

English summary of report 2015:2



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Application of the new penal provision

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**The Swedish National Council for Crime Prevention (Brå) –
centre for knowledge about crime and crime prevention measures**

The Swedish National Council for Crime Prevention (Brå)
works to reduce crime and improve levels of safety in society
by producing data and disseminating knowledge on crime
and crime prevention work.

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Summary and assessment

On 1 October 2011 a new penal provision on unlawful persecution was introduced in the Swedish Penal Code. The aim of the new provision was to incorporate the cases of repeated offences by one person against another, which did not fulfil the criteria for gross violation of integrity and gross violation of a woman's integrity. Thus the provision focuses on repeated harassment between persons who do not have or have not had a close relationship,¹ and on harassment within close relationships that is not sufficiently serious to meet the requirements for gross violation of integrity or gross violation of a woman's integrity. The new provision allows for a comprehensive assessment of repeated non-serious offences between both closely related and unrelated parties. With such an assessment, this type of crime can be given a higher penal value, which better reflects the strain produced by being exposed to it.

As is the case with gross violation of integrity and gross violation of a woman's integrity, the crime of unlawful persecution comprises several different types of sub-offences. The offences that are included are assault, unlawful coercion, unlawful threats, breach of domiciliary peace or unlawful intrusion, intrusive photography, molestation, sexual molestation, criminal damage, petty vandalism, and violation of a restraining order. The bill does not state the number of offences or criminal acts required to constitute unlawful persecution. It states that the more serious the criminal acts are, the fewer should be required (bill 2010/11:45).

In December 2012 the Swedish National Council for Crime Prevention was instructed by the Government to examine the application of the unlawful persecution offence.

Few reports in the initial years

In 2012 and 2013 respectively, 916 and 780 reported cases of unlawful persecution were registered by the police. There may be

¹ Persons who are or have been married, are or have been cohabiting under circumstances comparable to marriage, are or have been in an intimate relationship, family members or close relatives.

several explanations for the small number of offences that have been registered to date. One is that neither the person submitting the report nor police officers and prosecutors are always aware that the reported incidents may comprise unlawful persecution. Another explanation is that police officers and prosecutors often do not notice that the reported incidents may together constitute unlawful persecution until an investigation of the sub-offences has been initiated. Then the focus of the investigation changes. However, it is unclear whether a new offence report is then registered for the unlawful persecution offence. If this does not happen, the case will not be included as unlawful persecution in the statistics on reported offences, but rather as reports relating to the included sub-offences.

127 court convictions

During the period 2011–2013, at least 263 decisions were taken to prosecute for the unlawful persecution offence. In addition, five offences resulted in a waiver of prosecution. During the same period, there were a total of 127 court convictions for unlawful persecution. The prosecution decisions that have not resulted in convictions for unlawful persecution have either been dismissed, have resulted in convictions for other offences or have not yet been tried in court.

Molestation in close relationships dominates in the judgments

The cases of unlawful persecution that have resulted in convictions have usually comprised molestation offences and violations of restraining orders. Unlawful threat offences are also relatively common.

In over half of the cases that have resulted in convictions, the involved parties have had some form of close relationship. The persecution often starts in connection with one of the parties ending the relationship or making it clear that a casual relationship is not going to develop into something more. In roughly one-tenth of the cases, the injured parties have been persecuted in some form of professional capacity and a similar proportion of the cases involve the injured party having been persecuted by someone previously unknown to them.

No convictions related to crimes against elected representatives

None of the convictions have involved offences against an elected representative. This is the case despite the fact that the National Council for Crime Prevention's survey on exposure to threats and

violence within this group (the Politicians' Safety Survey, PTU, 2014:9) showed that 370 elected representatives had been exposed to threats and harassment by the same perpetrator more than once in 2012. The reason for this is probably that harassment against this group rarely occurs in a way that would allow for a conviction for unlawful persecution. Firstly, the propensity to report is relatively low, which can be seen from the PTU. Secondly, the harassment often takes place without the perpetrator being physically present.

Persecution most commonly by phone and SMS

Harassment by phone and SMS almost always constitutes a part of cases of unlawful persecution. In addition, the perpetrators had made some form of unwanted physical contact with the injured party in half of the cases and had otherwise made their presence felt, without direct physical or verbal contact, to the injured party in one-fifth of the cases. The criminal acts that are most difficult to prove are those where the perpetrators have made their presence felt to the injured party in various ways. This type of persecution is therefore less common among the cases that have resulted in convictions than it is in police reports.

Half have been sentenced to imprisonment

Half of those convicted have been given a prison sentence and one quarter have received probation. Forensic psychiatric care is a relatively common sanction, being imposed in 14 per cent of convictions, which represents a higher proportion than the average found in convictions for other offences listed in the same chapter of the penal code. Among those who are sentenced for unlawful persecution it is thus not uncommon for the offence to have been committed under the influence of what is assessed as being a severe mental disorder.

Unclear where the lower boundary for unlawful persecution lies

The National Council for Crime Prevention has found some possible causes for the small number of convictions for the unlawful persecution offence. One factor highlighted by both prosecutors and police officers is that the constituent elements are unclear. This may in turn result in cases being classified as the individual sub-offences instead of as unlawful persecution. Another problem is that it is unclear where the lower threshold for the unlawful persecution offence lies. The problem of defining the boundaries of the offence is based on several uncertainties:

- To begin with, it is unclear which incidents are sufficiently serious to meet the criteria for the molestation sub-offence.
- It is also unclear how many different sub-offences are then required for an unlawful persecution offence.
- It is unclear how long the unlawful persecution needs to have persisted.
- It is unclear whether an unlawful persecution offence may be comprised exclusively of molestation offences, or whether other sub-offences must also be included.

Evidentiary difficulties

The second explanation for the low number of convictions is evidentiary difficulties. First and foremost it is difficult to prove that the suspects were actually at the location described by the injured party, and that they were there with the intention of making unwanted and unwarranted contact with the injured parties or of making their presence felt. When it comes to phone calls, the prosecutor needs to be able to prove that it was the suspect who made the call. If it is not possible to provide proof of a sufficient number of incidents, the prerequisites for continuing with the case as unlawful persecution are lacking. Several of those interviewed by the National Council pointed out that these evidentiary problems have not diminished as a result of the new provision.

Difficulties increased by the low priority associated with the relevant sub-offences

The difficulties experienced by the criminal justice system in detecting and proving unlawful persecution are made more severe by the fact that several of the included sub-offences, particularly molestation, have a low priority and are therefore not always investigated. Investigations relating to several of the relevant sub-offences are typically led by the police rather than by a prosecutor. The police officers interviewed by the National Council felt that molestation in particular is an offence that rarely leads to investigation. This means that there is a risk of missing exposure to crime that does not appear in the current report or when the injured party later returns to report a subsequent incident. This is the case despite the fact that the incidents might be combined to produce an unlawful persecution offence.

A close relationship between the parties facilitates the possibility of conviction

The focus of the new provision was not primarily intended to be directed at harassment in the context of close relationships, but rather at harassment from unknown persons or more superficial

acquaintances. Despite this, it can be noted that almost half of the court convictions relate to cases where the perpetrator has or has had a close relationship with the victim. One reason for this is probably that the conditions for identifying and proving the offence are better in these cases. Firstly, repeat reports are coordinated earlier in cases relating to crimes in close relationships and the investigation is often led and performed by police officers and prosecutors who are specialised in investigating this type of crime. They are accustomed to handling offences involving violations of integrity and are therefore able to identify a pattern of offending more quickly. Secondly, it is easier to identify the suspect when there is a close relationship involved.

Violations of restraining orders also improve the conditions for proving the offence

In as many as 57 per cent of the convictions, the sub-offences included violations of a restraining order. This is probably due to the fact that it is easier to obtain a conviction for unlawful persecution if a decision has been made to issue a restraining order, which has then been violated. When there is a restraining order in place, every non-minor attempt to make contact with the injured party immediately becomes a punishable violation of the restraining order. In the absence of a restraining order, the extent and intensity of the attempts to contact the injured party must first be sufficient to constitute a molestation offence. Thereafter it must be possible to prove additional sub-offences before it becomes possible to consider a prosecution for unlawful persecution. Consequently, when there is a restraining order in place, it becomes easier to commit a large number of sub-offences that can together constitute an unlawful persecution offence. It also becomes easier to prove persecution when a person continues to contact the injured party in spite of the fact that a restraining order has been issued.

Practitioners positive towards the legislation but advocate realistic expectations

Despite the difficulties that have been describe above, both prosecutors and police officers are positive about the introduction of the new provision. They argue that it is good that this type of criminality is addressed and given a place on the agenda and that the sanctioning scale is more proportionate in relation to the severity of the offence. At the same time they stress that the difficulties that have always existed remain in terms of being able to prove the types of criminal acts that are often included in persecution behaviour. The cases are still equally difficult to investigate and prove, and it is thus also still equally difficult to prosecute them and to

obtain convictions. It is therefore important to encourage more realistic expectations regarding the effects of the new provision, particularly in relation to the type of expectations that are sometimes presented in the media.

The National Council's assessment

The National Council's follow-up was conducted approximately two years after the new provision on unlawful persecution came into force, which represents a relatively short period in this context. So far there have not been a particularly large number of either reports or convictions. If we compare with the offence of gross violation of a woman's integrity, which was the model for the new unlawful persecution offence, it can be noted that the number of reported offences was considerably lower during the initial years following the introduction of the provision than it is today. It is reasonable to expect that reports of unlawful persecution will also increase as police officers, prosecutors and the public become more aware of the new provision. However, so far no such increase has occurred.

If the unlawful persecution offence were to follow the same trend as gross violation of a woman's integrity, it would be wrong to expect any major increase in the proportion of reported offences that result in convictions. For gross violation of a woman's integrity, the proportion of offences resulting in convictions lies at between 10 and 15 per cent, a figure which is the same today as it was ten years ago. Both types of offence are difficult to prove. The difficulties are probably particularly substantial for unlawful persecution, since the sub-offences that are included are of a non-serious nature and are therefore more difficult to distinguish from the molestation offence. In light of this, it would be reasonable to expect that unlawful persecution would result in prosecution and conviction less often than gross violation of a woman's integrity, but this does not appear to be the case.

Important for the police to develop their awareness of the offence

Despite the difficulties associated with prosecuting the unlawful persecution offence, the police officers and prosecutors interviewed by the National Council were agreed that the new provision serves an important purpose and that it fills what was previously a gap in the legislation. In light of this, it is particularly important that the provision is applied in a way that leads to as many offences as possible being detected and resulting in conviction. Based on the results of the current study, the National Council would like to highlight three central areas for development:

- The police must have knowledge in order to be able to identify the offence.
- The police must be organised in such a way that reports of repeated offences are not spread across too many investigating officers.
- The suspected cases of unlawful persecution that are identified by police officers (and prosecutors) in the course of an investigation should always be registered in the form of an offence report, so that the statistics relating to the number of offences brought to the attention of the criminal justice system are correct.

One reason that unlawful persecution is not always “detected” by the criminal justice system is that the individual sub-offence types included in the unlawful persecution offence are of a kind that are often dismissed directly following the registration of an offence report, since they are assessed to be minor and difficult to clear. The molestation offence, which is included in the majority of cases of unlawful persecution, constitutes a case in point. Since the offences reported by a given injured party are not always registered by one and the same person, it is not certain that they will be recognised as a series of repeat reports.

It is therefore important that the police develop procedures to ensure that those who register offence reports relating to the crime types included in the unlawful persecution offence always ask the person making the report about possible previous reports and incidents, and that these are then well-documented.

It is equally important that in the next stage, the police (station officers and senior investigating officers) are aware of the possibility that a report may relate to unlawful persecution. The senior investigating officer who reviews whether the reported act meets the criteria for the registered offence, and who decides whether a criminal investigation should be initiated, must thus be able to see when several reports have been made relating to offences that may together constitute unlawful persecution.

Should investigations relating to molestation in close relationships be led by prosecutors?

Unlawful persecution is a crime for which the investigation is led by a prosecutor, as are threats and violence within close relationships. However, investigations regarding several of the sub-offences that are included in unlawful persecution are led by the police, irrespective of who has been subjected to the offence. In the National Council’s interviews with prosecutors, there was a suggestion that prosecutors would sometimes like to deviate from this rule, and would themselves like to lead investigations of particularly molestation offences committed within close relationships, in or-

der to obtain a better overall picture of the offences to which the injured party is exposed. It is the view of the National Council that there may be reason to discuss whether molestation offences in the context of close relationships, should be investigated by prosecutors more regularly even though such offences may be regarded as minor when viewed individually. The disadvantage is that this would increase the workload of prosecutors. The advantage would be that it would ensure that possible molestation offences would actually be included when a prosecutor investigates a case involving other offences committed within a close relationship. This would then probably increase the likelihood of prosecutions for unlawful persecution.

Several borderline cases should be tried by the courts to develop practice

Several of the prosecutors and police officers in the study believe that the lower boundary of what should be considered as unlawful persecution is not always sufficiently clear. This uncertainty is largely a result of the fact that there is as yet not much case law in this area.

In this context some of the prosecutors were self-critical and stated that they were perhaps a little too cautious about trying to bring prosecutions for unlawful persecution and instead prosecuting the individual sub-offences. The National Council shares the view that prosecutors can contribute to developing case law in this area by prosecuting the unlawful persecution offence more often in cases where it is unclear whether they should bring a prosecution for unlawful persecution or for the individual sub-offences. One possibility would be to prosecute for both unlawful persecution and *alternatively* for the individual sub-offences. The issue of defining where the boundaries between different offences should be drawn can then be tried by the courts.

Some prosecutors also stated that they would like the Supreme Court to try more cases that examined these boundaries.

More guidance required

Both police officers and prosecutors who were questioned in the National Council's study stated that they would like to receive more guidance on how the legislation should be interpreted. It is natural that prosecutors require guidance, given that it is their job to lead investigations focused on the unlawful persecution offence. However, it is equally important that the police are given clear information, since they are the ones who register offence reports and investigate the sub-offences that may together constitute unlawful persecution. It is only if and when the police, as a result of their in-

vestigations, conclude that a case may involve the unlawful persecution offence that the investigation is forwarded to a prosecutor.

Police officers state that they would like guidelines that are more detailed than those which are currently available. Seminars at both the national and local levels could result in a greater consensus on the provision's area of application, on where the boundaries for the offence should be drawn and on how borderline cases should be assessed.

- It is important that the police develop procedures to ensure that those who register offence reports relating to the crime types included in the unlawful persecution offence always ask the person making the report about possible previous reports and incidents, and that these are then well-documented.
- It is equally important that in the next stage the police are aware of the possibility that a report may relate to unlawful persecution. The senior investigating officer who reviews whether the reported act meets the criteria for the registered offence, and who decides whether a criminal investigation should be initiated, must be able to see when several reports have been made relating to offences that may together constitute unlawful persecution.
- The suspected cases of unlawful persecution that are identified by police officers (and prosecutors) in the course of an investigation should always be registered in the form of an offence report, so that the statistics relating to the number of unlawful persecution offences brought to the attention of the justice system are correct.
- More cases that do not constitute “obvious” instances of unlawful persecution – in terms of the extent, intensity and types of criminal act involved – should be prosecuted in order to develop case law on where the boundaries for the offence should be drawn.
- Both police officers and prosecutors would like to see more guidance and more detailed guidelines on where the boundaries for the unlawful prosecution offence should be drawn and on how borderline cases should be assessed.