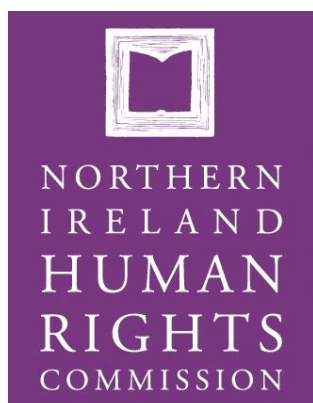


## **Committee Review of the Need for Stalking Legislation in Northern Ireland**

### **Summary**

The Northern Ireland Human Rights Commission:

- Advises that a consolidated piece of legislation prohibiting stalking would better protect victims of stalking and harassment in line with the Executive's obligations under the international human rights standards.
- Advises that the Committee should take note of the Executive's obligations under the international standards to draft legislation which ensures individuals are aware what acts and omissions will make him/her criminally liable.
- Recommends that any stalking legislation ensures that victims are able to access an effective remedy and are protected from secondary or repeat victimisation.
- Recommends that the Committee takes fully into account the Istanbul Convention in the development of stalking legislation.
- Recommends that the Committee considers how the Executive is addressing the concerns raised by the UNCRC in relation to cyberbullying, the age of criminal responsibility and the criminalisation of children.
- Advises that in order to satisfy the Executive's obligations under UNCRC, the Committee considers how any potential stalking legislation could incorporate online and offline activities, so that children are protected when using technology, the internet and social media.



## **Committee Review of the Need for Stalking Legislation in Northern Ireland**

### Introduction

1.1 The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.<sup>1</sup> In accordance with this function the following statutory advice is submitted to the Committee for Justice in response to the review into the need for stalking legislation in Northern Ireland.

1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:

- the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup>;
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>3</sup>;
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>4</sup>;
- the Convention against Torture (CAT)<sup>5</sup>;
- the UN Convention on the Rights of the Child (CRC)<sup>6</sup>;
- European Convention on Compensation for Victims of Violent Crimes<sup>7</sup>.

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<sup>1</sup> Northern Ireland Act 1998, Section 69(1).

<sup>2</sup> Ratified by the UK in 1976.

<sup>3</sup> Ratified by the UK in 1976.

<sup>4</sup> Ratified by the UK in 1981.

<sup>5</sup> Ratified by the UK in 1988.

<sup>6</sup> Ratified by the UK in 1991.

<sup>7</sup> 1983, Ratified by the UK in 1990.

- Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), (UK signature 2012)<sup>8</sup>
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>9</sup>.
- The Charter of Fundamental Rights of the European Union (CFR)<sup>10</sup>.
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

1.3 The NI Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's (UK) ratification.<sup>11</sup>

1.4. Section 24 (1) of the Northern Ireland Act 1998 provides that "A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention [ECHR] rights."

1.5 In addition to these treaty standards there exists a body of 'soft law' developed by the human rights bodies of the United Nations and the Council of Europe. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN GA, United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>12</sup>, (1985).
- UN General Assembly Declaration on the Elimination of Violence against Women, A/Res/48/104, 1993
- Beijing Platform for Action adopted by the United Nations 4th World Conference on Women (Beijing, 1995);
- Council of Europe, Committee of Ministers, Recommendation No. R (2002) 5 on the Protection of Women against Violence, adopted 30 April, 2002;

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<sup>8</sup> The UK is yet to formally ratify the Istanbul Convention. A Private Members Bill was introduced in June 2016 requiring the Government to "take all reasonable steps as soon as reasonably practicable to enable the United Kingdom to become compliant" with the Convention. The Bill is due to have its second reading in December 2016.

<sup>9</sup> 1987, Ratified by the UK in 1988, (as amended by Protocols No. 1 and No.2 1993) [UK ratification 1996].

<sup>10</sup> 2000, Ratified by the UK in 2000, 2000/C 364/01.

<sup>11</sup> The UK Mission at Geneva has stated, 'The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter.' See, UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008' (March 2010) on recommendation 22 (France).

<sup>12</sup> UN Doc. A/RES/40/34

- UN General Assembly Resolution, 'Intensification of efforts to eliminate all forms of violence against women', A/Res/61/143, 19 December 2006;
- Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, Annex to UN General Assembly Resolution on Strengthening crime prevention and criminal justice responses to violence against women, A/Res/65/228, 31 March 2011
- UN General Assembly Resolution on Intensification of efforts to eliminate all forms of violence against women, A/Res/67/144, 20 December 2012
- Conclusions of the 57th session of the UN Commission on the Status of Women on the elimination of all forms of violence against women and girls, (adopted 2013);

1.6 The Commission welcomes the Committee's review of the current legislation relevant to stalking and notes the potential to increase the protection available for victims of stalking, particularly women, children and victims of cyberstalking.

## **The Effectiveness of Current Legislation**

### *Current applicable legislation*

1. There is currently no specific legislation prohibiting stalking in Northern Ireland. There is also no legal definition of stalking. There are however a number of laws which are currently used to prosecute individuals engaging in behaviour similar to stalking.

2. The Protection From Harassment (Northern Ireland) Order 1997 prohibits a person<sup>13</sup> pursuing a course of conduct that amounts to the harassment of another person<sup>14</sup>. The Order also provides for the offence of 'putting people in fear of violence' with a maximum sentence of seven years<sup>15</sup> imprisonment on conviction. Under the Family Homes and Domestic Violence (Northern Ireland) Order 1998, a non-molestation order may be sought prohibiting a person from 'molesting another person who is associated with the respondent.'<sup>16</sup> There are also a number of Statutes which relate to communications including online communications that may be used to prevent certain forms of 'cyberstalking'. These include the Communications Act 2003<sup>17</sup>, the Malicious Communications

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<sup>13</sup> By way of injunction.

<sup>14</sup> Section 3.

<sup>15</sup> Section 6(4)(a).

<sup>16</sup> Family Homes and Domestic Violence (Northern Ireland) Order 1998, section 20(1)(a).

<sup>17</sup> Section 127 of the Communications Act 2003 makes it an offence to send a message that is of menacing character using public electronic communications.

(Northern Ireland) Order 1988<sup>18</sup>, the Postal Services Act 2000<sup>19</sup> and the recent amendment to the Justice Act (Northern Ireland) 2006 which deals specifically with 'revenge porn'<sup>20</sup>.

3. The Commission notes that in the 2012 Westminster parliamentary inquiry into Stalking Law Reform<sup>21</sup>, victims and professionals observed that in Britain, the Protection from Harassment Act 1997<sup>22</sup> was being used to deal with a range of other behaviour and was additionally, too broad to achieve its stated objective. The review also received evidence that the Family and Civil courts processes were being abused 'as some convicted men pursue[d] their victims through vexatious claims,'<sup>23</sup> resulting in re-victimisation.

4. In relation to stalking legislation in Northern Ireland the Commission notes the breadth of the Protection from Harassment (Northern Ireland) Order as well as the lack of a legal definition for stalking or harassment in any legislative provision. The Commission further observes that victims of stalking may have to turn to several different legal instruments to seek a remedy depending on how they are victimised. The legal framework may also complicate criminal prosecutions. The Commission queries whether several unrelated pieces of legislation is the most effective way to protect victims and to prevent further harassment and re-victimisation.

**5. The Commission advises that a consolidated piece of legislation prohibiting stalking would better protect victims of stalking and harassment in line with the Executive's obligations under the international human rights standards.**

*International Human Rights Obligations*

6. Stalking can engage a number of rights under the European Convention and international standards, including the right to life<sup>24</sup>, the prohibition of torture and cruel, inhuman and degrading treatment<sup>25</sup> and the right to a private and family life, which includes a person's physical

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<sup>18</sup> Section 3 of the Malicious Communications (Northern Ireland) Order 1988 makes it an offence to send letters with the intent of causing distress or anxiety.

<sup>19</sup> Section 85 of the Postal Services Act 2000 prohibits the sending by post of indecent or obscene articles

<sup>20</sup> Justice Act (Northern Ireland) 2006, Section 51.

<sup>21</sup> Independent Parliamentary Inquiry into Stalking Law Reform, Justice Unions' Parliamentary Group, February 2012, pg 22.

<sup>22</sup> The equivalent English legislation.

<sup>23</sup> Independent Parliamentary Inquiry into Stalking Law Reform, Justice Unions' Parliamentary Group, February 2012, pg 19.

<sup>24</sup> ECHR, Article 2 & ICCPR, Article 6.1

<sup>25</sup> ECHR, Article 3, ICCPR, Article 7 & CAT, Article 1

and psychological integrity<sup>26</sup>. All of these Articles place positive obligations on the State to protect victims of crime. Additionally, the right to an effective remedy<sup>27</sup> and to no punishment without law<sup>28</sup> may be engaged.

7. In *Osman v The United Kingdom*<sup>29</sup>, the European Court of Human Rights noted that Article 2 of the European Convention on Human Rights (ECHR) (right to life) requires States to 'take appropriate steps to safeguard the lives of those within its jurisdiction<sup>30</sup>.' The Court reiterated that this duty required the State to both put in place 'effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'<sup>31</sup> and also to 'take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'<sup>32</sup> Where the criminal law is not effective a State may be in breach of its positive obligations under Article 2 of the Convention.

8. Where a person is harassed or a victim of stalking but there is no loss of life, ICCPR, Article 7 and CAT, Article 1 may be engaged. Under Article 3 of the European Convention on Human Rights, the right to be free from torture, inhuman or degrading treatment is an absolute right which requires the State to take measures to ensure that individuals are not subject to these acts by the State itself or by private individuals. Where the actions of private individuals cause 'intense physical and mental suffering'<sup>33</sup> to others, the State has a duty to protect private individuals under ECHR, Article 3.

9. ICCPR, Article 15 provides that there shall be no punishment without law. The European Court of Human Rights has noted that ECHR, Article 7 requires that the law must also be 'accessible'<sup>34</sup> and 'foreseeable', which is defined in *Liivik v Estonia* as an individual 'know[ing] from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally

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<sup>26</sup> ECHR, Article 8 & ICCPR, Article 17

<sup>27</sup> ECHR, Article 13 & ICCPR, Article 2

<sup>28</sup> ECHR, Article 7 & ICCPR, Article 15

<sup>29</sup> [1998] ECHR 101.

<sup>30</sup> *Ibid.*, at para 115.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Kalashnikov vs Russia*, 15 July 2002, para. 95.

<sup>34</sup> Meaning 'accessible to the defendant', see *Vasiliauskas v. Lithuania*, Application no. 35343/05, para. 168.

liable and what penalty will be imposed for the act committed and/or omission.<sup>35</sup>

However the Court has acknowledged that 'many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice,<sup>36</sup> and that the role of the courts is to decide any questions of interpretation. In *Liivik*, the use of 'broad notions' and 'vague criteria' in the interpretation and application of criminal provisions resulted in a breach of ECHR, Article 7 (prohibition of retrospective criminal law).

**10. The Commission advises that the Committee should take note of the Executive's obligations under the international standards to draft legislation which ensures individuals are aware what acts and omissions will make him/her criminally liable.**

11. Applying ECHR, Article 8 (the right to private and family life), the Court has noted that States, in order to protect a person's physical and moral integrity, are required to 'maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.'<sup>37</sup> In *Hajduova*, where the Applicant's ex-husband was able to threaten her repeatedly as a result of the domestic authorities' inaction, this amounted to a breach of Article 8. In the English High Court case of *Waxman v Crown Prosecution Service*<sup>38</sup>, the CPS did not pursue a prosecution against the Claimant's harasser for breach of a non-molestation order. When finding that Article 8 had been breached, the Judge noted that Ms Waxman was a vulnerable person whose psychological integrity the State had a duty to protect from further action by pursuing the prosecution against her harasser.

12. Where States have failed to ensure and enforce an adequate legal framework to protect individuals against acts of violence by private individuals they have been found to be in breach of the ECHR.

13. International Human Rights Standards further require that State parties provide victims of crime with access to a remedy and provide them with protection from secondary victimisation when accessing that remedy. ICCPR, Article 2<sup>39</sup> requires each State party to provide persons whose rights or freedoms are violated with an effective remedy which

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<sup>35</sup> *Liivik v Estonia*, Application no. 12157/05, para. 93.

<sup>36</sup> *Ibid*, para. 94.

<sup>37</sup> *Hajduova v. Slovakia*, Application no 2660/03, para. 46.

<sup>38</sup> [2012] EWHC 133 (Admin).

<sup>39</sup> ICCPR, Article 2(3)(a).

must be enforced when granted<sup>40</sup>. ECHR, Article 13 provides that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.' The UN Human Rights Committee has stated that:

'Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.'<sup>41</sup>

14. The Commission advises that the 2012 EU Directive establishing minimum standards on the rights, support and protection of victims of crime which notes that victims of gender-based violence are particularly susceptible to secondary and repeat victimisation<sup>42</sup> and requires that Member States ensure that measures are available to protect these victims<sup>43</sup>. The UN Declaration on the Elimination of Violence against Women requires ensuring that '... the re-victimization of women does not occur because of laws insensitive of gender considerations, enforcement practices or other interventions.'<sup>44</sup>

15. The Commission notes that the cumulative effect of the international standards is that the State is required to enact, maintain and enforce effective legislation to protect individuals from inhuman or degrading treatment and to also protect their psychological integrity from the acts of private individuals. The State is further required to take measures to prevent secondary or repeat victimisation.

**16. The Commission recommends that any stalking legislation in ensures that victims are able to access an effective remedy and are protected from secondary or repeat victimisation.**

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<sup>40</sup> ICCPR, Article 2(3)(c).

<sup>41</sup> UN Human Rights Committee, General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para 15.

<sup>42</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, preamble, para 57.

<sup>43</sup> Ibid, Article 18.

<sup>44</sup> A/RES/48/104 (Article 4(f)).



## **The Need for and Benefit of Specific Stalking Legislation in Northern Ireland**

### *Protection against Gender-Based Violence*

17. Stalking is a deeply traumatising form of psychological violence. The overwhelming majority of victims of stalking are women<sup>45</sup>. International Human Rights standards have repeatedly recognised psychological violence as a part of gender-based violence against women<sup>46</sup>. The Istanbul Convention defines 'gender based violence against women' as 'violence that is directed against a woman because she is a woman or that affects women disproportionately'. Several binding international human rights standards have stressed the need to protect women against gender-based violence including stalking.

18. The UN Declaration on the Elimination of Violence Against Women acknowledges that violence against women encompasses physical, sexual and psychological violence. In its General Recommendation Number 19, the Committee for the Elimination of Discrimination Against Women recommended that State parties should take 'appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.'<sup>47</sup> The Committee further recommended that State parties should 'ensure that laws against...gender-based violence give adequate protection to all women,<sup>48</sup> and that they should 'take all legal and other measures that are necessary to provide effective protection of women against gender-based violence.'<sup>49</sup> In its General Recommendation Number 28<sup>50</sup>, the Committee advised that 'States parties must further ensure that women have recourse to affordable, accessible and timely remedies, with legal aid and assistance as necessary.'

19. The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)<sup>51</sup> goes further by calling on State parties to introduce substantive legislation on stalking. The Convention states that parties should 'take the

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<sup>45</sup> 1 in 5 women and 1 in 10 men will experience staking in their adult life (Homicides, Firearm offences and intimate violence 2009/10; Supplementary Volume 2 to Crime in England and Wales 2009/10 2nd Edition. Home Office Statistical Bulletin 01/11)

<sup>46</sup> see Article 3(d) Definitions.

<sup>47</sup> Committee for the Elimination of Discrimination Against Women, General Recommendation No. 19 (11th session, 1992), 24(a).

<sup>48</sup> Ibid, 24(b).

<sup>49</sup> Ibid, 24(t).

<sup>50</sup> Committee for the Elimination of Discrimination Against Women, General Recommendation No. 28, (Forty-seventh session, 4 – 22 October 2010), 34.

<sup>51</sup> The UK Government signed the Convention in June 2012. The Convention entered into force on 1 August, 2014.

necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.<sup>52</sup>

**20. The Commission recommends that the Committee takes fully into account the Istanbul Convention in the development of stalking legislation.**

*Cyberstalking or Online Stalking*

21. A further benefit of specific stalking legislation would be the opportunity to legislate on the issue of cyberstalking. The Oxford dictionary defines cyberstalking as the 'repeated use of electronic communications to harass or frighten someone, for example by sending threatening emails.' Cyberstalking can be an extension of a harasser's existing activity or it can solely facilitate the harassment of a victim. It can be carried out by a harasser who has never met their victim and to whom they are a complete stranger. It can also be performed through a number of online avenues.

The Commission is further aware of the easy access that children have to the internet and to social media and the potential for stalking to take place online. The NSPCC has reported that in 2014, 12 per cent of 11 – 16 year olds in the UK experienced cyberstalking<sup>53</sup>.

22. Research completed by the University of Bedfordshire in 2011 noted that;

'...victims were being harassed, with their antagonists using a variety of technological means to deliver the abuse. It is not just e-mails or phone calls or social networking sites, in the majority of cases it can be all of these and more. Harassers can use technology to invade multiple aspects of their victims' lives, leave them feeling that they have no way to escape.'<sup>54</sup>

23. Cyberstalking engages many of the same human rights as 'face-to-face' harassment. Depending on the extent of the harassment, it may engage ICCPR, Article 7, CAT, Article 1 and ICCPR, Article 17. Where cyberstalking or harassment involves children it may engage Article 3 of the UN Convention on the Rights of the Child which requires State parties to 'ensure the child such protection and care as is necessary for his or her

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<sup>52</sup> Istanbul Convention, Article 34.

<sup>53</sup> 'The experiences of 11-16 year olds on social networking sites,' NSPCC, 2014, pg 7.

<sup>54</sup> The University of Bedfordshire, 'Cyberstalking in the United Kingdom', 2011, pg 31.

well-being.<sup>55</sup> It further requires that a child's right to privacy, family and home life is protected<sup>56</sup> and that 'guidelines for the protection of the child from information and material injurious to his or her well-being'<sup>57</sup> are encouraged.

24. The Commission is further aware of the different though related behaviour of cyberbullying<sup>58</sup>, of which children can be both the victims and the perpetrators. In June 2016 the UNCRC raised concerns regarding cyberbullying in the UK. The Committee stated that:

'In the light of the recommendations resulting from the day of general discussion on digital media and children's rights, [the Committee recommends that the State party] train children, teachers and families on the safe use of information and communication technologies, raise awareness among children on the severe effects that online bullying can have on their peers and increase the involvement of social media outlets in the efforts to combat cyberbullying.'<sup>59</sup>

The UNCRC has also recommended that the UK raise the age of criminal responsibility<sup>60</sup> and has cautioned against criminalising children. In this regard, the Commission is aware that the Scottish Government has announced that they will increase the age of criminal responsibility to 12 years old<sup>61</sup>.

**25. The Commission recommends that the Committee considers how the Executive is addressing the concerns raised by the UNCRC in relation to cyberbullying, the age of criminal responsibility and the criminalisation of children.**

26. The Commission is aware that sending menacing messages online or through the post is prohibited in Northern Ireland<sup>62</sup>. However the legislation is silent on the use of the internet, social networks, fake online profiles or websites or identity theft to facilitate harassment and stalking. Additionally, there is no specific legislative provision protecting children

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<sup>55</sup> CRC, Article 3(2).

<sup>56</sup> CRC, Article 16.

<sup>57</sup> CRC, Article 17(e).

<sup>58</sup> Defined by the Oxford English Dictionary as 'The use of electronic communication to bully a person, typically by sending messages of an intimidating or threatening nature.'

<sup>59</sup> Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland\* CRC/C/GBR/CO/5 12 July 2016 para 49 (b)

<sup>60</sup> UNCRC, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, para 79(a).

<sup>61</sup> <http://news.gov.scot/news/minimum-age-criminal-responsibility>

<sup>62</sup> Above at para 2.

from online harassment. A piece of legislation specifically dealing with stalking offers the benefit of unifying existing legislation on electronic harassment as well as updating it to reflect the advances in internet technology since 1997.

**27. The Commission advises that in order to satisfy the Executive's obligations under UNCRC, the committee considers how any potential stalking legislation could incorporate online and offline activities, so that children are protected when using technology, the internet and social media.**

January 2017