majority of respondents believed that there was a failure to enforce injunctions, and that several breaches were tolerated before action was taken.³⁷ More broadly, many respondents highlighted the need for empathy and understanding to be shown to victims, and the difficulties which frequently surrounded the gathering of evidence needed to convict an individual.³⁸ The majority of respondents also identified a need for a specific offence of stalking to be created.³⁹ This is something to which we shall return in the third section.

2. Consider the effectiveness of the current legislation in dealing with stalking

Though stalking can involve the commission of a number of criminal offences,⁴⁰ the most important piece of legislation in this context is the Protection from Harassment (NI) Order 1997. This is more or less the same as the Protection from Harassment Act 1997 in England and Wales. Article 3(1) of the Order prohibits a person from pursuing a course of conduct which amounts to harassment of another, and which he or she knows or ought to know amounts to harassment. According to article 2(3) a ‘course of conduct’ must include at least two incidents. ‘Harassment’ is defined by article 2(2) as including conduct which causes alarm or distress to an individual, and this has been further defined by the Crown Prosecution Service as including ‘repeated attempts to impose unwanted communications and contact upon a victim

³⁵ *Ibid* at 7.

³⁶ *Ibid* at 9.

³⁷ *Ibid*.

³⁸ www.stalkingni.com/law/

³⁹ Home Office Review, above n.34, at 14.

⁴⁰ For instance: assault (*Smith v Superintendent of Woking Police Station* (1983) 76 Cr. App. R. 234; assault occasioning actual bodily harm (*Chan-Fook* [1994] 1 WLR 689) and the infliction of grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 (*Ireland: Burstow* [1998] AC 147).

in a manner that could be expected to cause distress or fear in any reasonable person'.⁴¹ This offence, which is sometimes called 'simple' harassment, is said to involve proof of three elements: (1) that the defendant carried out the conduct in question; (2) that the conduct can be considered harassment; and (3) that the defendant knew or ought to know that the conduct engaged in could amount to harassment. In addition to this, article 6 of the Order provides a more serious version of the offence when the defendant's course of conduct causes the victim to fear on at least two occasions that violence will be used against him or her; this is sometimes known as 'aggravated' harassment.

The Order also provides for other remedies, the most important of which are the injunction and the restraining order. An injunction may be issued under article 5 of the Order where an actual or apprehended breach of article 3 is the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question, and breach of such an injunction will amount to a criminal offence. Restraining orders, on the other hand, are issued in the context of criminal proceedings. Article 7 of the 1997 Order allows for such orders to be granted against a defendant convicted of an offence, and may, for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from conduct which amounts to harassment or will cause a fear of violence, prohibit the defendant from doing anything described in the order. Article 7A allows for similar orders to be made on acquittal in a case where the court considers it necessary to do so to protect a person from harassment by the defendant.

To what extent are these provisions effective in dealing with stalking? To a certain extent this question has already been addressed in the previous section, but given the similarities with the legislation in England and Wales prior to the reforms of 2012, it is useful to refer to some of the criticisms made in that context. Following a review of the 1997 Act conducted by the Home Office,⁴² it was concluded by the Government that the existing legislation was wide enough to cover most if not all instances of stalking, and that it was effective if properly enforced.⁴³ However, concerns had been expressed about the extent to which the 1997 Act

⁴¹ The Crown Prosecution Service (CPS), 'Stalking and Harassment' www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#b03 Accessed 15 December 2016.

⁴² *Review of the Protection from Harassment Act 1997: Improving Protection for Victims of Stalking* (Home Office, 2012), www.gov.uk/government/uploads/system/uploads/attachment_data/file/157899/stalking-responses.pdf Accessed 21 December 2016.

⁴³ *Ibid*, at 15.

was successful in protecting victims of stalking, most notably so-called ‘cyber stalking’.⁴⁴ Others criticised the Act for its lack of focus, pointing out that it had been used for disputes between neighbours and protests as well as for stalking cases, and said that these issues should be dealt with under different provisions.⁴⁵

Criticisms have also been made of the civil framework referred to above. For instance, it has been pointed out that restraining orders cannot be applied for until criminal proceedings have concluded in court, which can be problematical.⁴⁶ In particular, while court proceedings do not have to be successful for a restraining order to be granted, the victim receives little protection and relief during the process before the conclusion of criminal proceedings. In general, the effectiveness of civil orders has been questioned as there is a high rate of infringement; indeed, it has been estimated that between 60 and 69% of restraining and molestation orders are violated by the alleged perpetrator.⁴⁷ It has also been argued that in some cases issuing may exacerbate the offending behaviour, and that dangerous stalkers usually do not desist in response to civil orders, which may in many cases make matters worse.⁴⁸ Furthermore, the petition for an order can be opposed by the defendant and if issued may be subject to an appeal, meaning the victim is repeatedly involved in court proceedings, with the potential of secondary victimisation as a result of the process.

Stalking is undoubtedly being perpetrated within Northern Ireland, but as it falls under the umbrella legislation of harassment, it is difficult to assess how many of the offences committed under the 1997 Order related specifically to stalking.⁴⁹ However, statistics⁵⁰ demonstrate a concerning increase in the number of harassment offences that have been reported. These rose from 234 recorded offences in the 1998/1999 period to around 1,600 offences per year in the

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Belfast Domestic Violence Partnership Guidance, *Domestic Violence and Abuse: Legal Remedies (Information about the Criminal and Civil Law Surrounding Domestic Violence and Abuse in Northern Ireland)*, February 2015 www.setrust.hscni.net/pdf/Legal_Remedies.pdf Accessed on 16 December 2016.

⁴⁷ T. Kuennen, ‘Civil legal options for victims of stalking,’ in M. P. Brewster (ed.), *Stalking: Psychology, risk factors, interventions, and law* (Civic Research Institute 2003).

⁴⁸ R. Purcell, M. Pathé, and P.E. Mullen. ‘Editorial: When do repeated intrusions become stalking?’ (2004) 14(4) *Journal of Forensic Psychiatry and Psychology* 571-583.

⁴⁹ Stalking: ‘Private Members Business – in the Northern Ireland Assembly’ (12 September 2016) www.theyworkforyou.com/ni/?id=2016-09-12.6.1 Accessed 16 December 2016.

⁵⁰ Police Service Northern Ireland, ‘Trends in Police Recorded Crime in Northern Ireland from 1998/99 to 2014/15’ (Annual Bulletin, 2015), www.psni.police.uk/globalassets/inside-the-psni/our-statistics/police-recorded-crime-statistics/documents/police_recorded_crime_in_northern_ireland_1998-99_to_2014-15.pdf Accessed 15 December 2016.

period from 2009 to 2013. There was a further increase from 1,608 to 2,651 offences from 2013 to 2014, and to 3,059 from 2014 to 2015.⁵¹ Given that some if not most of these offences will have involved stalking, this suggests that there is a need for a new approach. In particular, while stalking incidents are undoubtedly taking place, they are being concealed by the lack of specific legislation, allowing stalking to slip through the cracks of the criminal justice system.

3. Consider the need for and potential benefits of having specific stalking legislation for Northern Ireland

This section will first consider whether there is a need for specific stalking legislation, before outlining some of the considerations that the legislature may want to be cognoscente of, in order to ensure any new legislation is effective.

A Need for Legislation?

As has been explored above, there is a lack of clarity with regard to the boundaries of stalking, given the absence of any legal definition of the concept. The 1997 Order can address a broad range of harms, and can extend to any form of persistent conduct which causes another alarm or distress.⁵² However, this approach has been criticized for its lack of specificity and certainty,⁵³ and for failing to acknowledge the specific harm of stalking. In particular, the current legislation creates little distinction between harassment and stalking.

Stalking undoubtedly bears similarities to harassment. Harassment has been defined in the Supreme Court as ‘a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress.’⁵⁴ As Mullen and Pathé assert, ‘most stalking involves multiple forms of harassment, engendering fear and apprehension, hypervigilance, and mistrust in its victims.’⁵⁵ However, the impact of stalking may be of a distinct nature, as ‘the defining characteristic of stalking is

⁵¹ *Ibid.*

⁵² Protection from Harassment (Northern Ireland) Order 1997, section 2(2).

⁵³ University of Modena and Reggio Emilia Modena Group on Stalking, *Protecting Women from the New Crime of Stalking: A Comparison of Legislative Approaches within the European Union* (European Commission, April 2007).

⁵⁴ *Hayes v Willoughby* [2013] 1 WLR 939, [2013] UKSC 17, [1].

⁵⁵ P.E. Mullen and M. Pathé, ‘Stalking’ (2002) 29 *Crime and Justice* 273, 296.

its relentless and persistent nature – it is not so much the conduct which causes distress as the continuation of the conduct and the ensuing uncertainty and anxiety which this engenders in the victim. Victims experience stalking continually, regardless of the frequency of the stalker’s acts, as the intervening periods are filled with trepidation.’⁵⁶ The effect of such behaviour is to curtail the victim’s freedoms and leave the victim feeling that they have to constantly take precautions (such as avoiding establishing a routine) to avoid the stalker.⁵⁷ There is therefore arguably a need for legislation which can capture the complex nature of stalking, and can distinguish between behaviours that are considered normal and ordinary and behaviours that amount to stalking. Without a specific offence, stalking can become hidden behind other related offences,⁵⁸ and the sinister behaviours of stalkers can be ‘conflated with nuisance crimes and disputes’.⁵⁹

It is also worth noting that the law constitutes an important part of social life and structure that often shapes the way social reality is perceived.⁶⁰ It can serve an expressive function, spreading a message as to what kind of actions are acceptable and unacceptable within a society. Individual action will often be informed by social norms, and government actions may have an impact in reinforcing or altering norms.⁶¹ Criminal law is inherently expressive, as the moral message expressed by the law is reinforced by the coercive power of the state to protect that morality.⁶² As has been observed, the criminalization of stalking and its legal recognition as a specific offence may help raise social awareness about the deviance of the behaviour and improve understanding about its effects.⁶³ In doing so, it may empower victims to report the activity and to seek intervention at an earlier stage, enabling the crime to be responded to in a prompt and effective way. Thus, we would argue that specific legislation would be beneficial

⁵⁶ Finch, above n.4 at 257.

⁵⁷ Pathe and Mullen conducted a study and found all but six of the one hundred victims reported major lifestyle changes and modified their daily activities in direct response to being stalked. This included avoiding places where the stalker might be and adopting additional, often expensive, security measures. Fear of venturing out forced a curtailment of social activities in 70 percent of respondents. Over half claimed they had changed or ceased employment as a consequence of being stalked. Forty percent of study participants relocated their residence on one or more occasions. M. Pathe and P.E. Mullen, ‘The impact of stalkers on their victims’ (1997) 170 *British Journal of Psychiatry* 12-17. See also S.M. Dennison, ‘Interpersonal Relationships and Stalking: Identifying When to Intervene’ (2007) 31(4) *Law and Human Behavior* 353-367.

⁵⁸ L. Richards, ‘Stalking: why and how we changed the law’ (2012) 3 *Family Court Journal* 44-51 at 44.

⁵⁹ R. Ford, ‘Better protection for stalking victims’ *The Times* (London, 26 November 2012) 22.

⁶⁰ C. R. Sunstein, ‘On the Expressive Function of Law’ (1995-1996) 144 *University of Pennsylvania Law Review* 2021.

⁶¹ *Ibid.*

⁶² J. Iontcheva Turner, ‘The Expressive Dimension of EU Criminal Law’ (2012) 60 *American Journal of Comparative Law* 555, 557.

⁶³ Korkodeilou, above n.15.

as a means of highlighting and responding to the specific crime of stalking. In the following subsection we consider some legal issues that should be borne in mind if new legislation is to be drafted.

Considerations for Future Legislation

Intimate Partner Stalking

Whilst some people are stalked by strangers, ‘studies have consistently documented that in the majority of stalking cases the victim and the stalker knew each other’, with one study demonstrating that ‘at least half of stalking victims had an intimate relationship with the stalker.’⁶⁴ It has been argued that the 1997 Act was designed to cover ‘stranger danger’, and that little or no attention was paid to ex-partner stalking during the drafting of the legislation.⁶⁵ On the other hand, it has been claimed that harassment legislation was not drafted with the intention of protecting victims of domestic abuse, given that this could be done in the context of existing legislation.⁶⁶ Specific stalking legislation should be aware of the difficulties that may be associated with identifying stalking within the context of intimate partner relationships, as the behaviours that signify stalking may not be evident to those outside of this direct relationship, and may not individually appear harmful. Addison and Perry note ‘whilst many types of obsessive stalking can cause a fear of violence, this is often because the persistence of the stalker is, in itself, a source of concern; however, the stalker may avoid specifically threatening words or actions’.⁶⁷ This can make it challenging for a victim to evidence stalking, and result in the victim feeling isolated and unsafe.

Additionally, periods of stalking behaviours may be infrequent (particularly in relationships of domestic abuse), and these behaviours can be viewed as isolated incidents. The consequences of reframing a pattern of conduct in terms of individual unrelated incidents is described by Finch, in the stalking context, as ‘fragmentation’. Finch argues that fragmentation ‘detracts from the seriousness of the totality of the conduct and make any penalty imposed for an individual criminal act appear insufficient.’⁶⁸ Any new anti-stalking legislation should take

⁶⁴ C. Fraser, et al., ‘The New Age of Stalking: Technological Implications for Stalking’ (2010) 61 *Juv. & Fam. Ct. J.* 39, 49.

⁶⁵ C. Humphreys and R. K. Thiara, ‘Neither justice nor protection: women’s experiences of post-separation violence’ (2003) 25(3) *Journal of Social Welfare and Family Law* 197.

⁶⁶ Family Homes and Domestic Violence (Northern Ireland) Order 1998, Art. 20.

⁶⁷ N. Addison and J. Perry, ‘Will the New Stalking Legislation Deliver for Victims?’ (2013) 177 *Criminal Law and Justice Weekly* 54.

⁶⁸ Finch, above n.4 at 257.

account of intimate partner stalking, by recognising that varying behaviours will constitute stalking in these forms of relationships. Additionally, legislation should attempt to address the issue of fragmentation, by providing that recurring incidents constitute a pattern of conduct despite the timeframe between.

Perpetrator' Intent

It has been argued that 'a significant proportion of stalkers suffer psychiatric conditions that effectively preclude the formation of criminal intent.'⁶⁹ Literature on the motives and characteristics of stalkers frequently highlights the mentally disordered natures of those who undertake stalking.⁷⁰ Research demonstrates that 'many stalkers are completely unaware of the effect of their behaviour, either because they are socially naïve, deluded into thinking that their efforts are appreciated, or because they are otherwise mentally ill.'⁷¹ Thus, their intent may not be to that 'harm or alarm; instead they may possess the, albeit misguided, intention to establish a relationship with the object of their attention.'⁷² However, whether or not the stalker is intending to create fear, this result is often achieved due to the nature of the perpetrator's actions, and therefore requires redress.

The 1997 Order requires that the defendant should have known, or ought to have known that his behaviour would cause harassment.⁷³ The lack of a need to prove specific intent is an advisable response to the varying degrees of intention and awareness which may accompany this crime. A general intent, which allows liability in cases where the perpetrator *ought to* have known, provides a more realistic threshold. Other approaches may include allowing the persistent nature of the behaviour to mitigate the need for *mens rea*,⁷⁴ or by establishing 'different levels of harassing/stalking behaviour, with calculated stalking being charged as a more serious form of stalking, and more reckless forms of stalking, or deluded stalking, ranking less seriously.'⁷⁵ Additionally, aggravated stalking, which includes fear of violence, could be considered as a distinct class of stalking.⁷⁶

⁶⁹ Purcell, Pathé and Mullen, above n.6 at 163.

⁷⁰ R. Meloy, 'Stalking (Obsessional Following): A review of some preliminary studies' (1996) 1(2) *Aggression and Violent Behaviour* 147.

⁷¹ J. Gowland, 'Protection from Harassment Act 1997: The 'New' Stalking Offences' (2013) 77 *Journal of Criminal Law* 387, at 397.

⁷² Purcell, Pathé and Mullen, as above n.6 at 163.

⁷³ Protection from Harassment Act 1997, s.1(1)(b).

⁷⁴ Dennison, above n.57 at 354.

⁷⁵ Gowland, above n.71.

⁷⁶ Protection of Freedoms Act 2012, s. 4 (a).

Stalkers have often engaged in stalking behaviour before, and may have obsessive or deluded motivations which cause them to resist or ignore criminal justice sanctions.⁷⁷ This raises issues as to how stalking can best be responded to. Indeed, some writers have questioned whether conventional criminal justice measures can be effective,⁷⁸ or whether psychiatric and psychological treatment options may offer a more effective response.⁷⁹ In particular, it has been suggested that in order to improve both practice and policy, anti-stalking legislation should contain provisions ‘requiring the psychiatric assessment and management of such offenders’.⁸⁰ This would assist with prevention, rather than merely punishment, by treating the cause of the stalking behaviour and aiming to ensure that it does not continue. The prevalence of psychiatric illness in perpetrators of stalking⁸¹ raises issues about increased criminalisation of offenders with mental health issues, whilst criminal justice responses of fines and short-term sentences are unlikely to lead to rehabilitation or reduction in risk of reoffending.⁸² Probation officers have raised issues regarding the lack of treatment programmes for offenders and the necessity for mental health reviews and referrals for stalking offenders.⁸³ Beyond legislative change, what is essential is implementation of current criminal justice practices in a way that reduces rather than exacerbating harm incurred by victims, through professional training and built in support models for victims. Any legislative response should keep at its centre the aims of offender management in Northern Ireland, to make communities safer and reduce risk of reoffending.

Victim Impact

The 1997 Order’s focus on the *reaction* of the victim as opposed to the *behaviour* of the offender, has been praised, as it ‘provides an obvious solution to the problem of listing and thereby limiting harassing/stalking behaviour’.⁸⁴ While critiques have been offered of this approach,⁸⁵ Gowland asserts that ‘this is inevitable given the nature of the offence’ as ‘stalking

⁷⁷ Morris, Anderson and Murray, as above n.9, at 29.

⁷⁸ S. Strikis, ‘Stopping Stalking’ (1995) 81 *The Georgetown Law Journal* 2771.

⁷⁹ ‘The stalking cure: how to rehabilitate a stalker’ *The Observer*, 17 February 2013, www.theguardian.com/society/2013/feb/17/how-to-rehabilitate-a-stalker Accessed 20 December 2016; See also R. MacKenzie and D. James, ‘Management and Treatment of Stalkers: Problems, Options and Solutions’ (2011) *Behavioural Sciences and the Law*.

⁸⁰ Purcell, Pathé and Mullen, above n.6 at 164.

⁸¹ Purcell, Pathe and Mullen, above n.48.

⁸² *The Observer*, above n.79.

⁸³ Justice Unions Parliamentary Group, above n.20 at 11.

⁸⁴ Gowland, above n.71.

⁸⁵ Purcell, Pathé and Mullen, above n.6 at 158.

can involve a limitless range of behaviour, from completely innocuous to outright blameworthy... there has to be some form of filter to decide who should be criminally liable.’⁸⁶ The focus on the reaction of the victim enables stalking legislation to frame the criminal activity in terms of ‘a series of actions that, when taken individually, often constitute legitimate behaviour’,⁸⁷ while acknowledging that a pattern of apparently legitimate conduct may become more sinister through repetition.⁸⁸

When considering the impact of the harm on the victim, anti-stalking legislation may wish to consider the gendered experience of both being victimised by stalking, and identifying behaviour as constituting stalking. It has been found that men are likely to report behaviours that constitute stalking only when the alleged perpetrator has made specific threats, whereas females are likely to report stalking behaviour regardless of an explicit threat.⁸⁹ A further study found that females were significantly more likely than men to identify behaviour in scenarios containing a male perpetrator and female victim as stalking. This highlights the differences in perception as to what constitutes stalking,⁹⁰ a reality that should be reflected in legislation if possible. This need not involve specifically gendered tests, but may amount to ensuring the perception of the victim and the context of the conduct is taken into account. While women are statistically more likely to be stalked,⁹¹ men may also be victims of stalking and it is important to note that men can struggle to be recognised as victims under gendered laws such as domestic violence and rape laws. Studies have found that stalking was regarded as more serious when the perpetrator was male and when the victim was female.⁹² It is important that any new legislation takes into account the gendered vulnerabilities that surround stalking, and recognise this crime as a victim-defined phenomenon.⁹³

⁸⁶ Gowland, above n.71.

⁸⁷ Purcell, Pathé and Mullen, above n.6 at 158.

⁸⁸ Richards, above n.58 at 45.

⁸⁹ A. M. Hills and J. L. Taplin, ‘Anticipated responses to stalking: Effect of threat and target-stalker relationship,’ (1998) 5(1) *Psychiatry, Psychology and Law* 139-146.

⁹⁰ S. Dennison and D.M. Thomson, ‘Identifying stalking: The relevance of intent in common sense reasoning,’ (2002) 26(5) *Law and Human Behavior* 544.

⁹¹ Paladin, ‘Key Facts and Figures’, paladinservice.co.uk/key-facts-and-figures/ Accessed 21 December 2016.

⁹² L. Phillips, et al., ‘Am I being stalked? Perceptions of stalking among college undergraduates.’ (2004) 31(1) *Criminal Justice and Behavior* 73-96; See also L. Sheridan, et al., ‘There's no smoke without fire': Are male ex-partners perceived as more 'entitled' to stalk than acquaintance or stranger stalkers?’ (2003) 94 *British Journal of Psychology* 87.

⁹³ Mullen and Pathe, above n.55.

Responding to New Methods of Stalking

It may be useful for legislation to include *examples* of actions or omissions that could amount to stalking, such as following, telephoning, sending gifts or letters, watching and starting, and damaging property.⁹⁴ However, a definitive list may be best avoided, as such an approach may lead to courts viewing the list as exhaustive. Research demonstrates that perpetrators are quick to adapt to new methods, meaning the law must be able to respond to these developments.⁹⁵ One example is where the conduct involves the use of tracking devices that can be attached to a victim's car and then used to monitor the victim's location from any device with internet access.⁹⁶ This form of stalking can result in the victim feeling eternally observed without being able to define how, as the stalker can demonstrate to them a knowledge of their daily activities. As has been suggested, one of the biggest challenges victims consistently face is convincing professionals that they are being stalked.⁹⁷ Anti-stalking legislation should be able to adapt to address issues of 'surveillance by stalkers with newer forms of technology that do not require proximity to or communication with the victim.'⁹⁸ Online communication is currently covered by the Malicious Communications (Northern Ireland) Order 1988, if the communication sent is '... indecent or grossly offensive, a threat, or information which is false and known or believed to be false by the sender,'⁹⁹ yet this does not cover other online activity (such as monitoring a person's communication and movements) or other forms of online communication (which may appear benign to another observer, but provide significance to the victim due to the relationship with the stalker). Future legislation that is drafted with sufficient flexibility will ensure it is possible to respond to new methods of stalking as technology continues to develop.

4. Consider examples of stalking legislation in other comparable jurisdictions

⁹⁴ Morris, Anderson and Murray, above n.9 at 16.

⁹⁵ Modena Group on Stalking, above n.53 at 69-70.

⁹⁶ Fraser et al, above n.64

⁹⁷ *Ibid* at 51.

⁹⁸ T.B. Carter, 'Local, State and Federal Responses to Stalking: Are anti-stalking laws effective?' (2016) 22 *Wm. & Mary J. Women & L.* 333, 385.

⁹⁹ The Malicious Communications (Northern Ireland) Order 1988, Art 3(1).

This section examines the approach taken in comparable jurisdictions. After an analysis of the approach in the US, Canada and Australia, it focuses more particularly on the two jurisdictions which are arguably of most relevance to this debate: England and Wales, and Scotland.

The US, Canada and Australia

Since 1990 many Anglo-American jurisdictions have enacted legislation which aims to address stalking and harassment.¹⁰⁰ Legislation generally falls into one of two groups: a 'list' style law which lists prohibited activities, and those which use a general term such as 'stalking' or 'harassment' (such as the approach used within Northern Ireland).¹⁰¹ The list approach is taken by most US states, by Canada, and by seven of the eight Australian territories. For example, in Chapter 33A of Queensland's amended Criminal Code, 'unlawful stalking' is conduct such as following, loitering near, watching or approaching a person; contacting a person in any way; loitering near, watching, approaching or entering a place where a person lives, works or visits; leaving offensive material where it will be found by, given to or brought to the attention of, a person; giving offensive material to a person, directly or indirectly; an intimidating, harassing or threatening act against a person,; an act of violence, or threat of violence, against or against property of, anyone, including the defendant. In Canada, section 264(1) of the Criminal Code prohibits conduct such as repeatedly following from place to place the other person or anyone known to them; repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; besetting or watching the dwelling - house, or place where the other person, or anyone known to them, resides, works, carries on a business or happens to be; or engaging in threatening conduct directed at the other person or any member of their family.

This list approach has been criticised for being too narrow, and failing to capture the full range of behaviour used by stalkers. As we observed, it is arguably preferable for law to enable a flexible response to the different ways in which perpetrators may stalk their victims. However, this approach has also been criticized for being too broad, in that some of the behaviours used by stalkers would in another context be innocent, and therefore should not be included in a list of criminal offences.¹⁰² Indeed, in the US there have been challenges to the constitutionality of

¹⁰⁰ G. Urbas, 'Australian Legislative Responses to Stalking' Paper presented at the Stalking: Criminal Justice Responses Conference convened by the Australian Institute of Criminology and held in Sydney 7-8 December 2000.

¹⁰¹ Finch, above n.4 at 11.

¹⁰² Hansard, HC Debates 17 December 1996, col. 790.

stalking laws, with the argument being that the law criminalises legitimate behaviour.¹⁰³ However, courts have been unwilling to accord constitutional rights to harassing behaviour.¹⁰⁴

In 1993 the US National Criminal Justice Association, the National Institute of Justice and the National Victim Center developed a Model Anti-Stalking Code, in an attempt to address difficulties associated with prosecuting such cases. The Code adopted an approach which considered the test to be whether the behaviour would cause fear in a reasonable person:¹⁰⁵

‘Any person who:

- (a) Purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and
- (b) Has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and
- (c) Whose acts induce fear in the specific person or bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

Is guilty of stalking.’

The Code proved to be an important template, with many states incorporating its language into their law, and courts citing it when interpreting provisions of state law.¹⁰⁶ In 2007, the US National Center for Victims of Crime developed ‘The Model Stalking Code Revisited: Responding to the New Realities of Stalking’, stating that as much more was now known about stalkers and the effectiveness of stalking laws, there was a need to update the legislation. They proposed a new offense, which states that:

¹⁰³ Morris, Anderson and Murray, above n.9 at 29.

¹⁰⁴ See for example, *Commonwealth v Schierscher*, 447 Pa. Super. 61, 668 A.2d 164 (Pa. Super. Ct. 1995) (described in US Department of Justice ‘Strengthening Anti-stalking Statutes’ (2002) Legal Series Bulletin 1, p3).

¹⁰⁵ National Criminal Justice Association, Project to Develop a Model Anti-stalking Code for States (US Department of Justice, National Institute of Justice, 1993).

¹⁰⁶ The National Center for Victims of Crime, ‘The Model Stalking Code Revisited: Responding to the New Realities of Stalking’ January 2007, at 12.

‘Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:

(a) fear for his or her safety or the safety of a third person; or

(b) suffer other emotional distress

is guilty of stalking.’¹⁰⁷

A course of conduct was defined as two or more acts, including but not limited to acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.¹⁰⁸ Thus, they included a list of example conduct, while making clear that the list was not intended to be definitive. The Centre argued that the required level of intent should be that the perpetrator ‘should know’ that the conduct would cause fear or distress, as proving specific knowledge was too difficult, and overlooked the critical issue, which was the harm caused to the victim.¹⁰⁹ The ‘reasonable person’ test was advocated as a means of avoiding having to prove the victims’ exact state of mind, and of capturing the specific context in which the crime was being perpetrated.¹¹⁰

The United Kingdom

Looking within the United Kingdom may be particularly helpful to developing legislation on stalking in Northern Ireland as England and Wales and Scotland both have specific stalking legislation. The creation of stalking-specific provisions has come about in the last two decades and in part due to activism by individuals, charities and government collaboration.

England and Wales

In England and Wales, the primary tool for dealing with stalking was until 2012 the unamended Protection from Harassment Act 1997 (which corresponded to the 1997 Order). Under the Act, as we have seen, a course of conduct amounting to harassment can give rise to criminal penalty and civil proceedings.¹¹¹ Despite the wide drafting of the legislation, it became difficult to

¹⁰⁷ *Ibid* at 24.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* at 32-43.

¹¹⁰ *Ibid*.

¹¹¹ J. Woodhouse and P. Strickland, ‘Stalking: Criminal Offence’ (House of Commons Library Briefing Paper 6261, 19 May 2016) 4.

prosecute harassment amounting to stalking without a definition of the behaviour covered by that term.¹¹² Three years after the 1997 Act came into force, the Home Office commissioned a report that revealed that there were misunderstandings on the part of the police as to what constituted ‘a course of conduct’ thus subjecting victims to additional and unnecessary incidents before an arrest was pursued.¹¹³ Additionally, restraining orders, while effective when issued for reducing recidivism, were rarely used and poorly enforced by police in cases of breach.¹¹⁴ These systemic problems coupled with a number of high profile cases in which women were murdered by their stalkers suggested that the existing legislation was inadequate.¹¹⁵ A campaign was therefore launched by a national charity (Protection Against Stalking) in cooperation with the National Association of Probation Officers (NAPO) to create stalking-specific legislation. Following this, an Independent Parliamentary Stalking Law Reform Inquiry in 2011 led to a consultation process which placed the experiences of victims and frontline practitioners at its centre. The inquiry heard compelling evidence suggesting that the Protection from Harassment Act 1997 was not an effective tool against stalking and many stalkers were falling through the net.¹¹⁶ In particular, its failure to provide a legal definition of stalking¹¹⁷ meant that the sinister behaviour of stalkers was being conflated with nuisance crimes and disputes.¹¹⁸

The same year a survey of victims entitled ‘The Victim’s Voice’ was released which again revealed how inadequate the legal framework was to deal with stalking, and that police felt their hands were ‘tied by the law.’¹¹⁹ The need for early identification, intervention and prevention was also stressed. As a result of this consultation process, the Protection of Freedoms Act 2012 was introduced, which amended the 1997 Act and created two new offences of stalking. Section 2A states that a person is guilty of stalking if they pursue a course of conduct which amounts to harassment, but which also amounts to stalking. A course of conduct is considered as amounting to stalking if it amounts to harassment, if the acts or

¹¹² The Scottish Parliament, ‘Stalking and Harassment’ (Research Note 00-58, 10 August 2000) 2.

¹¹³ Harris, as above n.19 at 20-22.

¹¹⁴ *Ibid* at 42-44.

¹¹⁵ L. Richards, ‘Understanding Risk DASH (2009) – Risk Identification, Assessment and Management Risk Model’, Presentation at the “Criminal Justice System Responses to Stalking and its Incidence in Domestic Abuse” Conference convened by ‘One Small Step’ Charity, London, March 2010..

¹¹⁶ Ford, above n.59.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ L. Richards, ‘Findings from the Victim’s Voice Survey: the victims experience in the Criminal Justice System’ Protection against Stalking (2011), paladinservice.co.uk/wp-content/uploads/2013/06/Headlines-from-Victim-Survey-10-11-11.pdf Accessed 20 December 2016..

omissions involved are ones associated with stalking, and the person should have known or ought to know that the course of conduct amounts to harassment. The section lists examples of acts or omissions which can be 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.’

Section 4A creates the offence of stalking involving fear of violence or serious alarm or distress, which occurs if conduct amounts to stalking and causes another to fear on at least two occasions that violence will be used against them, or causes another person serious alarm or distress which has an impact on their usual day-to-day activities.

The offences came into force on 25 November 2012, and in 2013-14, 743 prosecutions were brought under the new stalking offence.¹²⁰ The Crown Prosecution Service noted that prosecutions for all stalking and harassment offences, using both new and older legislation, had increased by more than 20 per cent in 2013-14 (from 8,648 in 2012-13 to 10,535). Breaches of restraining and non-molestation orders, which can often involve stalking-related behaviours, also saw a 14.6 per cent rise in prosecutions brought to court in 2013-14 (from 15,838 to 18,149). In 2014-15, over 1,100 prosecutions were commenced, and 1,102 in 2015 to 2016.¹²¹ This suggests that the creation of a specific offence can enable the criminal justice system to better respond to stalking related criminal activity. A later report noted that there had been a significant increase in the reports of stalking to the police, which they attributed in part to the

¹²⁰ CPS, New stalking legislation helps to bring thousands more prosecutions as CPS and ACPO launch protocol to improve service to stalking victims’ www.cps.gov.uk/news/latest_news/stalking_protocol/ Accessed 20 December 2016.

¹²¹ UK Government, ‘New protection for victims of ‘stranger stalking’, 7 December 2016 www.gov.uk/government/news/new-protection-for-victims-of-stranger-stalking, Accessed 20 December 2016.

new legislation.¹²² However, they were critical of the small number of cases charged, the perceived leniency of sentences, the lack of sufficient treatment for perpetrators with psychiatric and psychological issues and the high re-offending rates. It was argued that police continued to demonstrate a lack of understanding in relation to stalking, and were failing to properly investigate allegations. These criticisms demonstrate the need to accompany changes in the law with appropriate training of police, and criminal justice professionals.

It is worth noting that the Government has also explored whether a civil remedy in the form of a Stalking Protection Order is necessary to better protect victims of stalking by strangers. This Order would attempt early intervention to stop obsession from forming and to intervene when prosecution is not possible.¹²³ At the time of writing, the Government has not published further steps for enacting the Stalking Protection Order, but the Home Secretary has outlined the measures as allowing police to apply to the courts for an order to impose restrictions on perpetrators, such as staying away from their target or restricting their internet use. They may also be subject to requirements such as attending a rehabilitation program or seeking treatment for mental health issues. Breaching the conditions will be a criminal offence with a maximum sentence of five years in jail.¹²⁴

Scotland

The Protection from Harassment Act 1997 only had limited application in Scotland, and did not make harassment a statutory offence under Scots law. The Act specifies that in Scotland, non-harassment orders can be obtained either through criminal procedures, if the prosecutor moves for one after a conviction of harassment, or through civil procedures, if a victim applies for one.¹²⁵ In cases of a breach, a perpetrator would be criminally liable under section 9 of the Act. The Harassment Act, in its application to Scotland, also contains civil remedies which allow victims to seek damages for the harassment. Other relevant orders included anti-social behaviour orders, which could be granted in cases of behaviour which 'caused or was likely to

¹²² Paladin Briefing: Key Headlines from the Report 'Stalking Law: Two Years on November 2012-2014, March 2015.

¹²³ Home Office, 'Introducing a Stalking Protection Order – A Consultation' (December 2015) 7-8

¹²⁴ UK Government, New protection for victims of 'stranger stalking', 7 December 2016, www.gov.uk/government/news/new-protection-for-victims-of-stranger-stalking Accessed 20 December 2016.

¹²⁵ Protection from Harassment Act 1997, section 11.

cause alarm or distress,'¹²⁶ and exclusion orders, in cases where it was necessary to prevent a spouse from entering a home.

Due to the absence of a specific statutory framework, the Scottish judiciary had predominantly relied upon the common law crimes of threats and breaches of the peace to capture the complex and wide behaviours of stalking. As was noted in the 1977 case of *Montgomery v McLeod*, 'there is no limit to the kind of conduct which may give rise to a charge of breach of the peace. All that is required is that there must be some conduct such as to excite the reasonable apprehension to which we have drawn attention, or such as to create disturbance and alarm to the lieges in fact.'¹²⁷ However, two important cases in Scotland profoundly shaped the definition of breach of peace, narrowing the definition and making it less applicable in the context of stalking.

*Smith v Donnelly*¹²⁸ saw the legality of the crime of breach of the peace challenged under the Human Rights Act as breaching Article 7(1) of the European Convention on Human Rights, which requires that offences are clearly defined. The test imposed by the case required the community to be affected by activities of the stalker, which precludes behaviours where the stalker and the victim are the only people aware of the behaviour.¹²⁹ The second case, *Harris v HM Advocate*¹³⁰ further narrowed the test for breach of peace, requiring that behaviour at least disturb a small group of individuals in a private house in which the risk of discovery was a realistic possibility.¹³¹ Consequently, cases involving technology like email, social media and other private interactions between stalkers and victims would become very difficult to prosecute. As a result of these cases, breach of the peace was highlighted as seemingly less capable of dealing with the issue of stalking in Scotland, contributing to the debate that led to eventual creation of stalking-specific offences.

This led to the introduction of the Criminal Justice and Licensing (Scotland) Act 2010. The 2010 Act creates a specific offence of stalking, which occurs where A engages in a 'course of conduct' (defined as engaging in conduct on at least two occasions) which causes B to suffer

¹²⁶ S. Christie, Anti Social Behaviour Orders, (1999) Scottish Law Gazette, pp201-203.

¹²⁷ *Montgomery v McLeod* 1977 SCCR Supp 164 at 165.

¹²⁸ [2001] SLT 1007

¹²⁹ S. Middlemiss, 'Let the Stalker Beware? Analysis of the Law of Stalking in Scotland' (2014) *JCL* 410.

¹³⁰ (2009) HCJAC 80

¹³¹ *Ibid*, citing from *Smith v Donnelly* [2002] JC 64 [20]

fear and alarm. A must either intend to cause fear or alarm, or know or ought to have known that the conduct would likely cause fear or alarm. The section provides a list of conduct which can amount to stalking, 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.¹³²

The section also contains a ‘catch all’ of a behaviour that a reasonable person would expect the victim to suffer fear or alarm.¹³³ During the Parliamentary Inquiry into the England and Wales legislation,¹³⁴ Ann Moulds from Action Scotland Against Stalking informed the Committee that the Domestic Abuse Task Force in Strathclyde prosecuted 150 people in the first four months of the 2010 Act being implemented. She also informed the Committee that over 90% of perpetrators charged under the Act pleaded guilty before trial. She stated that since 2010, cases were investigated thoroughly, with attention paid to the offender’s background and previous history. Police had introduced operational guidelines and had incorporated new procedures to deal with the stalking laws. Over 400 alleged stalkers were prosecuted in the first 11 months of 2011. In 2012 the Crown Office provided information about the number of prosecutions under section 39, noting that in the six months between April and October 2012,

¹³² Criminal Justice and Licensing (Scotland) Act 2010, s39(6).

¹³³ Woodhouse and Strickland, above n.111 at 5.

¹³⁴ Justice Unions’ Parliamentary Group, above n.20 at 23-24.

there were 51 convictions and nine acquittals, and in the six month 2012/2013 period, there were 26 prosecutions and one conviction.¹³⁵

The laws in England and Wales and Scotland differ in a number of ways. The law in England and Wales creates two offences of stalking, and requires evidence of harassment before an offence of stalking under section 2A can be made out. Section 4A in the Protection of Harassment Act also focuses on the effect the crime has on the day-to-day activities of the victim, a focus which is not included within the Scottish legislation. In both jurisdictions, the recognition of the specific offence of stalking has been praised as an improvement for victims. However, there are additional legal loopholes that have become clearer in the years since the legislation was enacted in both jurisdictions.¹³⁶ The Suzy Lamplugh Trust, Veritas Justice CIC and Voice4Victims, report 'Restoring the Balance' noted that many victims felt judicial ignorance about stalking and domestic abuse, including a lack of understanding of when contact with the victim or children was about further stalking, abuse and control, meant the courts did not recognise the role they were playing in perpetuating the cycle of abuse.¹³⁷ This demonstrates that legislative reform may be insufficient in itself to ensure stalking is responded to in an effective way.

Conclusion

This submission has demonstrated that the law in Northern Ireland is currently failing to suitably respond to the crime of stalking. Drawing on civil society reports, official statistics, academic commentary and similar debates in other jurisdictions, it has argued that specific stalking legislation could assist in ensuring this crime is adequately responded to. It has provided a number of examples of comparable jurisdictions, demonstrating that there is increasing acknowledgment of stalking as a specific offence, and a number of possible ways of approaching the drafting of legislation. In particular, it has highlight that both other jurisdictions have created stalking-specific legislation, although adopting slightly different approaches.

¹³⁵ Middlemiss, above n.129.

¹³⁶ See Suzy Lamplugh Trust, Veritas Justice CIC and Voice4Victims, 'Restoring the Balance' (2015).

¹³⁷ *Ibid.*

Without adopting a prescriptive approach which suggests a specific form of legislation, this submission has noted that any future legislation should avoid requiring specific intent which may be lacking, should focus on the impact stalking has on its victims as a means of identifying the crime, and should be drafted in a way that allows the law to adapt to future methods of stalking. While it has argued that the introduction of legislation would have symbolic value and would better equip the criminal justice system to address stalking, it has also acknowledged that legislation alone cannot ensure this. Thus, there is a need for training to be provided to police and other criminal justice professionals in order to ensure that they are able to correctly identify and respond to the crime of stalking.