

March 2023

Women's Aid Submission to the Criminal Justice (Miscellaneous Provisions) Bill 2022



Women's  Aid

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Women's Aid is a national, feminist organisation working to prevent and address the impact of domestic violence and abuse (henceforth DVA) including coercive control, in Ireland since 1974. We do this by advocating, influencing, training, and campaigning for effective responses to reduce the scale and impacts of domestic abuse on women and children in Ireland and providing high quality, specialised, integrated, support services.

More information on Women's Aid is available on our website www.womensaid.ie.

Women's Aid warmly welcomes the Criminal Justice (Miscellaneous Provisions) Bill 2022, particularly Part 4 and Part 5. There is a lot to be commended in this Bill, including the new offences of Non-fatal strangulation or non-fatal suffocation, Non-fatal strangulation or non-fatal suffocation causing serious harm, Stalking, the improvement of the existing offence of Harassment, and the introduction of civil orders against Stalking.

While overall welcoming this Bill Women's Aid would like to make the following recommendations:

Summary of recommendations

In S23 of this Bill, which amends S10 of the Non-Fatal Offences Against the Person Act, 1997:

- in S10(2)(a)(i) and S10(2)(b) of the NFOAP Act as amended replace the word "will" with the word "might"
- in both S10(2)(a)(ii) and S10(2)(b) of the NFOAP Act as amended, delete the words "that has a substantial adverse impact on his or her usual day-to-day activities"
- include a provision to retain the current ability of the Court to make orders on foot of criminal proceedings even without conviction, when it is in the interest of justice to do so.

In S26 of this Bill:

- in S26(2)(a) replace the word "will" with the word "might"
- delete the words "that has a substantial adverse impact on the person's usual day-to-day activities" in S26(2)(b)
- Amend S26 of the Bill so that victims of Harassment can also apply for civil orders.

In S27 of this Bill:

- Amend S27 to include an ex-parte procedure to apply for civil orders against Stalking for applicants who are at immediate risk of serious harm.

Part 4: Offences of Harassment, Stalking, Non-Fatal Strangulation and Non-Fatal Suffocation

S23 of this Bill substitutes a new section for the existing S10 of the Non-Fatal Offences Against the Person Act, 1997. This includes a rewritten offense of Harassing and a new offence of Stalking.

The following comments relate to S10 of the NFOAP Act as amended by S23 of this Bill.

Offence of Harassment, S10(1) of the NFOAP as amended

Women's Aid welcomes the proposed changes to the offence of Harassment, which is clearer and more comprehensive than the existing offence. We also appreciate that the offence will include behaviour of which the victim was not aware of at the time it happened but became aware of later.

Offence of Stalking, S10(2) of the NFOAP as amended

Women's Aid strongly welcomes the introduction of this offence, which criminalises more severe and potentially dangerous behaviours than those of Harassment. However, we believe that the wording of the offence could be improved as below.

This proposed offence reads (emphasis added):

(2) A person shall be guilty of the offence of stalking where—

(a) the person, without lawful authority or reasonable excuse, by his or her acts, intentionally or recklessly causes another, at the time when the acts occur or when the other becomes aware of them—

(i) to fear that violence **will** be used against him or her or another person connected to him or her, or

(ii) serious alarm or distress that **has a substantial adverse impact on his or her usual day-to-day activities,**

and

(b) the person's acts are such that a reasonable person would realise that the acts would cause the other, at the time when the acts occur or when the other becomes aware of them, to fear that violence **will** be used against him or her or another person connected to him or her, or serious alarm or distress **that has a substantial adverse impact on his or her usual day-to-day activities.**

Women's Aid is concerned that in S10(2)(a)(i) the use of the word "will" may create too high a threshold. As the victim of stalking cannot know/prove with absolute certainty that violence **will** be used, however living with the continuous fear that violence **might** be used is draining, exhausting and a harm in itself from which victims should be protected. We accordingly suggest replacing the word "will" with "might". The reasonable person test in S10(2)(b) should be sufficient to guard against unfounded complaints and should also be amended accordingly.

Recommendation

In S10(2)(a)(i) and S10(2)(b) of the NFOAP Act as amended replace the word "**will**" with the word "**might**".

The wording of S10(2)(a)(ii) may also create too high a threshold for the offence by focusing on the **impact** on the conduct on the victim, rather than on the conduct of the accused.

Women's Aid believes that the focus of the offence of Stalking should be on the **conduct** of the perpetrator causing serious alarm and distress and not on the impact on the victim, which may be hard to prove and may differ from person to person depending on personal characteristic, history and circumstances.

Requiring proving "substantial adverse impact" on the victim's usual activities puts the onus on the victim having to prove such impact and plays against the resilience of certain victims who may continue with their day-to-day lives notwithstanding the actions of the perpetrator, regardless of psychological stress and risks to safety.

Moreover, victims may delay reporting and/or the Gardaí may postpone charges unless or until they feel they are able to prove "substantial adverse impact on the person usual day-to-day activities". In the meantime, the stalking may escalate leading to injuries or even fatalities. This wording may therefore prevent vital early intervention and protection.

The offence already stipulates that the alarm or distress caused must be "serious" and it is also subjected to the reasonable person test, so the focus on substantial adverse impact seems unnecessary.

Recommendation

In S23 of this Bill amending S10 of the NFOAP Act, in both S10(2)(a)(ii) and S10(2)(b) delete the words "that has a substantial adverse impact on his or her usual day-to-day activities"

Ancillary orders in criminal proceeding for Harassment and Stalking

The Bill proposes that when a person is found guilty of Harassment or Stalking, the court may, in addition to or as an alternative to any other penalty, order that the person shall not communicate with or about the victim or approach the victim.¹

Under the current S10(5) of the Non-Fatal Offences Against the Person Act 1997, the court is **also** able to make these orders when the accused is **not** convicted, if it finds it is in the interest of justice to do so². This was also the case in the General Scheme of this Bill.³

Women's Aid believes that the courts should retain the option to make orders without a criminal conviction **when in the interest of justice to do**.

Criminal proceedings may not be successful for a range of reasons, however in certain cases where criminal standards for conviction are not reached, the victim still has valid protection needs and it would be useful and appropriate for the Court to be able to make orders accordingly.

While this Bill provides for civil orders against stalking (see below), the victim would have to start proceedings afresh in the civil courts after unsuccessful criminal proceedings, with attendant legal costs and delays in obtaining protection.

Recommendation

Women's Aid recommends that the Bill is amended to retain the current ability of the Court to make orders on foot of criminal proceedings even without conviction, when it is in the interest of justice to do so.

Part 5 Civil orders against relevant conduct

Women's Aid is delighted that civil orders in respect of Stalking have been included in this Bill, as not all stalking victims are eligible for protective orders under the Domestic Violence Act 2018. These orders are distinct from orders on the foot of criminal conviction as described under Ancillary orders above.

1 S10(4) of the NFOAP Act as amended by S23 of this Bill

2 (5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.

NFOAP Act 1997, S10(5)

3 (5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1) or (2), the court may nevertheless make an order under [Head 2] upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.

General Scheme of the Criminal Justice (Miscellaneous Provisions) Bill 2022 – Additional Provisions, Head 1, (4)

The relevant conduct against which orders can be applied for is defined on the lines of the Stalking offence in S26(2) and (3).

(2) For the purposes of this Part, “relevant conduct” means conduct engaged in, without lawful authority or reasonable excuse, by the respondent towards the applicant or, where relevant, a person connected to the applicant, that would reasonably be considered likely to cause the applicant—

(a) to fear that violence will be used against the applicant or person, or

(b) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities.

The same observations noted above on the Stalking offence in relation to the word “will” and the wording “that has a substantial adverse impact on his or her usual day-to-day activities” apply here in in S26(2)(a) and S26(2)(b) respectively.

Women’s Aid believes that victims of stalking should be able to apply for civil orders without having to prove that the conduct of the perpetrator has a “substantial adverse impact” on their day-to-day living or that it “will” lead to violence. The fact that such conduct causes the applicant to fear that violence might be used against them or that it causes **serious** alarm or distress should be enough. In fact, it is especially important that civil orders, meant to **prevent** stalking from continuing and quite possible escalating, do not have such high threshold.

Recommendation

Women’s Aid recommends that

in S26(2)(a) the word “**will**” is replaced by the word “**might**”

in S26(2)(b) the words “that has a substantial adverse impact on the person’s usual day-to-day activities” are deleted.

Women’s Aid notes that these civil orders do not seem to be available for victims of Harassment, but only for victims of Stalking. While Harassment may be meant to capture less severe conduct than Stalking, this offence still interferes with a person’s peace and privacy or causes them alarm, distress or harm. Its persistency means that the impacts will be cumulative. Moreover, if left unchecked it may well escalate.

It is not always possible for victims to initiate criminal proceedings for Harassment or such proceedings may not go ahead for a variety of reasons, leaving victims with no recourse.

Women’s Aid believes that victims of Harassment should also be able to access civil orders and recommends that this Bill be amended accordingly.

Recommendation

Amend S26 of the Bill so that victims of Harassment can also apply for civil orders.

Finally, Women's Aid believes that there should be an emergency ex-parte procedure for civil orders where applicants are at **immediate risk of serious harm** from Stalking and some form of urgent protection is warranted. The Bill only provides for applications made on notice to the respondent⁴. However with the current workload of the District Courts, there is a risk that a significant amount of time would pass between application and hearing (as already happening for example with hearings for Barring and Safety orders), in the meantime the stalking behaviour could continue and escalate.

There is a need for fast ex-parte orders, modelled on the Protection orders in the Domestic Violence Act 2018 to protect victims of stalking at immediate risk of harm.

Recommendation

Amend S27 to include an ex-parte procedure to apply for civil orders against Stalking for applicants who are at immediate risk of serious harm.

Women's Aid would be very pleased to discuss this submission in person should the opportunity arise to do so.

⁴ S27(2)