

# Acknowledging the role of the Criminal Justice System in Combatting Domestic Violence: Assessing the Recent Law Reform Commission's Recommendations

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## Abstract

This article considers the recent Law Reform Commission *Report on Aspects of Domestic Violence*. The Law Reform Commission examined two specific aspects of criminal justice reform. First, the potential amendment of bail laws to permit for denial of bail for preventative reasons where an individual is charged with breach of a domestic violence order is examined. Second, the offence of harassment in section 10 of the Non-Fatal Offences against the Person Act 1997 is considered with a view to examining whether this offence could be reformed so as to provide better protection to victims of domestic violence.

## Introduction

For family lawyers, the civil remedies available in the Domestic Violence Acts 1996-2002 (as amended) may often be the first means of protecting victims of domestic violence which comes to mind. Indeed, victims themselves may be reluctant to report the abuser to the gardaí and involve the criminal justice system, preferring instead to take the civil route and obtain preventative orders to protect themselves from the abuser. This is due perhaps not only to a potential reluctance on the part of victims to have the abuser held criminally liable and a need for immediate protection in the form of emergency orders such as interim barring orders<sup>2</sup> or protection orders<sup>3</sup> which cannot be provided within the criminal justice system.<sup>4</sup> However, whilst discussions of reform in this area often tend to focus on civil law, the Law Reform

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<sup>2</sup> Domestic Violence Act 1996, s. 4. On an application for a barring order, a court may grant an interim barring order which excludes the respondent from the applicant's home, thereby protecting the complainant between the initiation of the application and its hearing.

<sup>3</sup> Domestic Violence Act, s. 5. A protection order can be granted on an application for a barring order or a safety order and prohibits the respondent from threatening or using violence against the applicant or from watching or besetting the place where the applicant lives.

<sup>4</sup> Horgan and Martin note that criminal remedies in the form of convictions under the Non-Fatal Offences against the Person Act 1997 for assault offences or offences such as harassment or false imprisonment 'are not as robust as either a barring or safety order in the sense that there is no interim remedy available after the complaint is filed and the summons issued': R. Horgan & F. Martin, "Domestic Abuse in 2008: What Has Been Done to Tackle the Problem?" (2008) 11 I.J.F.L. 66.

Commission's recent *Report on Aspects of Domestic Violence*<sup>5</sup> considers how criminal law reform might aid in increasing protection for victims of domestic violence.<sup>6</sup> Given the recent announcement that the introduction of a Domestic Violence Bill is expected in 2015<sup>7</sup>, this Report represents a timely consideration of this area of the law.

The Law Reform Commission<sup>8</sup> Report focuses on two issues. Reform of bail laws to permit refusal of bail for preventative reasons where an individual is charged with breach of a domestic violence order is considered. Potential amendment of the criminal offence of harassment<sup>9</sup> so as to better protect victims of domestic violence from this type of abuse is also examined. This article looks at the discussion of these topics in the Report. The article concludes by considering other avenues of criminal justice law reform which should be explored in the context of domestic violence.

### **Potential Reform of Bail Laws**

Section 17(1) of the Domestic Violence Act 1996 provides that it is an offence is committed when a respondent in a domestic violence case:

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

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<sup>5</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013).

<sup>6</sup> This Report is informed by responses received by the Commission as a result of the publication of two Issues Papers in July 2013: Law Reform Commission, *Issues Paper on Domestic Violence: Bail* (Dublin: Law Reform Commission, 2013) and *Issues Paper on Domestic Violence: Harassment* (Dublin: Law Reform Commission, 2013). The Commission invited responses from interested individuals, as well as members of the public generally.

<sup>7</sup> Minister Shatter announced his intention to publish a Domestic Violence Bill in 2015 in an address to the Family Lawyers Association of Ireland Four Jurisdictions Family Law Conference on February 8<sup>th</sup>, 2014: <http://www.justice.ie/en/JELR/Pages/SP14000036> (Last accessed: 11<sup>th</sup> February, 2014).

<sup>8</sup> Hereafter referred to as the Commission.

<sup>9</sup> Non-Fatal Offences against the Person Act 1997, s. 10.

This offence is punishable on summary conviction by a Class B fine (i.e. a maximum fine of €4,000)<sup>10</sup> or, at the discretion of the court, to imprisonment for a maximum term of twelve months, or both.<sup>11</sup>

The problem with the summary nature of the offence in section 17 from the perspective of bail laws is that it is not possible for a judge to deny bail on preventative grounds. Article 40.4.6 of the Constitution<sup>12</sup> provides that:

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

This Article was added to the Constitution after a referendum in 1996.<sup>13</sup> The constitutional provision is elucidated upon by section 2 of the Bail Act 1997 which provides that a judge may refuse to grant bail s/he is ‘satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person’.<sup>14</sup> The key term within both the constitutional and legislative provisions is ‘serious offence’ which is an offence listed in the Schedule<sup>15</sup> of the 1997 Act ‘for which a person of full capacity and not previously convicted may be punished by a term of imprisonment...of five years or by a more severe penalty’.<sup>16</sup> Thus, there are two requirements for an offence to be a ‘serious offence’. It must be an offence listed in the schedule to the Act *and* it must carry a penalty of five years imprisonment or more upon conviction.<sup>17</sup> Since breach of a domestic violence order is a summary offence, it does not qualify as a ‘serious offence’.

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<sup>10</sup> Domestic Violence Act, 1996, s. 17(1), as amended by the Fines Act 2010, s. 5.

<sup>11</sup> Domestic Violence Act, 1996, s. 17(1),

<sup>12</sup> This Article was originally numbered as Article 40.4.7. Subsequent amendments to the Constitution caused the provision to re-numbered.

<sup>13</sup> This referendum gave rise to the Sixteenth Amendment of the Constitution Act 1996. Prior to this amendment, the Supreme Court had held that it was not permissible to deny bail for preventative reasons: *The People (Attorney General) v O’Callaghan* [1966] I.R. 501.

<sup>14</sup> Bail Act 1997, ss. 2(1). In determining whether refusal of an application for bail is reasonably considered necessary to prevent the commission of a serious offence, the court does not need to be satisfied that the commission of a specific offence by that person is apprehended: Bail Act 1997, ss. 2(3).

<sup>15</sup> The scheduled offences include murder, manslaughter, rape, serious non-fatal offences, incest, other sexual offences, offences relating to explosives, firearms and weapons, larceny, criminal damage, dangerous driving, offences against the State, riots, forgery, and attempt or conspiracy amongst others: Vicky Conway et al, *Irish Criminal Justice: Theory, Process and Procedure*, (Dublin: Clarus Press, 2010), p. 121.

<sup>16</sup> Bail Act 1997, s. 1.

<sup>17</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para 1.19.

The Commission thus considered whether the law should be amended. To allow for breach of a domestic violence order to become a ‘serious offence’, three reforms would be required.<sup>18</sup> First, the offence would need to be punishable by five years’ imprisonment or a more severe penalty. Second, breach of a domestic violence order would have to be listed in the schedule to the 1997 Act. Finally, the offence would need to become triable on indictment because Article 38.2 of the Constitution provides that only minor offences can be tried summarily<sup>19</sup> and an offence that carries a punishment of up to five years imprisonment cannot be classified as a minor offence. In relation to this latter requirement, the Commission noted that for practical reasons, it would not be feasible for breach of a domestic violence order to be only triable on indictment. This is because ‘many breaches of domestic violence orders are, in relative terms, minor and are therefore suitable to be tried summarily as “minor offences”’.<sup>20</sup> Thus, sensible reform would require that section 17 be converted into a hybrid offence whereby it would be triable on indictment or summarily. When tried on indictment, the maximum penalty would be five years imprisonment and when tried summarily, the current penalty would continue to apply, that is, a fine or twelve months imprisonment.<sup>21</sup>

Allowing for bail to be denied on preventative grounds provides protection to victims who might be at risk of further acts of domestic violence while the defendant is on bail. This could be important if being charged for breach of the original domestic violence orders has inflamed an already abusive relationship, leading to further acts of domestic violence after the defendant is charged under section 17. Despite this, the use of bail laws to ensure the safety of the victim is inappropriate and, as the Commission has found, unwarranted. None of the groups consulted by the Commission<sup>22</sup> considered that breach of a domestic violence order should be a serious offence or that there is a particular problem caused by the courts’ inability to use the preventative detention provisions of the Bail Act 1997 for breaches of domestic

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<sup>18</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.29

<sup>19</sup> Article 38.2 provides that: ‘Minor offences may be tried by courts of summary jurisdiction’.

<sup>20</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.30.

<sup>21</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.30.

<sup>22</sup> The consultees included practitioners and other individuals with specialist knowledge of domestic violence.

violence orders.<sup>23</sup> The Commission provided significant detail on the reasons why such reform is not to be recommended.

### ***Exploring why the mooted reforms are unworkable***

One of the primary reasons why the mooted reforms are inappropriate is that it could lead to unfairness for defendants and thereby fall foul of the due process guarantees afforded to defendants in both the Irish Constitution<sup>24</sup> and the European Convention on Human Rights (ECHR).<sup>25</sup> Given the protection provided to liberty in both the Irish Constitution<sup>26</sup> and the ECHR<sup>27</sup>, along with the presumption of innocence<sup>28</sup>, it is not acceptable to deprive an individual of his/her liberty prior to trial unless this is absolutely necessary. This is why the constitutional amendment and the Bail Act were necessary to permit the refusal of bail for preventative reasons. Converting a summary offence into a serious offence in order for the bail laws to apply represents a blatant attempt to circumvent these provisions which is contrary to the spirit of both the constitutional amendment and the legislation.<sup>29</sup> Certainly the type of violence involved in a domestic violence case may be serious but as stated above, if this is the case, it should be prosecuted as a separate offence, thereby allowing for preventative detention to be ordered.<sup>30</sup> Reform of the type considered here is inappropriate and may even constitute a breach of human rights protections for defendants.

Aside from due process concerns, making breach of a domestic violence order a ‘serious offence’ punishable by five years’ imprisonment is inappropriate because the 1996 Act is intended to be preventative, not punitive. The orders available under this Act are designed to

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<sup>23</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.98.

<sup>24</sup> Article 38.2.

<sup>25</sup> Article 6.

<sup>26</sup> Article 40.4.1 provides that: ‘No citizen may be deprived of his personal liberty save in accordance with law’.

<sup>27</sup> Article 5 of the ECHR provides that: ‘Everyone has the right to liberty and security of person’.

<sup>28</sup> In *O’Leary v Attorney General*, the right to be presumed innocent was recognised as an element of the defendant’s right to a fair trial in Article 38.1: [1993] 1 IR 102 at 107. Article 6(2) of the ECHR provides that ‘everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law’.

<sup>29</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.118.

<sup>30</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.114.

protect victims and to prevent further violence. The offence for breach of such orders acts as a deterrent for flouting them. As the Commission notes, criminalising breach of a domestic violence order is not meant to punish serious misconduct such as assault causing harm.<sup>31</sup> Such punitive consequences should be confined to criminal prosecution for the behaviour which amounts to breach, such as a prosecution for offences such as assault or harassment.

A final reason why section 17 is unsuitable for conversion to a serious offence is the potential for unintended consequences which may actually work to the disadvantage of victims. It must be remembered that section 17 applies not only to breaches of barring orders<sup>32</sup> and safety orders<sup>33</sup> which have been granted after a full hearing, but also to interim barring orders<sup>34</sup> and protection orders<sup>35</sup> which may have been granted on an *ex parte* basis. The Supreme Court has previously commented on the ‘draconian consequences’ which attach to the breach of an interim barring order, namely, potential criminal liability.<sup>36</sup> The Commission suggests that ‘any further adverse effect, such as making breach of such an order a “serious offence” might lead to a conclusion that *ex parte* orders should no longer be permissible’.<sup>37</sup> This would be a wholly undesirable side-effect of reform and would seriously disadvantage victims of domestic violence who would no longer be able to protect themselves with interim orders.

### ***Pre-existing Conditions make the Reform Unnecessary***

Although it is clear that amending the law to allow for denial of bail for preventative reasons in relation to breach of domestic violence orders is not feasible, the Commission’s discussion also revealed that such a reform is in fact unnecessary. The prevailing legal environment can sufficiently protect victims from further violence whilst the defendant is on bail.

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<sup>31</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.36.

<sup>32</sup> Domestic Violence Act 1996, s. 3.

<sup>33</sup> Domestic Violence Act 1996, s. 2.

<sup>34</sup> Domestic Violence Act 1996, s. 4.

<sup>35</sup> Domestic Violence Act 1996, s. 5.

<sup>36</sup> The Court has noted that where an interim barring order is granted, the respondent ‘automatically commits a criminal offence in failing to comply with the order, even if it should subsequently transpire that it should never have been granted’: *DK v Crowley* [2002] 2 IR 744 at 759.

<sup>37</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.71.

Perhaps the most notable reason why the reforms discussed in the Report are unnecessary is that there are other grounds on which bail can be refused which can afford equal protection to victims. First, if the conduct which amounts to the breach of a domestic violence is itself a ‘serious offence’ (e.g. assault causing harm<sup>38</sup>) then the defendant can be charged with this offence as well as the breach of the domestic violence order.<sup>39</sup> In this instance, bail could be denied for preventative reasons in relation to the charge of assault causing harm which would satisfy the definition of ‘serious offence’.<sup>40</sup> Indeed, since ‘attempting or conspiring to commit, or inciting the commission’ of any serious offence listed in the schedule is sufficient in itself to qualify as a ‘serious offence’<sup>41</sup>, there is considerable scope here for applications of bail to be denied on preventative grounds. This is an important protection available to victims of more egregious forms of domestic abuse. In this instance, bail can be denied but it is a separate issue from the summary charge of breach of domestic violence orders. The second ground on which bail could be refused which is relevant in a domestic violence case is where the defendant is likely to interfere with witnesses.<sup>42</sup> Since the victim is a witness in the case, the possibility that the defendant would harass or commit further acts of violence against the victim would constitute a likelihood of interfering with witnesses and thus bail could be refused on this basis.<sup>43</sup>

Aside from the judge’s ability to refuse bail on other grounds, an important protection for victims of domestic violence is the judge’s ability to attach conditions to bail which will minimise the potential for further offending. Of course, the fundamental bail condition is that the accused will appear before the court when required to do so.<sup>44</sup> There is also a further mandatory condition that the defendant will not commit an offence while on bail.<sup>45</sup> However, section 6(1) of the Bail Act 1997 lists other conditions which the judge may attach to bail if

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<sup>38</sup> Non-Fatal Offences against the Person Act 1997, s. 3. This is defined as an assault which causes harm, that is, harm to body or mind, including pain or unconsciousness. The maximum penalty on conviction on indictment is a fine or five years imprisonment, or both: ss. 3(2)(b).

<sup>39</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.68.

<sup>40</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.68.

<sup>41</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.68.

<sup>42</sup> This ground for refusal of bail was acknowledged in the seminal Irish case on bail, *People (Attorney General) v O’Callaghan* [1966] IR 501 at 508.

<sup>43</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.119.

<sup>44</sup> Liz Campbell, et al, *Criminal Law in Ireland: Cases and Commentary*, (Dublin: Clarus Press, 2010), p. 497.

<sup>45</sup> Liz Campbell, et al, *Criminal Law in Ireland: Cases and Commentary*, (Dublin: Clarus Press, 2010), p. 497.

this is ‘appropriate having regard to the circumstances of the case’. The judge could require the defendant to do any of the following:

- (a) reside or remain in a particular district or place in the State,
- (b) report to a specified Garda Siochana Station at specified intervals,
- (c) surrender any passport or travel document in his/her possession or, if s/he is not in possession of a passport or travel document, refrain from applying for a passport or travel documents,
- (d) refrain from attending at such premises or other place as the court may specify,
- (e) refrain from having any contact with such person(s) as the court may specify.

As the Commission highlights, the fourth and fifth conditions may prove particularly useful in domestic violence cases.<sup>46</sup> During its consultations, it was brought to the Commission’s attention that where a person is charged with breach of a domestic violence order, the judge at the initial remand hearing will often impose such conditions on the defendant.<sup>47</sup> The effect is that the defendant is forbidden from going near the victim’s home or place of work or from making any contact with the person.<sup>48</sup> If a member of the gardaí applies to court and testifies that the defendant ‘is about to contravene’ a bail condition, the court can issue an arrest warrant for the defendant to be brought before the court as soon as possible.<sup>49</sup> In this instance, the court has the power to remand the defendant in custody, thereby revoking the defendant’s bail.<sup>50</sup> In this way, the victim can be protected from further breaches of the defendant’s bail conditions. The Commission found that there have been instances where bail has been revoked as a result of breach of conditions in the context of domestic violence cases.<sup>51</sup>

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<sup>46</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.23.

<sup>47</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.23.

<sup>48</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.23.

<sup>49</sup> Bail Act 1997, ss. 6(5).

<sup>50</sup> Bail Act 1997, ss. 6(9).

<sup>51</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.24.



Consequently, it is clear that the imposition of bail conditions has been used to provide important protection for victims. Although it is not ideal that a breach will already have occurred at this stage, this concession is necessary to avoid undue interference with the due process rights of defendants.

The imposition of conditions is furthered by a pro-arrest policy on the part of the gardaí in domestic violence cases.<sup>52</sup> Reported breaches will be acted upon and the defendant would at that stage have his bail revoked. Thus, if the holder of a domestic violence order is put in danger or in any way interfered with by the defendant, this will be acted upon quickly and s/he will be protected from further incidents. Additionally, an important deterrent for defendants who might offend whilst on bail is the possibility of obtaining a longer sentence if subsequently charged with this offence. Campbell et al note that ‘commission of an offence on bail has important ramifications in terms of sentencing given that any sentence of imprisonment imposed shall be consecutive on any sentence passed for a previous offence’.<sup>53</sup> This is a departure from the general tendency for courts to order that sentences run concurrently.<sup>54</sup> Thus, the defendant could receive a longer period in prison if, for example, s/he assaults or harasses the holder of a domestic violence order while s/he is on bail. This deterrent contributes to protecting victims from further incidents while the defendant awaits trial for breach of a domestic violence order.

From the foregoing, it seems clear that the current bail laws provide sufficient protection for victims of domestic violence. These laws provide fairness for defendants and respect due process values, allowing them to retain their liberty while on bail subject to good behaviour. If they fail to behave appropriately then it is fair that they be then detained on remand. At the same time, the holders of domestic violence orders are protected as defendants can be expressly prohibited from harming or otherwise interfering with them and they are deterred

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<sup>52</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 1.10.

<sup>53</sup> Liz Campbell, et al, *Criminal Law in Ireland: Cases and Commentary*, (Dublin: Clarus Press, 2010), p. 500. This is provided for in s 11(1) of the Criminal Justice Act 1984 (as amended by section 22 of the Criminal Justice Act 2007).

<sup>54</sup> Vicky Conway et al, *Irish Criminal Justice: Theory, Process and Procedure*, (Dublin: Clarus Press, 2010), p. 170.

from contravening these prohibitions by risk of being detained on remand in the event of breach and of a harsher sentence if they commit an offence such as assault whilst on bail.

### **Redefining the Criminal Law on Harassment**

The second issue considered by the Commission was whether the criminal offence of harassment could be reformed in order to more effectively respond to domestic violence. Section 10(1) of the Non-Fatal Offences against the Person Act 1997 provides that:

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

Harassment occurs where an individual by his/ her acts intentionally or recklessly seriously interferes with another’s peace and privacy or causes alarm, distress or harm to another and the acts are such that a reasonable person would realise that they would have had this effect.<sup>55</sup> On summary conviction, harassment is punishable by a Class C fine (i.e. a maximum fine of €2,500) or a maximum term of imprisonment for twelve months, or both.<sup>56</sup> A defendant tried on indictment is liable to a fine or a maximum term of imprisonment of seven years.<sup>57</sup> Section 10 also gives the court the power to grant a restraining order, that is, an order that an individual is not permitted to communicate with the complainant or approach within a certain distance of the complainant’s home or workplace.<sup>58</sup> Notably such an order can be imposed even where the defendant has not been found guilty of harassment if the court is satisfied that it is ‘in the interests of justice’ to impose the order.<sup>59</sup> Failure to comply with the order is an

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<sup>55</sup> Non-Fatal Offences against the Person Act 1997, ss. 10(2).

<sup>56</sup> Non-Fatal Offences against the Person Act 1997, ss. 10(6)(a).

<sup>57</sup> Non-Fatal Offences against the Person Act 1997, ss. 10(6)(b).

<sup>58</sup> Non-Fatal Offences against the Person Act 1997, ss. 10(3).

<sup>59</sup> See *DPP v Ramachandran* [2000] 2 IR 307 where a non-contact order was imposed even though the conviction for harassment was quashed by the Court of Criminal Appeal.

offence.<sup>60</sup> Section 10 is also an offence for which a restriction of movement order can be granted. Section 101 of the Criminal Justice Act 2006 provides that where an individual is convicted of an offence listed in Schedule 3 of the Act<sup>61</sup> and the court considers that a sentence of three months or more is warranted, a restriction of movement order may be imposed instead of imprisonment.<sup>62</sup> A restriction of movement order can limit the offender's movements to the extent that the court sees fit<sup>63</sup> and may be imposed for up to six months<sup>64</sup>

The Commission considered the offence of harassment in the context of domestic violence. Two particular issues were examined. First, the Commission discussed whether the types of behaviour listed in section 10 are broad enough to ensure that all forms of domestic violence would be punishable as harassment. Second, the Commission interrogated whether the requirement of persistence in section 10 was unnecessarily limiting in a domestic violence context as it does not allow one-off incidents to qualify as harassment. The Commission also examined whether a specific offence of stalking should be introduced.

### *Assessing the types of behaviour covered by section 10*

Section 10 defines harassing behaviour as including 'following, watching, pestering, besetting or communicating'.<sup>65</sup> This is a general description of harassment which 'describes the behaviour using broad terms that encompass a wide range of behaviour'.<sup>66</sup> For example, the Commission observes that 'watching' includes a wide range of activity and is not limited to watching a person in a particular place or in a particular way.<sup>67</sup> The Commission examined two alternative methods of defining harassment. First, a specific definition could be used

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<sup>60</sup> Non-Fatal Offences against the Person Act 1997, ss. 10(4).

<sup>61</sup> This Schedule also includes other offences under the Non-Fatal Offences against the Person Act 1997, including assault and coercion, as well as offences under the Criminal Justice (Public Order) 1994.

<sup>62</sup> Criminal Justice Act 2006, ss. 101(1).

<sup>63</sup> The order may include provisions requiring the offender to be or not be in a certain place, or such class or classes of place or places, at such time or during such periods as may be specified in the order: Criminal Justice Act 2006, ss. 101(2). The court may not require that the offender be in one place for more than twelve hours in one day.

<sup>64</sup> During the period of the order, the offender must keep the peace and be of good behaviour: Criminal Justice Act 2006, ss. 101(3).

<sup>65</sup> Criminal Justice Act 2006, ss. 10(1).

<sup>66</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.14.

<sup>67</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.14.

whereby harassing behaviour is defined ‘more particularly than a general description such as “watching a place where a person lives or works”’.<sup>68</sup> The second option is not to have a definition of harassing behaviour. This was recommended by the Legal Issues Subcommittee of the National Steering Committee on Violence against Women who suggest that it should not be necessary to prove one of the types of behaviour in section 10 in order to make out the offence of harassment.<sup>69</sup> The Commission points out that in essence this would mean that there would be no description of harassing conduct and instead ‘any behaviour that intentionally or recklessly “seriously interferes with the other’s peace and privacy or causes alarm, distress or harm to the other”’ would be criminalised.<sup>70</sup>

The Commission dismissed the option of making the definition of harassment more specific by listing specific types of behaviour which would constitute harassment. For example, a specific definition of harassment would state that the offence included ‘watching’ and specify that this includes watching the complainant in particular places or via particular means or that ‘communicating’ is covered by specific modes of communication (e.g. telephone, mail, email). The argument in favour of such a specific definition is that it would increase certainty about the types of behaviour which constitute harassment. However, it is difficult to see why a specific definition would be helpful when section 10 is broad enough to allow judges to interpret the section so as to encompass a wide range of harassing behaviour. Indeed, as the Commission notes, ‘where the types of behaviour that can amount to harassment are specifically listed and narrowly described there is the possibility that not all circumstances will be covered giving rise to “loopholes” which would allow a determined harasser act within the law’.<sup>71</sup> Thus, the effect may be to exclude certain types of behaviour and minimise rather than increase protection for victims of domestic violence.

The Commission also rejected the introduction of a general definition of harassment which does not refer to types of behaviour which might constitute the offence, that is, the option put

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<sup>68</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.14.

<sup>69</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.15.

<sup>70</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.15.

<sup>71</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.18.

forward by the Legal Issues Sub-Committee of the National Steering Committee on Violence against Women. The rationale for this proposal was that it is not appropriate that only the conduct listed in section 10 is made criminal whilst other behaviour which might not fit within these classifications but still causes harm is not.<sup>72</sup> However, according to the Commission's consultation, it would appear that, although section 10 lists behaviour which the defendant must engage in for the offence of harassment to apply, these descriptions are sufficiently generic to cover the types of harassment that occur in the context of domestic violence. The Office of the Director of Public Prosecutions (DPP) informed the Commission that the majority of section 10 prosecutions arise in a domestic violence context and usually involve a person being harassed by a former partner who persistently waits outside the complainant's home or place of work.<sup>73</sup> Since section 10 can cover this behaviour<sup>74</sup>, and is malleable enough to incorporate other forms of behaviour which may arise<sup>75</sup>, it is unnecessary to move to a broader definition of harassment. Indeed, the current approach to definition is necessary to ensure certainty in the definition of criminal offences, which is a constitutional requirement.<sup>76</sup>

The Commission also considered whether a specific offence of stalking such as that found in the English Protection from Harassment Act 1997 is necessary. The English Act provides a non-exhaustive list of behaviour which can amount to stalking.<sup>77</sup> However, as stated above, the Office of the DPP has confirmed that section 10 is already capable of punishing behaviour which would amount to stalking and indeed that the majority of prosecutions under section 10 are for stalking-type activity. Thus, introduction of a specific offence of stalking

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<sup>72</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.16.

<sup>73</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.17.

<sup>74</sup> *The People (DPP) v Quirke* [2010] IECCA 98.

<sup>75</sup> The Commission notes that section 10 has been applied where a man used his mobile phone to record co-workers ('Man hid camera to spy on women in shower', Irish Independent, 18<sup>th</sup> December 2012) and where a father sent his son 37 unwanted emails (<http://www.joe.ie/news/current-affairs/dublin-man-found-guilty-of-harassing-his-son/>) (Last Accessed: 26<sup>th</sup> January 2014).

<sup>76</sup> Article 38.1 of the Constitution has been interpreted as creating a requirement of certainty in criminal justice provisions: *King v Attorney General and Director of Public Prosecutions* [1981] IR 233; *Cagney v Director of Public Prosecutions*; *McGrath v Director of Public Prosecutions* [2008] 2 IR 111.

<sup>77</sup> Section 2A(3) lists 'examples of acts or omissions which, in particular circumstances, are ones associated with stalking', namely: following a person; contacting or attempting to contact, a person by any means; publishes any statement or other material relating or purporting to relate to a person, or purporting to originate from a person; monitoring a use by a person of the internet, email or any other form of electronic communication; loitering in any place (public or private); interfering with any property in the possession of a person or; watching or spying on a person.

would be an unwarranted addition to the statute books and would simply result in a ‘duplication of the offence of harassment under section 10’.<sup>78</sup> Indeed, this is what has happened in England and Wales where the offences of stalking and harassment refer to similar behaviour.<sup>79</sup>

Ultimately, the Commission concluded that the general view expressed in the consultations was that ‘the current formulation of the offence in section 10 strikes a good balance between the need to have a broadly drafted offence whilst also ensuring that the offence is sufficiently certain’.<sup>80</sup> This is a sensible conclusion. Moving towards either a more specific or a more general defence involves more attendant difficulties than benefits and there is no evidence that the current law is problematic. In addition, introducing a specific offence of stalking is unnecessary since such behaviour is already adequately covered by section 10. That said, the Commission’s investigation is a worthwhile one and grants assurance that the offence as currently constructed appears to be offering appropriate protection to domestic violence victims.

### ***The persistence requirement***

As Hanly notes, section 10 does not penalise one-off contacts, no matter how unwanted they might be, and it is not clear from the Act at what point the threshold for harassment is reached.<sup>81</sup> The requirement of persistent contact suggests that the defendant must have engaged in the prohibited contact on at least two occasions but it is unclear how many such occasions are required before a court would accept that harassment has occurred.<sup>82</sup> McIntyre et al suggest that the requirement to show a number of incidents over a period of time may present some problems in borderline cases.<sup>83</sup> The Legal Issues Sub-Committee of the National Steering Committee on Violence against Women argues that the requirement of

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<sup>78</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.91.

<sup>79</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.46. For a discussion of the English law on harassment generally in the Commission’s Report, see paras 2.38-2.52.

<sup>80</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.84.

<sup>81</sup> Conor Hanly, *An Introduction to Irish Criminal Law*, (Dublin: Gill & MacMillan, 2006), p. 268.

<sup>82</sup> Conor Hanly, *An Introduction to Irish Criminal Law*, (Dublin: Gill & MacMillan, 2006), p. 268.

<sup>83</sup> Conor Hanly, *An Introduction to Irish Criminal Law*, (Dublin: Gill & MacMillan, 2006), p. 181.

persistence should be removed.<sup>84</sup> The Commission did not agree on this point and recommended, it is submitted, rightly, that the persistence requirement be retained. The essence of harassment is the repeated performance of a certain act or omission (e.g. repeatedly following or watching someone). To engage in such behaviour once is not in itself a crime. This is why the persistence requirement is justified. Removal of this requirement could result in over-criminalisation. As the Commission notes, it would create a danger that any form of unpleasant conduct could constitute harassment.<sup>85</sup>

In any event, it seems that removing the persistence requirement is not required as the judgment in *DPP (O'Dowd) v Lynch*<sup>86</sup> indicates that 'persistence' is interpreted broadly. The defendant in this case was employed to carry out some work in a house where two children, aged eleven and fourteen years of age, respectively, were also present. Over the course of approximately three hours, the defendant exposed himself to the children on a number of occasions, as well as masturbating in front of them. The court had to consider whether the incidents here, committed over a period of three hours<sup>87</sup>, satisfied the persistence requirement in order for a prosecution for a prosecution for harassment to succeed. The Court held that 'incidents capable of being severed even if they are not so separated, or, to put the matter another way, immediately succeed each other' are capable of fulfilling the persistence requirement and that 'one unambiguously continuous act (i.e. an act which could not sensibly be broken down into a succession of actions)' may also have the quality of persistence.<sup>88</sup> The Office of the DPP supported the contention that the persistence requirement is unproblematic, reporting that it was not presenting prosecutors with difficulties in bringing prosecutions under section 10.<sup>89</sup>

Overall, as with the bail laws, the Commission found that harassment should continue to be defined in its current form. The current definition is broad enough to cover all the types of

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<sup>84</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.33.

<sup>85</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.33.

<sup>86</sup> [2010] 3 IR 434.

<sup>87</sup> The evidence suggested that the incidents occurred between 1:40pm and 4:45pm.

<sup>88</sup> [2010] 3 IR 434 at 443.

<sup>89</sup> Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.34.

behaviour necessary to punish domestic violence effectively. The persistence requirement is needed to prevent over-criminalisation and is not causing difficulties. Given the workability of section 10, a specific offence of stalking is not required. Thus, it seems that the substantive rules in this area are providing adequate protection to victims of domestic violence.

## **Conclusion**

It is unusual to find a Law Reform Commission publication which does not recommend any reforms. However, it is reassuring that both these laws are already effective in the context of domestic violence. However, whilst these two aspects of the criminal justice system appear to be working well, there are other issues which require examination. For example, it is worth considering whether there should be a specific criminal offence of domestic violence. The issue of sexual abuse as a form of domestic violence should also be considered. Most notably, the prevailing rules which require the consent of the DPP for a charge of marital rape to be brought need to be amended.<sup>90</sup> The use of modern technology to harass or control victims of domestic violence also requires attention. For example, it is necessary to consider how best to punish a situation where mobile phone technology is used to track an individual's movements or where social media is used to control or harass.<sup>91</sup> Hopefully, these issues will be addressed in future discussions of reform or, ideally, by the legislature in the near future. In the meantime, this Report is a worthwhile preliminary examination of the public/private dichotomy of this complex area of Irish law.

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<sup>90</sup> Criminal Law (Rape) (Amendment) Act 1990, s.5(2).

<sup>91</sup> The Commission referred to this issue in this Report but noted that this will be considered separately in a forthcoming consultation. *Cyber-bullying, including cyber-crime affecting personal safety, privacy and reputation* is included in the Commission's Fourth Programme of Law Reform: Law Reform Commission, *Report on Aspects of Domestic Violence*, (Dublin: Law Reform Commission, 2013), para. 2.93.