

# **Study on the Experience of Overseas Jurisdictions in Implementing Anti-Stalking Legislation**

## **Executive Summary**

October 2013

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#### **Introduction**

1. The Law Reform Commission proposed anti-stalking legislation in Hong Kong in the year 2000. A prudent approach has been adopted in this difficult area of the law by consulting the community and relying on further developments overseas in order to avoid unintended consequences and interference with innocent behaviour.
2. The purpose of this study was to examine the development and operation of anti-stalking legislation in the United Kingdom, Australia, New Zealand, Canada, the United States and South Africa. While most of these jurisdictions have had both criminal and civil forms of anti-stalking legislation for many years, South Africa's general civil regime came into force only on 27 April 2013. The study specifically aimed to evaluate the anti-stalking legislation's impact on freedom of the press, freedom of demonstration/protest and freedom of expression as perceived by people in the respective jurisdictions.
3. Both key findings and recommendations are highlighted in this Executive Summary.
4. References to "Parts" and "Appendices" are to those in the Final Report.

#### **Current Anti-Stalking Legislation**

5. Most of the anti-stalking laws cover both criminal and civil harassment either in the same or separate statute. Such laws have focused on protecting safety, and increasingly private life. The approaches adopted to achieve that have not been uniform and vary in scope, form and penalty, even within the same country (for example, Australia and the United States).

6. There are anti-stalking laws prohibiting specified types of conduct while there are others that give a vague definition of stalking conduct. There are ones, which recognise legitimate or constitutional protected activities as specifically exempted from the scope of the laws, while others do not. Overall, the broadest piece of legislation is the UK's Protection from Harassment Act (PHA).

(Part 1 and Appendices A, B, C and F are referred).

7. While conduct is sanctioned under overseas anti-stalking legislation, speech is only expressly included in the definition of conduct under the UK's PHA. This is distinguished from the other overviewed jurisdictions where the focus is on conduct (Part 1; Part 4.1.10; Part 5's Introduction are referred).

8. Anti-stalking legislation in the overviewed jurisdictions has been amended on several occasions, increasingly taking into account new forms of behaviour; most recently, cyber stalking and cyber bullying which are evolving in the virtual communities and networks; i.e. social media. There are at least two approaches of how to treat these new forms. One is to treat them as conduct that engages in the same manner as traditional face-to-face, letter and phone communication. The other is to note that since speech is involved, it should be treated differently. For example, by removing the non-offending content to see whether the remaining pattern infringes the definition of stalking.<sup>1</sup>

9. But when the writing on social media has large audiences, in particular the emerging online citizen-journalism, there is opinion that speech should be considered as speech about a person, rather than speech directed to that person. Such writing has the same effect of a book or a newspaper; i.e., it is not directed at persons, and therefore should not be considered stalking behaviour. In this connection, the following legislation makes it explicit that the prohibited conduct is targeted at an individual:

- “intentionally directed at a person” - Queensland

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<sup>1</sup> Apart from this, issues of extraterritoriality and liability of server providers need also be considered (Part 7.2.1 is referred).

- “intention to cause physical or mental harm to the victim....or to arouse apprehension or fear in the victim for his or her own safety or that of any other person” – Victoria
- “behaviour that is directed against that other person” – New Zealand
- “‘credible threat’ ... made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family” – California

(Part 1, Part 6.5.3 are referred).

## Surveys and Statistics on Stalking

10. While most jurisdictions did not rely on surveys before enacting anti-stalking legislation, subsequent surveys have demonstrated that the laws did not adequately address stalking (Part 2.2 is referred).

11. Different practices of reporting, influenced by different legislative frameworks, make a comparison in terms of prevalence and incidence of stalking extremely difficult across different jurisdictions. Added to this is the fact that not all jurisdictions have relevant data available. However, the following general trends have been observed:

- (a) Most victims know their stalkers; i.e. stalking occurs more often when the victim and the offender know each other, including when they have been in a relationship (Part 2.1 US; Part 2.2 UK<sup>2</sup>; Part 2.3 Canada, Part 2.8.1’s second table Victoria<sup>3</sup> are referred).
- (b) The majority of stalking victims tend to be female while the majority of perpetrators male (Part 2.2. UK<sup>4</sup>; Part 2.3 Canada, Part 2.11.1. US are referred).
- (c) The number of reported stalking complaints and the number of prosecutions vary from year to year without suggesting that either stalking is on the rise or that it has

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<sup>2</sup> This information originates from a recent survey which was relied on by the government for introducing the stalking offences in the UK PHA in 2012.

<sup>3</sup> The categories showing that the victim and the offender know each other contain more cases added together than the “not related/associated” category.

<sup>4</sup> Footnote 2 above applies.

been deterred through anti-stalking legislation. Perhaps the exception is Queensland, where the number of reported stalking offences showed a decreasing trend between 2002 and 2012 (Part 2.7.1 is referred). The reason behind this trend is not clear, but see paragraph 22(a) below.

- (d) With the exception of Victoria and Queensland, none of the overviewed jurisdictions report in their statistics the nature of stalking complaints / cases (or the victim-offender relationship). However, the surveys referred to in Part 2, in the US, UK, Canada, do show such information (Parts 2.1, 2.2 and 2.3 are referred; also note Part 3.5 Canada, Manitoba).
- (e) The jurisdictions that have damages as an available civil remedy in their anti-stalking legislation (the UK, Scotland, Manitoba and California) do not report the number of cases where damages were pursued (Part 3 is referred).
- (f) Civil remedies in the form of injunctions found under the UK PHA are popular. Available data shows an increase of 26.95% in the number of injunction applications from 2009 to 2010, and an increase of 32.5% in the number of injunctions granted from 2009 to 2010 (Part 3.1 is referred).
- (g) Preventive civil remedies are not reported in all the overviewed jurisdictions.
- (h) None of the overviewed jurisdictions provide statistics on the number of cases due to news-gathering/reporting or protest/demonstration activities.

### **Cases Involving News-gathering Activities**

12. The only jurisdiction with cases showing that news-gathering activities have been targeted in the application of anti-stalking legislation is the UK, mostly under the civil harassment provisions of the PHA, and mostly in the form of injunctions. There are no reported cases arising out of news activities pursued under civil harassment in the other jurisdictions (Part 4 is referred). Likewise, there are no reported criminal cases pursued under the anti-stalking statutes arising out of news activities in the UK or in the other jurisdictions.

However, there have been instances of harassment involving either the media sector or news- or information-gathering activities through social media, where complaints have been lodged with the police (Part 4.1.10; Part 4.5.3, Part 7.4 are referred).

13. An aspect observed in UK case law is that while the Court of Appeal in *Thomas* indicated that harassment describes conduct targeted at an individual, other UK courts have not followed that interpretation (e.g. *Trimingham*).

14. A factor affecting all jurisdictions, is the fact that not all cases are reported, in particular trials dealt with summarily, unless there is an appeal.

15. As all the cases identified in relation to news activities involve civil proceedings, a couple of things are observed in relation to applications under the UK PHA. Firstly, while the general rule in civil proceedings is that hearings will be heard in public, exceptions apply to a number of types of proceedings, including applications under the PHA, which will be listed in the first instance in private unless the judge orders otherwise. Thus the existence of more cases where the media might have been involved is not unlikely in the UK (Part 4.1 is referred).

16. Secondly, as most cases under the UK PHA involve injunction applications, a few points should be noted. The first one concerns without notice injunction applications; i.e. no formal notice is required to be given to the defendants. This type of applications is allowed under the Civil Procedure Rules. The second point is a reminder that the merits of the case are not fully argued in applications for injunctions. Once an injunction has been granted, it does not necessarily mean that proceedings are going to be continued. As a matter of fact, interim injunctions have been used as a tactical movement with no intention to proceed further with a permanent injunction or with a claim for damages.

17. Thirdly, injunctions can be pursued *ex-parte*, on urgent basis, and they can be served on a whole group rather than on individual reporters. There are injunctions that not only impose a restraint on publishing certain information but also on disclosing the very existence of the injunction, the so-called super-injunctions. There are also anonymised (represented by letters) injunctions. Furthermore, breach of an injunction constitutes a criminal offence under

section 3(6) of the PHA with a maximum sentence of 5 years under section 3 (9), which is a more serious punishment than that for contempt of court in breaches of ordinary injunctions.

18. The injunctions sought under the UK PHA are thus more convenient, which is also assisted by the broadness of the statute, as conduct restrained can include nearly anything.

19. While the cases brought against paparazzi photographers have attracted neutral or favourable comments, the cases brought against news activities have given rise to serious concerns over the freedom of speech and the press.

(Part 4.1.10; Part 5.1.10, Part 7.1 are referred).

20. The UK PHA general defences of “in the particular circumstances the pursuit of the course of conduct is reasonable” and “conduct was pursued for the prevention or detection of crime” have not assisted the media<sup>5</sup> (Part 4.1 is referred).

21. As to the jurisdictions where specific defences exist (i.e., Queensland, Victoria, California and Nevada), the following has been observed.

22. Besides the existence of specific defences in Queensland and Victoria, which have the effect of protecting freedom of expression and more particularly news activities, other reasons are identified for the absence of cases arising out of news activities in those jurisdictions. They include:

- (a) prosecutorial guidelines or policies which direct prosecutors to opt for summary charges under statutes that would reflect the same level of culpability as that under the stalking statute (Queensland);
- (b) imposing an obligation on prosecutors to act in a way compatible with human rights and avoid prosecutions wherever possible (Victoria).

(Part 4.2 is referred).

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<sup>5</sup> In *Trimingham v. Associated Newspapers Ltd* discussed in Pat 4.1.5, the “reasonableness” defence was not the reason why the injunction was set aside.

23. Besides the existence of specific defences in California and Nevada which have the effect of protecting freedom of expression and more particularly news activities, other reasons are identified for the absence of cases arising out of news activities in those jurisdictions. They include:

- (a) anti-stalking statutes in jurisdictions other than California and Nevada with no specific defences that protect speech / media have been used against reporters (Part 4.5.3 is referred);
- (b) reporters, including freelance photographers, who cover the news have been generally protected under the terms of the First Amendment (“Congress shall make no law...abridging the freedom of speech, or of the press”) but the activities covering the lives of celebrities may not qualify as news. However, in these cases the focus has been on the right to privacy;
- (c) prosecution’s political sensitivity of the matter leads to a stricter threshold before issuing charges; and
- (d) the US legal system has a tradition of deferred and non-prosecution agreements.  
(Part 4.5 is referred).

24. New Zealand’s “lawful purpose” defence in section 17 of the Harassment Act (HA) (available only for civil harassment) might assist investigative journalists should they engage in harassment. However, this has only been an *obiter* comment and more recent *obiter* comment indicates that the acts of a photographer should be covered by the HA (Part 5.3.1 is referred). Furthermore, the HA has been used against social media expression (Part 4.3.1 is referred).

25. As for Canada, while the provisions of the Canadian Criminal Code (CCC) do not contain specific defences protecting news activities, no reported case was found to relate to such activities. There are a few reasons which may explain this phenomenon. They include:



- (a) the CCC protects journalists from intimidating tactics. Any person with intent to provoke a state of fear in a journalist in order to impede him or her in the performance of his or her duties commits a criminal offence (section 423.1 of the CCC);
- (b) the bar for proving criminal harassment may be too high to need to exempt journalistic activities as it requires both the element of “fear for safety” and conduct actually causing such fear for safety on the part of the victim. This, in combination with a list of specified prohibited conduct, may prevent the arbitrary use of the provisions against, for example, articles published;
- (c) the Charter of Rights and Freedoms provides the superstructure in which media protection is framed. Specifically, section 2(b) of the Charter protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The Charter may play a part in deterring spurious claims or casual prosecutions of newsgathering activities. Generally speaking, freedom of speech and the press is construed broadly but subject to limits which must be reasonably justifiable;
- (d) in addition to media protection in section 423.1 of the CCC, section 430 of the CCC also offers media protection. This section (“mischief”) focuses on damage and interference with property, which contains in section 430(7) an exclusionary provision: “[n]o person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information”, similar to that in section 423, Intimidation. Case law has confirmed that the purpose of this provision (section 430(7)) is “to clearly recognize, protect, and preserve public debate and free speech,” and that examples of persons entitled to its protection include pollsters, election enumerators, political candidates, sales people, peaceful picketers, solicitors of funds, political advocacy groups and the media; (Part 5.4.4 is referred)
- (e) The Communications, Energy, and Paperworkers (CEP) Union, the largest media union in Canada, has its own Code of Ethics, namely the CEP Journalism Code of Ethics. Those engaged in journalism and newsroom management activities are

governed by 25 principles in the collection and dissemination of news and opinion. Such principles include:

We shall obtain information, photographs and illustrations only by straightforward means. The use of other means can be justified only by over-riding considerations of the public interest. A journalist is entitled to exercise a personal conscientious objection to the use of such means (Principle 8); and

Subject to the justification by over-riding considerations of the public interest, we shall do nothing that entails intrusion into private grief and distress (Principle 12).

(Part 4.4 Introduction is referred).

### **Cases Involving Demonstration / Protest Activities**

26. The jurisdiction with the most cases of protests activities being targeted by anti-stalking legislation is the UK, where they have been mostly pursued under the civil harassment provisions of the PHA, most notably, injunctions like in the cases of news activities (Part 5.1 is referred). However, there have also been a few criminal prosecutions against protestors under the PHA (Part 5.1.2, 5.1.11, and 5.12 are referred).

27. In addition to the issues relating to civil injunctions arising out of news activities, civil injunctions sought against protesters under the PHA have extended their scope not only to the person who protest but persons related to the protester; i.e. non-parties at the time the injunction is applied for and granted. The court has power to grant an injunction against a representative defendant and to grant an injunction against a party by description. In both cases the issue before the court is whether those described are likely seriously to interfere with the claimant's rights, but in a representative claim the issue will also be whether the particular defendant is likely to interfere with the claimant's rights. Courts have had no difficulty in responding to these questions in the affirmative. The effect of these injunctions is that, since the persons have not been identified, they may not be in a position to respond to the allegations or to resist the order for injunction (Part 5.1.3 is referred).

28. The cases against protests/demonstrations brought under the UK PHA have attracted very serious concerns over the freedom of expression and peaceful assembly.

29. Alternative remedies to protests / demonstrations in the UK are criminal harassment charges under the Public Order Act 1986 (POA). In particular, section 5 of the PAO's "likely to be caused harassment, alarm or distress" is similarly used in the PHA. Thus, protestors could be prosecuted for harassment under POA rather than under PHA. Whether this would be the case might depend on prosecution policies and police investigation guidelines (Part 5.1.10 is referred).

30. A few cases have been identified in the other overviewed jurisdictions where the anti-stalking statutes have been used against protestors / demonstrators.

31. Victoria's case law suggests that the defence of conduct for the purpose of engaging in political activities would not assist the personal agenda of a protestor who uses his wider political objectives to cover up for the crime of stalking (Part 5.2.2 is referred).

32. The New Zealand HA has been used against protests / complaints. The courts have only suggested without deciding that the defence of "lawful authority" in section 17 of the HA (available for civil harassment but not for criminal harassment) may include protesting, lobbying for change, providing information and making complaints. Such behaviour would be lawful on the face of it and will not constitute harassment to qualify for a restraining order unless directed at a particular individual causing distress or likely to cause distress, judged by a subjective and objective standard. However, no case has been located where the defence has assisted protestors / demonstrators. Rather the courts have interpreted the object of the legislation as having the purpose of restricting freedom of expression to the extent necessary to provide protection for the victims of harassment (Part 5.3.3 is referred).

33. In Canada, one reason that could explain the absence of protest cases, at least in relation to labour-related activities under the criminal harassment provisions of the CCC, is that such activities were deemed to be excluded by the lawful authority defence due to the enactment of provincial statutes that allow and regulate strikes and picketing (Part 4.4.1, Part 5.4 and Part 6.4 are referred). However, the Supreme Court of Canada does not seem to rule

out the potential use of criminal harassment against activities such as picketing (which, like news-gathering activities, might be thought of as something that falls within 'lawful authority' in section 264). For example, the Supreme Court remarked only in *obiter* in a libel case that a defamatory statement involving picket signs alleging the appellant engaged in incest, could potentially also constitute criminal harassment under section 264 if it were made only to the defamed person (Part 4.4 are referred).

34. Case law in the US is to the effect that where the predicate contacts within a demonstration or protest involves expression, a restraining order may only be granted where expression or other associated conduct unambiguously, unequivocally and specifically communicates determination to cause harm (Part 5.5.1 is referred).

**Public Concern over the Impact of Anti-stalking Legislation on Freedom of the Press, Freedom of Demonstration / Protest and Freedom of Expression during the Legislative Process of Anti-stalking Legislation: Government responses before such legislation was passed**

35. In almost all the jurisdictions overviewed, public concerns over the impact of anti-stalking legislation on either freedom of the press, or freedom of demonstration/protest or freedom of expression were expressed. In some cases those concerns were moderately raised and in others, more vigorously pursued. In some cases, governments responded by way of giving assurances during legislative debates that those freedoms and rights would be guaranteed; in others, more concrete responses were given which translated in amendments to the draft laws. Sometimes, governments did not give much time for debate.

36. In the UK, the extent of concerns by the media, civic groups and the rest of the public over the freedom of the press, freedom of demonstration/protest and freedom of expression were serious. However, they attracted responses by the government only by way of assurances instead of amendments. One feature that was present during most legislative debates was the way the government rushed through those debates.

37. Regarding collective harassment, the concerns, in particular over freedom of protest were also serious, but because the UK faced the problem of animal protection extremists and most MPs agreed that this new form of harassment was to tackle that particular problem, the

government said that the right balance between civil liberties and the protection of potential victims had been struck. No other jurisdiction covers expressly this form of harassment, nor is it apparent from the provisions that they have such effect (Part 6.1.1 is referred).

38. On harassment to deter lawful activities, otherwise known as ‘economic sabotage,’ with its accompanying power to issue injunctions, there was no real debate as this offence was swiftly introduced by the government. However, strong criticism has been voiced against this form of harassment being used to undermine freedom of expression and peaceful assembly. This form of harassment only explicitly exists under the UK PHA. While the anti-stalking provisions in the Queensland’s Criminal Code Act 1899 and the intimidation offence in the Canadian Criminal Code might have certain resemblance, no similar effect is detected (Part 6.1.2 is referred).

39. With regard to the new stalking offences in the PHA, no serious public concerns over the relevant freedoms were expressed. We believe this was because the government relied on a survey that showed the seriousness of the stalking problem, mainly on women (Part 6.1.3 is referred).

40. No major public concerns were expressed by the media sector or civic groups in Queensland over the impact of the anti-stalking provisions on the relevant freedoms. It appears that concern groups eventually accepted the legislation which in 1999 not only broadened the scope of the laws but also the specific defences (Part 6.2.1 is referred).

41. Victoria provides an illustration of a government listening to serious public concerns and acting upon them by inserting amendments to the draft law that recognize activities such as news-gathering, disputes and demonstrations. At the same time, the term “without malice”, which qualifies the defences, is maintained. While journalists and other professionals remain protected by the defence in section 21A(4A)(a), they cannot use their profession as a cover to stalk and then try to rely on the defence (Part 6.2.2 and Part 1.4 are referred).

42. In New Zealand, the extent of public concern over the impact of anti-stalking legislation on freedoms of the press, demonstration / protest and expression was minimal. In particular, the absence of a defence for criminal harassment was not a concern, as the media

submission accepted that while the acts of the media sector might fall within the definition of criminal harassment, it was highly unlikely that the criminal offence would be applicable because of the requirement that there be a mental intent to cause fear in the victim or recklessness as to that result. In other words, they accepted that the statutory provisions would provide sufficient protection in the criminal sphere (Part 6.3 is referred).

43. Canada's concerns on freedom of expression were serious while the concerns specifically on freedom of the press were only briefly alluded. The government did address suggestions by concern groups but gave justifications for not incorporating them all. In particular, the suggestion of a less restricted defence than "lawful authority" in the CC was rejected on the basis that it would weaken the legislation too much. The suggestion to specify the type of activities that would fall under the "lawful authority" defence was also rejected because instances of lawful authority were already provided in relevant legislation in the provinces; one example being labour picketing. Thus whether an act of stalking was done without lawful authority would depend on each province's legislation of what "lawful authority" entails (Part 6.4 is referred).

44. No media concerns over the impact of the laws on the freedom of the press and expression in general were reported in California. In fact, it was the media which publicized stalking incidents eventually leading to the enactment of the anti-stalking legislation. On the other hand, media concerns in Nevada were taken into account during the legislative process of its anti-stalking law; particularly, in relation to expanding the defences to cover protests and news-gathering activities, the most detailed defences among all jurisdictions (Part 6.5 is referred).

45. Finally, media's and civic groups' concerns in South Africa were serious in number and substance; particularly over the impact of the anti-stalking Bill on the freedom of speech and the press; perhaps more than in the other jurisdictions' previous legislative processes. The seriousness of the concerns can be explained on the grounds that the drafters decided not to include a specific defence for the media and instead followed the approach in the UK, where critics had expressed grave concerns over the impact of the statute on freedom of the press. Another possible reason for the serious extent of the concerns expressed is that the South African journalism situation, compared to other countries, is different in the sense that

in South Africa, journalists have been reported as often being harassed by people they reported about. Thus the media might have reacted with more sensitivity to the impact of anti-stalking legislation on their daily work. However, the government did not introduce a specific defence as requested. (Part 6.6 is referred).

### **Public Concern over the Impact of Anti-stalking Legislation on Freedom of the Press, Freedom of Demonstration / Protest and Freedom of Expression Expressed Subsequent to the Enactment of the Legislation**

46. After the enactment of anti-stalking legislation, public concerns in some jurisdictions are still being expressed over its impact on the relevant freedoms. It is the UK PHA which has attracted most of the criticisms and concerns.

47. Concerns after the amendments to the PHA in 2001 and 2005 have been directed more prominently towards the erosion of the rights to freedom of expression and peaceful assembly rather than towards the erosion of the freedom of the press. This is because the amendments in question (collective harassment, and harassment to deter lawful activities) reflect a decision of the government to restrict demonstrations and protests in the UK. While concerns over the impact of the PHA on the freedom of the press seem to overlap with the concerns over the government's weighing in a statutory privacy law; injunctions under the PHA have continued to apply to the media as shown in Part 4.1 which have attracted strong criticism (Part 7.1 is referred).

48. In Australia, the focus has been on cyber stalking when the relevant pieces of legislation have been used to control interaction through social media. However, online stalking problems arising from trades, professions, news-gathering, demonstration or other activities have not been identified (Part 7.2.1 is referred).

49. In New Zealand, while there has been an instance of stalking against a protestor, which was pursued by the police where the complainant was a government department, the case appears to have settled through intervention of the alleged stalker's lawyers. On the application of the HA provisions to the media, little attention has been given to this issue except through a comment about the possibility of the provisions being used against investigative journalism (Part 7.3 is referred).



50. In Canada, public concerns over negative effects of criminal harassment on freedom of expression and other related freedoms immediately after the enactment were not apparent. In recent years however, this discourse seems to have changed to a certain degree. Three incidents of stalking, one involving a public political figure and the others cyber-stalking have raised concerns about the importance of freedom of the press when it interacts directly with privacy interests, and concerns about the importance of freedom of expression in general through social media, respectively. One of the incidents raises the issue of the emerging citizen-journalism, which has yet to be adequately addressed. (Part 7.4 is referred).

51. US concerns over the impact of anti-stalking laws on freedom of expression have recently focused on the expansion of such laws to cover communication through electronic means. (Part 6.5.3 and 7.5 are referred).

### **Recommendations for the Way Forward in Hong Kong**

52. The following summarises the key recommendations included in Part 8:

1. More research of the problem of stalking in Hong Kong should be promoted in order to enhance evidence-based policy making in this area.
2. Any new criminal or civil liability based on the stalking of another person should exempt legitimate activities such as news gathering activities and expressive activities concerning public affairs, unless those activities involve the use of violence, the threat of violence, intimidation or other illegal means.
3. A new offence of “Stalking”, together with its ancillary provisions should be added to a new Part IVA of the Crimes Ordinance, Cap 200 (CO).<sup>6</sup>
4. The UK approach to formulating the statutory terms of the new criminal offence of stalking should not be followed.

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<sup>6</sup> The approach of inserting anti-stalking provisions in existing criminal statutes is known to Canada (The Criminal Code), the US (Penal Code of California, and Nevada’s Revised Statutes) and Australia (The Criminal Code of Queensland, and the Crimes Act of Victoria).



5. The new offence of stalking should be based on the criminalisation of a course of conduct,<sup>7</sup> consisting of at least two of the acts in a list of four categories of prohibited acts (either the same or different acts)<sup>8</sup> which causes a person reasonably, in all circumstances, to fear for his or her safety or the safety of anyone known to him or her.
6. The mental element of stalking should be intention of causing a person fear for his or her safety or the safety of anyone known to him or her, or while reckless as to whether his or her conduct might cause such fear for safety. Recklessness should be understood here as either (i) an awareness of an unreasonable risk of causing fear for safety, or (ii) not caring about such a risk.
7. The exemptions from criminal liability should include conduct that comes within one or more of the following categories. Exemptions (a) to (c) are drawn from the Nevada legislation while exemption (d) from the Victoria legislation.
  - (a) Conduct done pursuant to lawful authority.
  - (b) Activities of a person while gathering information for communication to the public if those activities were done pursuant to a contractual arrangement with a newspaper, periodical, press association, radio or television station, or other media organisation.

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<sup>7</sup> A course of conduct is a term used in jurisdictions such as Victoria, California and Nevada.

<sup>8</sup> To constitute a course of conduct there must be at least two occasions of prohibited conduct, an approach adopted in Canada (case law on the concept of “repeatedly” indicates that conduct can be repeated only if it occurs on two occasions), New Zealand (pattern of behaviour) and California, which also follows the LRC’s position in that the concept of persistence be included in the *actus reus*.

The list of prohibited acts is :

- (a) watching, or loitering outside of or near the building or place where a person resides, works, carries on business, studies or happens to be;
- (b) contacting a person, either directly or indirectly, for example by telephone, mail, fax, email or through the use of any technology;
- (c) sending, delivering or causing the delivery of letters, telegrams, facsimiles, electronic mail, or packages or other objects to a person;
- (d) following, pursuing or accosting a person from place to place.

(c) Activities of a person carried out in the normal course of his or her lawful employment.

(d) Activities of a person carried out for the sole purpose of discussing or communicating matters that concern public affairs.

A defendant wishing to rely upon one or more of the exemptions has an evidential burden to raise the issue; and once the issue has been raised, the prosecution would need to disprove the applicability of the exemption beyond a reasonable doubt.