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

Final Report

October 2013

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

Final Report

1. This study focuses on the development and operation of anti-stalking legislation in the United Kingdom, Australia, New Zealand, Canada, the United States and South Africa. It examines how each of these jurisdictions have handled public concerns with such legislation being used to interfere with the freedom of the press, freedom of demonstration/protest and freedom of expression.

2. The study consists of eight parts. Part 1 briefly outlines the current legislation in each of the six jurisdictions. Parts 2 and 3 deal with statistical information, as available at present, in the last five years on stalking complaints, their nature, prosecutions and disposal of such cases as well as on stalking cases where civil action was pursued. Parts 4 and 5 provide an account of high-profile or randomly selected stalking cases involving news-gathering activities (Part 4) and demonstration/protest activities (Part 5) in each of the jurisdictions, as available. Part 6 evaluates the extent of public concern over the impact of anti-stalking legislation. It outlines relevant amendments made during the legislative process to safeguard fundamental freedoms, and how governments in each jurisdiction dealt with concerns. Part 7 evaluates the extent of public concerns subsequent to the enactment of anti-stalking statutes/relevant amendments.

3. Part 8 identifies recommendations for the way forward in Hong Kong, taking into account the focal point of the discussion during the consultation period which ended on 31 March 2012, i.e., the impact the proposed anti-stalking legislation in Hong Kong might have on press freedom, freedom of demonstration/protest, and freedom of expression.

4. This Report represents the final findings of the University of Hong Kong research team led by Professor Simon NM Young, former Director of the Centre for Comparative and Public Law.

PART 1

1. Brief Overview of the Current Anti-Stalking Legislation

5. This part offers a brief overview of the current anti-stalking legislation (covering behaviour described as harassment, stalking and intimidation), in the United Kingdom (UK), Australia (Queensland and Victoria), New Zealand, Canada (including Manitoba), the United States of America (US) (including California and Nevada) and South Africa. Appendices A and B respectively show in outline and detailed form the anti-stalking statutes and the main anti-stalking provisions of the jurisdictions studied.

6. The leading jurisdiction enacting modern anti-stalking legislation is the US state of California, in 1990. Within three years, almost all US states enacted similar legislation. In 1993, Canada amended its Criminal Code and became a supporter of like laws. Between 1993 and 1996, all Australian jurisdictions had enacted anti-stalking legislation, Queensland being the first one to do so. The UK and New Zealand followed suit in around 1997. Most of these laws have been amended on several occasions and cover both, criminal and civil harassment either in the same statute or separately. In October 2000, the Law Reform Commission of Hong Kong proposed a criminal offence of harassment to address the problem of stalking.

7. In relation to Australia, we conducted a search of all nine Australian jurisdictions' anti-stalking legislation. We concluded that the legislation in Queensland and Victoria are the most relevant to the present study because they provide specific defences/exemptions with regard to activities related to news-gathering and protest/demonstration. We conducted the same exercise in relation to US legislation. Although in the US most states provide for a defence of "constitutionally protected activities", some states incorporate more specific defences; among them, California, Nevada, Illinois, Arizona, Arkansas and Florida. We concluded that the defences in California and Nevada are good examples for further research. A table showing specific defences/exemptions in Appendix C also includes the text of the defences from the four other US jurisdictions.

8. The legislation in England and Wales, Northern Ireland, and New Zealand recognizes two classes of harassment, criminal and civil in one single statute. The UK anti-stalking legislation allows a civil suit for damages and injunctions. A civil cause of action must exist before an injunction can be granted. New Zealand's civil harassment does not include a suit

for damages. Scotland, Canada, and the US also recognize criminal and civil harassment but in separate statutes. In the US, while all states have criminal stalking laws, only 12 states have passed civil stalking laws. One such state is California whose civil anti-stalking legislation allows a suit for damages. Federal Canadian legislation covers criminal harassment and intimidation, while the Canadian province of Manitoba was the first Canadian jurisdiction to recognize an explicit statutory tort of stalking allowing also a suit for damages. All Australian states legislate stalking as a criminal offence while civil harassment is more associated with harassment at work, such as sexual harassment for which a suit for damages is available at common law. The South African anti-stalking legislation only recognizes civil remedies against harassment excluding a suit for damages. Its civil anti-stalking provisions were first contained in domestic violence legislation and later extended to other contexts in 2010. Stalking behaviour as a crime continues to be addressed by existing laws.

9. Whether in a single or separate statute, or whether or not part of criminal proceedings, all jurisdictions provide for preventive civil remedies against stalking/harassment. The line between criminal and civil law becomes blurred when violation of the civil remedies leads to criminal sanctions which may be ordered even after acquittal of a criminal charge of stalking/harassment.

10. In the UK, New Zealand and Queensland, preventive civil remedies are generally called restraining orders; in other Australian jurisdictions, they receive several names, including personal safety intervention orders, in Victoria. In the Canadian province of Manitoba, prevention and protection orders exist; and in the US and South Africa, the common label is protection/protective orders. Scotland uses the expression non-harassment orders.[1]

11. Another way of classifying stalking legislation may be based on whether it specifies certain acts that amount to stalking/harassment, other elements being present. At first glance it may appear that whenever there are prohibited specified acts, the laws may not be so broad.

[1] In Hong Kong, injunctions (in effect restraining orders) are available to spouses, former spouses, other relatives, cohabitants and former cohabitants, under the Domestic and Cohabitation Relationships Violence Ordinance, Cap 189. Applications are made to the District Court.

This is not necessarily the case. We attempt such classification. The statutes that provide a list of prohibited behaviour/conduct are:

a. Canadian Criminal Code R.S.C. 1985 (sections 264 Criminal harassment, and 423 Intimidation)

b. Manitoba Domestic Violence and Stalking Act, C.C.S.M. c. D93 (civil harassment)

c. Queensland Criminal Code Act 1899 (sections 359A-F Unlawful Stalking)

d. Victoria Crimes Act 1958 (section 21A Stalking)

e. New Zealand Harassment Act 1997 (criminal and civil harassment)

f. South Africa Protection from Harassment Act 2010 (civil harassment)

g. UK Protection from Harassment Act 1997 (only in relation to section 2A: Offence of stalking; i.e. the less serious of the two stalking offences)

h. Criminal Justice and Licensing (Scotland) Act 2010 (section 39 Offence of Stalking)

12. Statutes which do not provide a list of prohibited behaviour/conduct are:

a. California Penal Code § 646.9 Stalking

b. California Civil Code § 1708.7 Stalking

c. Nevada Revised Statutes § 200.571- 200.601 Harassment and Stalking

d. UK Protection from Harassment Act 1997[2] (criminal and civil harassment), except for section 2A. The legislation extends to Scotland only in relation to civil harassment.

[2] When the Protection from Harassment Bill was being debated at the committee stage in 1996, the amendment proposed by one MP that would have included a list of prohibited conduct was not agreed by the Government. In opposition to the amendment it was said that "The best catch-all is to stick to the word "harassment"." *See* HC Deb 17 December 1996 vol 287 cc820-35, col 825.

e. Protection from Harassment (Northern Ireland) Order 1997 (criminal and civil harassment) which is very similar to the Protection from Harassment Act 1997.

13. The main motivation for anti-stalking law reform in the respective jurisdictions has been to tackle behaviour arising from broken domestic relationships and of crazed fans. Increasingly conduct arising from relationships at work, at school, between neighbours, gang activities and other types of relationships is being labeled stalking/harassment. Bullying at work and at school is also, in some jurisdictions, part of stalking behaviour. Furthermore, stalking through the use of the Internet and other electronic means, commonly known as cyber-stalking and cyber-bullying, is increasingly the focus of anti-stalking reform.

14. More and more forms of conduct are being introduced to describe harassment with the result that in some jurisdictions, anti-stalking legislation is perceived as curtailing freedoms of speech, expression, the press,[3] and the right to protest and demonstration. One of the main contributors to this perception has been the UK's Protection from Harassment Act 1997 which is the only jurisdiction which explicitly includes speech as conduct.[4] The problem is that the core of anti-stalking laws is conduct rather than speech alone.

15. But the broad scope of anti-stalking provisions in general has prompted comments such as that the anti-stalking reforms have widened the scope of the laws to such an extent that they cover "almost every act of human behaviour."[5]

16. Anti-stalking legislation which deals with cyber stalking and cyber bullying will be mentioned as part of the developments in the relevant jurisdictions. They involve evolving social media-related bahaviour with a combination of conduct and speech. They can be treated as traditional conduct, or differently; for example, by removing the non-offending content to see whether the remaining pattern infringes the definition of stalking.[6] Issues of content ownership that implicates Internet service providers may arise, as well as issues of extraterritorial application (Victoria is an example where its anti-stalking legislation specifically covers this aspect).

[3] As to the distinction between freedom of the press and freedom of expression (or whether there is or should be such a distinction) see Anne S.Y. Cheung, *Self-censorship and the struggle for press freedom in Hong Kong* (The Hague: Kluwer Law International, 2003), Chapter 5, Part C ("Cheung").
[4] This perception is reflected in public opinion and case law as discussed below.
[5] Queensland Hansard 1999 (13 April) 984.
[6] Aaron H. Caplan, "Free Speech and Civil Harassment Orders" (2013) *64 Hastings Law Journal* 781, 849.

17. When the writing on social media with large audiences, in particular the emerging citizen-journalism, is at issue, it seems logical to suggest that it should be considered as speech about a person, rather than speech directed to that person. As such, that writing is addressed to large audiences in the same way a book or a newspaper is, and therefore should not be considered stalking.[7]

1.1. United Kingdom (UK): Protection from Harassment Act 1997

18. The UK's Protection from Harassment Act 1997[8] (PHA) covers both criminal and civil harassment, i.e. the same prohibition on harassment applies for the purpose of criminal and civil proceedings. Section 14 of the PHA provides that the provisions in relation to civil harassment apply to Scotland, while section 39 of the Criminal Justice and Licensing (Scotland) Act 2010, in force since 13 December 2010, provides for the offence of stalking. Very similar provisions to those in the PHA are found in the Protection from Harassment (Northern Ireland) Order 1997.

19. The PHA encompasses a wide range of behaviour and underlines "the increasingly blurred line between civil and criminal forms of redress."[9] This blurred line has been criticized as undesirable because it shows that breach of a restraining order in a civil court leads to a criminal sanction where the standards of proof are different.[10]

20. An illustration of the blurred line between civil and criminal forms of redress is the situation where a breach of an injunction under sections 3(3) or 3A of the PHA occurs and when a court is allowed to issue a warrant of arrest upon the concerned party's application. If the person has, without reasonable excuse, breached the injunction he is not punished with contempt of court (the normal civil remedy) (sections 3(7)/3A(3)), but his breach constitutes an offence punished with up to five years' imprisonment, or a fine or both (sections 3(6) and

[7] *Ibid.*
[8] The Protection from Harassment Act 1997 ("PHA") is accessible at http://www.legislation.gov.uk/ukpga/1997/40?timeline=true&view=extent
[9] Celia Wells, "Stalking: the criminal law response" (1997) 463 *Criminal Law Review*, p 463.
[10] Referring to Clause 3 [the currents s.3 of the PHA] of the Protection from Harassment Bill, A. Bennet MP said "I turn to the construction of clause 3, which begins with a civil remedy and builds a criminal offence on to that civil remedy. It is fairly unusual in this country for legislation to muddle criminal and civil court procedures, and we think that there are good reasons for keeping the two separate": HC Debates, session 1996-1997, December 17, 1996, col.847.

(9)).[11] Another example is section 5A, which was introduced to allow a court to make a restraining order in respect of a person acquitted (or whose conviction was quashed on appeal) of any offence under the PHA.

21. The power of making a restraining order under section 5A was added in 2009 by the Domestic Violence, Crime and Victims Act 2004 c. 28, section 12(5).[12] The maximum penalty for breach of the order is five years' imprisonment (section 5(6)). Before 2009, those orders were only available in the civil courts and the amendments meant that the power to impose such orders was extended to the criminal courts.

22. Although the government indicated that such orders would not undermine the presumption of innocence, as the court will have to consider "the same question as would a civil court—is an order necessary to protect from harassment?",[13] and that such orders would be available against either party, these two issues are not reflected in the provisions.[14]

23. Additionally, the court is also given discretion to issue a post-conviction restraining order under section 5.

24. The PHA basically creates two levels of criminal offences, one less serious than the other, and a tort of harassment (in the same terms as the less serious offence of harassment) allowing for remedies such as damages and injunctions. The Act prohibits a person from pursuing a course of conduct which amounts to harassment and which he knows or ought to know amounts to harassment of another. In deciding when a person ought to know that their course of conduct would amount to harassment, an objective test is applied; namely, if a reasonable person in possession of the same information would think the conduct in question would amount to harassment, then, the course of conduct would amount to harassment, other requisite elements being present as well.

[11] For a criticism on Governments' tendency to propose new crimes without strong and principled justification which might infringe on human rights, see Andrew Ashworth, "Social control and "anti-social behaviour:" the subversion of human rights?" (2004) *Law Quarterly Review* 263.
[12] See Explanatory Notes 54-60 at http://www.legislation.gov.uk/ukpga/2004/28/notes/division/4/2/3; amendment effective September 30, 2009.
[13] HL Deb, 15 December 2003, col 949.
[14] The relevant section in the PHA only reads: "[(3A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3 [civil remedy]."

25. The broadness of the PHA is obvious from, among others, the description of harassment: "References to harassing a person include alarming the person or causing the person distress" (section 7(2)).

26. The more serious form harassment is where the defendant's course of conduct causes another to fear, on at least two occasions, that violence will be used against him or her, and the defendant knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions (section 4(1)).

27. The PHA's other forms of harassment include collective harassment (i.e. the pursuit of conduct by two or more people); harassment to deter lawful activities (i.e. harassing two or more persons on separate occasions; meaning, only one instance of harassment would suffice); and most recently, two levels of stalking (one less serious than the other). The penalties in the PHA range from imprisonment terms of six months (lower level form) to five years (higher level form), to fines, or both.

28. In relation to stalking, sections 2A (Offence of Stalking) and 4A (Stalking involving fear of violence or serious alarm or distress) are relevant. The offences follow the "course of conduct" pattern in the other provisions. However, for the less serious offence in section 2A, for the first time, the PHA introduces "examples of acts of conduct" (sections 2A (3)). They are:

> (a) following a person,
>
> (b) contacting, or attempting to contact, a person by any means,
>
> (c) publishing any statement or other material—
>
> > (i) relating or purporting to relate to a person, or
> >
> > (ii) purporting to originate from a person,
>
> (d) monitoring the use by a person of the internet, email or any other form of electronic communication,
>
> (e) loitering in any place (whether public or private),

(f) interfering with any property in the possession of a person,

(g) watching or spying on a person.

29. It should be noted that during parliamentary debates leading to the introduction of stalking offences, it was felt that the PHA should provide for only one level of harassment, leaving the courts room for imposing tough sentences only for the worst types of behaviour. However, as the PHA already provided for two levels of offences, it was decided that stalking should follow the same pattern.

30. Finally, the provisions of the PHA would not apply to civil or criminal harassment if the conduct in question:

a. was pursued for the prevention or detection of crime;

b. the conduct was pursued by those required to act under any enactment or rule of law; and

c. where in the particular circumstances the pursuit of the course of conduct is reasonable. In the context of criminal harassment, this general defence is only available for the lower level form of causing harassment in section 1 and for the lower level form of stalking in section 2A; not for the higher levels of harassment in section 4 and stalking in section 4A.[15]

1.2. Scotland: The Criminal Justice and Licensing (Scotland) Act 2010, section 39 Stalking

31. Section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 creates the offence of stalking. The provision has been in force since 13 December 2010.[16]

32. The new stalking offence provides that a course of conduct (which involves conduct on at least two occasions (subsection 6)) causes a person suffer fear or alarm when there is either an intention to cause such fear or alarm (subsection 3), or when the person pursuing the

[15] This is evident from the provisions. The legislative intention on this aspect (re harassment) is found at HC Deb 17 December 1996 vol 287 cc820-35, col 834, further discussed in Part 6 below.
[16] The Criminal Justice and Licensing (Scotland) Act 2010 is accessible at http://www.legislation.gov.uk/asp/2010/13/contents

course of conduct knows or ought to have known in all the circumstances that it would likely cause such fear or alarm (subsection 4).

33. Subsection 6 defines what amounts to conduct by way of nine specified acts, similar to those in section 2A of the PHA. However, unlike the stalking offences in the PHA, section 39 does not create two levels of offences.

34. The same three general defences in the PHA are available in section 39 (subsection 5). The penalties range from imprisonment terms of one to five years, fines or both.

1.3. Queensland: The Criminal Code Act 1899, section 359A-F Unlawful Stalking

35. The first Australian jurisdiction to enact anti-stalking legislation was Queensland when the offence of "unlawful stalking" was introduced into its Criminal Code in late 1993.[17] At that time there were only two sets of provisions; one, dealing with unlawful stalking and the other with summary proceedings (sections 359A and 359B respectively).[18]

36. As significantly amended, section 359A-F of the Criminal Code provides that 'unlawful stalking' includes either one protracted act, or conduct that occurs on more than one occasion, consisting of one or more acts of certain specified kind or similar to those specified acts in section 359B. One of those acts is "an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence." It appears that harassment is a sub-form of stalking.

37. There are two situations envisaged in the provisions in which the conduct would amount to unlawful stalking. One is where such conduct "would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to or against property of, the stalked person or another person." The other is where such conduct "causes detriment, reasonably arising in all the circumstances, to the stalked person or another person."

38. Although not part of the criminal proceedings, section 359E(3)(c) provides that breach or threat to breach an injunction or order which has been imposed by a court or

[17] Gregor Urbas, "Australian Legislative Responses to Stalking," Australian Institute of Criminology (2000) p 3 ("Urbas"). The Criminal Code is accessible at http://www.legislation.qld.gov.au/legisltn/current/c/crimincode.pdf.
[18] Urbas, p3.

tribunal under a law of Commonwealth or a State may be taken into account in assessing whether to increase the maximum penalty of five years' imprisonment to seven years. Other aggravating factors include an intentional threat to use violence, and possession of a weapon within the meaning of the relevant legislation.

39. Section 359F, also not part of criminal proceedings, provides for the application and granting of restraining orders, breach of which leads to up to one year's imprisonment or a fine.

40. The statutory exemptions to the offence on unlawful stalking are:

a. acts done in the execution of a law or administration of an Act or for a purpose authorised by an Act;

b. acts done for the purposes of a genuine industrial dispute;

c. acts done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest;

d. reasonable conduct engaged in by a person for the person's lawful trade, business or occupation; and

e. reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving.

41. There is no case law deciding specifically on the exemptions of "acts done for the purposes of a genuine industrial dispute" (section 359D (b)) and "acts done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest" (section 359D(c)).

42. The Explanatory Notes to the Criminal Code (Stalking) Amendment Bill 1999[19] and the Government's clarification during parliamentary debates[20] indicate that the defences of genuine political and industrial disputes in section 359D are retentions of the defences in the

[19] Accessible at http://www.legislation.qld.gov.au/Bills/49PDF/1999/CrimCodeStlkAmdBExp99.pdf
[20] See Part 6.2.1 below.

old section 359A(4) of the Criminal Code 1899.[21] Concerning the old section 359A(4), the Queensland Government explained in the Explanatory Notes to the Criminal Law Amendment Bill 1993[22] that the defences required the defendant to "prove, on the balance of probabilities, that the relevant course of conduct was undertaken for the purposes of a genuine industrial – or other – dispute carried on in the public interest". Nevertheless, there is no case law deciding on this old section 359A(4), and the terms "genuine" and "carried on in the public interest" were not discussed during parliamentary debates when section 359A(4) was passed.[23]

43. Regarding section 359D (e), which provides that unlawful stalking does not include "reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving," the Explanatory Notes to the Criminal Code (Stalking) Amendment Bill 1999 do not explain what kind of conduct engaged in by a person to obtain or give information is "reasonable". There appears to be only one case which decided on section 359D (e), *C v. H*. [24]

44. In *C v. H,* the stalker was the victim's adoptive father who had been convicted of indecently dealing with the victim in 1995. In 2002, the victim received a note from her adoptive father which said "Please ring" and left a phone number. The victim's husband called the adoptive father and asked him not to contact the victim anymore. However, he sent the victim another note, a two-page letter. This letter dealt with allegations that the adoptive father wished to make about the offence against the victim for which he had been convicted. He was charged with and convicted of unlawful stalking by a Magistrates' Court on the basis that the three acts were protracted (i.e. the first note, the phone call which was provoked by the adoptive father, and the second note).

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[21] The Criminal Law Amendment Act 1993 which contains the old section 359A(4) of the Criminal Code 1899 is accessible at http://www.legislation.qld.gov.au/legisltn/acts/1993/93ac065.pdf

[22] Accessible at http://www.legislation.qld.gov.au/Bills/47PDF/1993/CriminalLawAmdB93E.pdf

[23] Queensland Hansard 1993 (18 November) 6065-6077, accessible at http://www.parliament.qld.gov.au/documents/Hansard/1993/931118ha.pdf#xml=http://www.parliament.qld.gov.au/internetsearch/isysquery/af450bd8-a30c-4a87-a460-606635e57df7/1/hilite/
The only defence discussed in the parliamentary debate concerned the exclusion of industrial disputes where the Government explained that this exclusion aimed at preserving the jurisdiction of the various industrial relations bills passed by the Parliament (see p 6077 of the Hansard records).

[24] Unreported [2003] QCA 493. See comments on this case in Heather Douglas, "Personal Protection and the Law: Stalking, Domestic Violence and Peace and Good Behaviour" (undated) ("Douglas") accessible at http://www.qlrc.qld.gov.au/events/personalprotection.pdf.

45. On his unsuccessful appeal, the District Court found that he could also have been convicted on the basis of the two separate incidents; namely, the two notes; in which case "protraction" was not necessary to be proven. The District Court rejected the defence that the second note was delivered for the purpose of obtaining information about the whereabouts of the victim's mother. Therefore, his conduct was not reasonable under section 359D(e).

46. The Court of Appeal refused leave to appeal on the basis that the two stalking acts, i.e. the letters, had been proven and that this was enough for the stalking conviction. The Court also noted that there was no error on the part of the District Court in rejecting the ground of appeal based on section 359(e).

1.4. Victoria: The Crimes Act 1958, section 21A Stalking

47. The Australian state of Victoria was the third or fourth jurisdiction in Australia to include stalking provisions in the Crimes Act 1958. It did so through the Crimes (Amendment) Act 1994 (Vic).[25]

48. As amended, section 21A of the Crimes Act 1958[26] criminalises stalking, and, similar to Queensland's, specifies acts or conduct that constitute stalking. The list of specified conduct is probably the longest among all jurisdictions considered in this study. Also, the maximum penalty is higher than that in Queensland: up to 10 years' imprisonment.

49. A person has the intention to cause physical or mental harm (including self-harm, or to arouse apprehension or fear) either if he knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear; or he in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.

50. A court may, within the meaning of the Personal Safety Intervention Orders Act 2010, make a personal safety intervention order in respect of stalking. Contravention of the order is

[25] *Ibid*.
[26] The Crimes Act 1958 is accessible at http://www.austlii.edu.au/au/legis/vic/consol_act/ca195882/

an offence attracting up to two years' imprisonment and a fine, or both (section 100 of the 2010 Act).[27]

51. The Victorian anti-stalking provisions provide for defences in the following terms:

> it is a defence to the charge for the accused to prove that the course of conduct was engaged in without malice—
>
> i. in the normal course of a lawful business, trade, profession or enterprise (including that of any body or person whose business, or whose principal business, is the publication, or arranging for the publication, of news or current affairs material); or for the purpose of an industrial dispute; or
>
> ii. for the purpose of engaging in political activities or discussion or communicating with respect to public affairs.

52. As noted in Part 6.2.2 below, the Attorney-General refused to define the term "without malice" in the Legislative Assembly's parliamentary debates on the Crimes (Stalking) Bill in 2003 and left the interpretation task to the courts. However, there is no case law interpreting the term within the anti-stalking legislation. During the parliamentary debates, an MP mentioned the defamation case of *Roberts v. Bass*[28] and asked what bearing the case might have on the term "without malice" in the anti-stalking legislation.[29] There was no answer to this question.

53. The case *Roberts v. Bass* highlights the difficulties in interpreting this term. What is perhaps certain from the case is that malice does not include irrationality or prejudice. We briefly discuss this lengthy judgment.

54. In *Bass*, Mr. Rodney Bass (the Respondent) sued Mr. Geoffrey Roberts (the 1st Appellant) for damages because the 1st Appellant had injured him by publishing three defamatory materials in an electoral contest. The Respondent also sued Mr. Kenneth Case

[27] the Personal Safety Intervention Orders Act 2010 is accessible at http://www.austlii.edu.au/au/legis/vic/consol_act/psioa2010409/s100.html
[28] [2002] HCA 57.
[29] This is discussed in Part 6.2.2.

(the 2nd Appellant) for defamation as the 2nd Appellant distributed a defamatory publication, one of the publications created by the 1st Appellant, on the election day. One of the main issues in the case was whether the 1st and 2nd Appellants' conduct in publishing the defamatory materials in the election contest was malicious. If the answer was positive, their defence that their conduct occurred on a privileged occasion (i.e. they had a duty or interest to make the statements, though defamatory, and the recipient had a corresponding duty to receive that statements) would fail. Both the trial judge and the Full Court of the Supreme Court of Australia held that the 1st and 2nd Appellants' conduct was malicious.

55. The two Appellants appealed to the High Court of Australia which had a seven-judge bench. The judgments made by them were split. The majority (Gaudron J, McHugh J, Gummow J and Kirby J) agreed that, in an electoral and democratic process, it was acceptable to publish material with the intention of injuring a candidate's political reputation and causing him/her to lose office.

56. A defendant who published relevant material with such motive merely made use of the occasion to express his/her views about a candidate for election and thus, there was nothing improper with his/her conduct. The majority concluded that there was no malice in the 2nd Appellant's conduct and allowed his appeal. As for the 1st Appellant, his appeal was also allowed but a retrial was ordered for the trial judge to apply the correct law into the facts. While Gleeson CJ and Hayne J found that that the 2nd Appellant's appeal should be allowed, they held that the 1st Appellant's conduct was malicious and his appeal should be dismissed. Callinan J opined that there was abundant evidence found by the trial judge that the conduct of both Appellants was malicious and their appeal should therefore be dismissed. As to what does not amount to malice, Gleeson CJ said that "neither irrationality, nor prejudice, constitute or establish malice."

57. The divided views among the Justices in this case reflect the complexities of the issue of malice and its application. But it should be remembered that this case was decided in the context of defamation and electoral campaign.

58. The term " without malice" in the "Crimes (Stalking) Bill as sent print – explanatory memorandum"[30] explains the term as follows:

> The defence requires that the course of conduct complained of must be carried out without malice. Where an offender's real purpose is 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 another person, malice will be present. It will therefore not be possible for a person who happens to be a journalist or other profession [sic] to use their profession as a cover to stalk and to then try to rely on the defence.

59. Thus a journalist, or other professional, who is carrying out his professional duties will still be covered by the exemption, but if he uses his profession for his own personal agenda, he will not be protected.

60. The government also did not explain the meaning of the terms "normal" and "lawful" during parliamentary debates or in the above-mentioned explanatory memorandum. Case law up to date has not clarified the meaning of those terms in the context of a course of conduct engaged in without malice "in the normal course of a lawful business" within the anti-stalking statute.

1.5. New Zealand: The Harassment Act 1997

61. The New Zealand's Harassment Act 1997[31] (HA) came into force in 1998[32] and, like the UK PHA, covers two classes of harassment, criminal and civil.

62. The HA formed part of a package of legislation (the Harassment and Criminal Associations Bill) that targeted different levels of offending and problems associated with gang activities.[33]

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[30] Accessible at http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/9D830232116C04F0CA2570D700196255/$FILE/551079exa1.pdf

[31] The Harassment Act 1997("HA") is accessible at http://www.legislation.govt.nz/act/public/1997/0092/latest/versions.aspx

[32] While Parts 1-2 and 4 came into force in 1 Jan 1998, Part 3 (Civil harassment) came into force on 1 May 1998.

[33] This is discussed in Part 6 below.

63. The purpose of the HA is to provide protection to victims who have been subjected to repeated actions that constitute harassment. Similar to the UK, harassment is given a broad definition to include such actions as harassment by neighbours, incidence of stalking, harassment and intimidation by gang members. To achieve this, the Act creates criminal offences for "the most serious types of harassment"[34] and also empowers the District Court to grant civil law restraining orders for harassment victims not covered by the Domestic Violence Act 1995.

64. Under the HA, harassment is a pattern of behaviour directed usually at a target person, but can involve behaviour directed at someone in a family relationship with the target person. A pattern of behaviour arises upon doing a specified act (in section 4) on at least two separate occasions within 12 months.

65. One of the specified acts in section 4 is "contacting a person (by telephone, letter, email, text, social media such as Facebook, or in any other way)." Thus, unlike the UK PHA, where conduct includes speech, and like most anti-stalking legislation, the HA is more subtle in its formulation, because it maintains the core of harassment, which is conduct, by specifying an act which is aimed at conduct by way of "contacting" by any means.

66. The person who harasses must intend to make a person fear for their safety or for the safety of a partner or family member, or know that the harassment is likely to make a person fear for their safety or for the safety of a partner or family member. This is criminal harassment and it attracts a maximum penalty of two years' imprisonment (section 8).

67. If any of the specified acts (which the harasser must have carried out two or more times) causes or is likely to cause the target person serious distress and it would distress a reasonable person in the applicant's situation, then, he can apply for and be granted a restraining order under Part 3 (Civil harassment). The court must consider the degree of distress, actual or threatened, and any order must be necessary for the protection of further harassment (section 16). Contravening a restraining order makes a person liable to imprisonment of up to two years (section 25).

[34] *R v. D* [2000] 2 NZLR 641 paras 12 – 19.

68. The HA does not contain a specific defence or exemption in relation to the criminal offence of harassment; however, civil harassment provides for a general defence of lawful purpose. This means that a court would not make a restraining order if the person proves that the specified act was done for a lawful purpose (section 17).

69. In mid 2012, proposals for reform in the context of digital communications were made by the New Zealand Law Commission. The Commission recommended, among others, amendments to the HA which would broaden the definition of harassment by including the concept of "continuing act carried out over any period" (i.e. one instance of behaviour would be sufficient to trigger harassment). Specified acts would also include "electronic communication."[35]

70. In addition, there is currently, work underway to develop a new type of order under the HA to reduce the likelihood of victims of serious violent or sexual crimes having unwanted contact with their attackers. The new order can impose a range of conditions on offenders, including restrictions on visiting particular locations or geographical areas, and not to contact victims. Similar to existing restraining orders, the new order can apply indefinitely if the court considers it necessary. Legislation to amend the HA and implement the changes on these aspects is expected to be progressed in 2013.[36]

1.6. Canada: Criminal Code R.S.C. 1985, section 264 Criminal harassment and section 423 Intimidation

71. Before 1993, persons who engaged in stalking behaviour were liable under various offences, including intimidation (section 423 of the Criminal Code). On 1 August 1993, the Criminal Code[37] was amended to create the offence of criminal harassment (section 264) as a specific response to violence against women, particularly in the context of domestic

[35] See Communications (New Media) Bill drafted for the Law Commission by the Parliament Council Office, sub-part 3 Harassment Act 1997:
29 Principal Act p 10
30 Section 3 amended (Meaning of "harassment") p 10
31 Section 4 amended (Meaning of "specified act") p 11
32 Section 19 amended (Standard conditions of restraining orders) p 11.
See also The Ministerial Briefing Paper–Harmful Digital Communications: The adequacy of the current sanctions and remedies, August 2012. Both are accessible at http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media?quicktabs_23=ministerial_briefing

[36] Information obtained by email from Mr Malcolm Luey, General Manager, Criminal Justice Group, Ministry of Justice, New Zealand, 1 March 2013.

[37] The Criminal Code R.S.C. 1985 is accessible at http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html

violence.[38] Nevertheless, the offence extends to all contexts of daily life. Amendments introduced since then have not altered the definitions in section 264.[39]

72. Section 264 provides that a person commits the offence of harassment if he engages in prohibited conduct (referred to in section 264 (2) (a) to (d)) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them. Criminal harassment can also be conducted through the use of a computer system, including through the Internet.[40]

73. Under section 423, a person commits the offence of intimidation if he wrongfully engages in specified acts (in section 423 (1)), for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing.

74. Unlike the other jurisdictions which require a course of conduct or specify a minimum number of times that a conduct has to be engaged in, the Canadian Criminal Code does not make such references. Section 264 refers to repeatedly following and communicating, while watching or besetting a place, or where there has been threatening behaviour.

75. The maximum penalty for the offence of harassment is 10 years' imprisonment, and five years for the offence of intimidation.

76. Where a person is convicted or discharged under section 264, the "court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be" (section 109).

[38] Criminal Harassment: A Handbook For Police And Crown Prosecutors, March 2004 (as at 3 August 2012) ("Criminal Harassment Handbook") accessible at http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/part1.html#leg; accessed 9 February 2013.
[39] *Ibid*.
[40] See the Criminal Harassment Handbook, Part I, para 1.6 Cyber-stalking and Online Harassment.

77. While both sections of the Criminal Code (264 and 423) provide for a general defence of lawful authority,[41] the offence of intimidation has a specific defence which applies to one of the seven acts specified in section 423(1)(a) to (g). That one act is found in section 423(1)(f): "besets or watches the place where that person resides, works, carries on business or happens to be." (This act is also specified in section 264(2)(c) for which there is no similar exemption). Section 423(2) provides the following exemption:

> a person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

1.7. Manitoba: The Domestic Violence and Stalking Act, C.C.S.M. c. D93

78. Canadian provincial legislatures have the authority to pass legislation designed to prevent crime as opposed to punishing people who commit crimes; the latter is a matter of federal jurisdiction.

79. In 1997, the Canadian province of Manitoba introduced the Domestic Violence and Stalking Act, C.C.S.M. c. D93[42] and inserted an explicit tort of stalking (section 26) under which stalkers can be sued for damages.

80. Stalking is defined by closely using the definition of criminal harassment: "Stalking occurs when a person, without lawful excuse or authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, repeatedly engages in conduct that causes the other person reasonably, in all the circumstances, to fear for his or her own safety" (section 1(2)(2)). Note the difference of the defence "without lawful excuse or authority" here and the one in the older section 264 of the Criminal Code, "without lawful authority" only.

[41] The private investigator hired to check into an insurance claim has been cited as an example of "lawful authority. See http://www.duhaime.org/LegalResources/CriminalLaw/LawArticle-95/Stalking.aspx, accessed 16 February 2013.
[42] The Domestic Violence and Stalking Act is accessible at http://web2.gov.mb.ca/laws/statutes/ccsm/d093e.php. The Act was assented to on 29 June 1998 and is in force since 30 September 1999; formerly the Domestic Violence and Stalking Prevention, Protection and Compensation Act, accessible at http://web2.gov.mb.ca/bills/38-2/b017e.php#top

81. There is a deeming provision of fear applied to certain persons: "Where, but for mental incompetence or minority, a person would reasonably, in all the circumstances, fear for his or her safety owing to conduct referred to in subsection (2), the person is conclusively deemed to have the fear referred to in that subsection" (section 1(2) and (4)).

82. Examples of conduct referred to in subsection (2) include:

> (a) following from place to place the other person or anyone known to the other person;
>
> (b) communicating directly or indirectly with or contacting the other person or anyone known to the other person;
>
> (c) besetting or watching any place where the other person, or anyone known to the other person, resides, works, carries on business or happens to be; or
>
> (d) engaging in threatening conduct directed at the other person or anyone known to the other person.

83. The Act also provides for protection and prevention orders, while compensation can also be pursued. Furthermore, if the stalker operated a motor vehicle to further stalking or domestic violence, his driver's licence can be suspended. The Act also gives the court discretion to require persons committing domestic violence or stalking to attend counselling or therapy.

84. Breach of an order attracts a financial penalty, or up to two years' imprisonment, or both; and in the case of a corporation, a fine (section 13(2)). Furthermore, the corporate officers and directors who direct, authorize, assent to, permit or participate or acquiesce in an offence by the corporation, may be convicted of the offence, whether or not the corporation has been prosecuted or convicted (section 13(3)).

1.8. United States of America (US)

85. Stalking in the US is dealt with through state law. There are also federal laws mainly related to harassment arising from interstate or foreign commerce/communications.

86. Most of the states follow a list-of-conduct approach while there are differences in definitions among states. The differences or variations relate to four aspects:

- the type of repeated behaviour that is prohibited;
- whether a threat is required as part of the stalking;
- the reaction of the victim to the stalking; and
- the intent of the stalker.[43]

1.9. California: Penal Code § 646.9. Stalking

87. In response to highly publicized stalking incidents, California became the leading jurisdiction to enact a stalking law in 1990. Through December 31, 1991, 10 people had been convicted and sentenced under the then provisions of the California's Penal Code.[44]

88. Under the current California Penal Code, Title 15 (Miscellaneous Crimes), Chapter 2 (Other Miscellaneous Offences) § 646.9,[45] a person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking (§ 646.9 subdivision (a)). The penalty is imprisonment of up to one year, or a fine or both.

89. "Harasses" means "engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose" (subdivision (e)).

90. "Course of conduct" means "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activities are not included within the meaning of "course of conduct" (subdivision (f)).

91. "Credible threat" means:

[43] Scottish Executive Social Research, "Stalking and Harassment in Scotland," 15 November 2002, p 9, citing US Department of Justice (2002) *Strengthening Antistalking Statutes*, Legal Series Bulletin 1.
[44] See Dawn A. Morville, "Stalking Laws: Are They Solutions for More Problems?" (1993) 71 *Washington University Law Review* 921, 928 n 42 ("Morville").
[45] The California Penal Code § 646.9 is accessible at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=639-653.2.
All US states' legislation is accessible at http://www.victimsofcrime.org/our-programs/stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state

> a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, 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, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of "credible threat" (subdivision (g)).

92. Thus, the defences in the California Penal Code § 646.9 are:

a. a course of conduct pursued under constitutionally protected activities,

b. a credible threat made under constitutionally protected activities.

93. Furthermore, § 646.9 exempts from liability "conduct that occurs during labor picketing" (subdivision (i)).

94. If a person who commits the offence in subdivision (a) is the subject of a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, the imprisonment term will range from at least one year to a maximum of four years (§ 646.9 subdivision (b)).

95. Regarding sentencing, there is a possibility that if probation is granted, or a suspended sentence imposed, a condition that the person participates in counselling can be imposed too. The court has also to consider issuing a protective order restraining the defendant from any contact with the victim. The sentencing options are not mutually exclusive from each other.

1.10. California: Civil Code § 1708.7. Stalking

96. One of the 12 states, which allow the filing of a civil law suit against stalkers, is California, through an explicit tort of stalking in its Civil Code. The plaintiff (i.e. the stalked

person) can sue for damages, including, but not limited to, general damages, special damages, and punitive damages.

97. § 1708.7 states that a series of elements of tort must be proved. They include engaging in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff, as a result of which the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member.

98. Most of the definitions used in the tort of stalking mirror those in the criminal offence under the Penal Code. However, for civil harassment substantial emotional distress has to be shown: "the course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person" (subdivision (d)(4)).

99. Note also that civil harassment mediation is available in California for certain types of harassment.[46]

100. There is a wide exemption in § 1708.7:

> This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly.

1.11. "Constitutionally protected activity" in California

101. The following references to "Constitutionally protected activity" are found in section 646.9 of the California Criminal Code:

- "Constitutionally protected activity is not included within the meaning of "course of conduct." (Subdivision (f))

- "Constitutionally protected activity is not included within the meaning of "credible threat." (Subdivision (g))

[46] See Civil Harassment: Applying Mediation, October 2007, at http://www.mediate.com/articles/pageN5.cfm

- This section shall not apply to conduct that occurs during labor picketing. (Subdivision (i))

102. The following references to "Constitutionally protected activity" are found in section 1708.7 of the California Civil Code:

- "Constitutionally protected activity is not included within the meaning of "pattern of conduct." (Subdivision (b)(1))

- "This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly." (Subdivision (f))

103. The statutory exemption for "constitutionally protected activity" is provided in anti-stalking legislation for the purpose of avoiding an overbreadth challenge. [47] Such "constitutionally protected activity" includes most commonly an activity protected under the First Amendment to the United States Constitution. The First Amendment contains several guarantees of personal freedom[48] and reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

104. Other constitutional rights such as the right to travel, the right to remain in a public place, are also protected activity. [49] Available Californian case law where "constitutionally protected activity" has been interpreted in the context of the anti-stalking provisions deals with the First Amendment. We discuss some of those cases.

[47] Robert P. Faulkner and Douglas H. Hsiao, "And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation" (1994) 31 *Harvard Journal on Legislation* 1, 19-20.
[48] "The Complete Bill of Rights: the drafts, debates, sources, and origins", edited by Neil H. Cogan; David Lindsay Adams, Theresa Lynn Harvey, New York: Oxford University Press, 1993, Introduction.
[49] See Marjorie A. Caner, J.D., "Validity, construction, and application of stalking statutes" (1995) 29 *American Law Reports* 5th 487.

105. In ***Moore v. Fox***,[50] the California Appellate Court reiterated that only speech on matters of public concern is at the heart of First Amendment protection.[51] "Speech between purely private parties, about purely private parties, and on matters of purely private interest are wholly without …First Amendment concerns."[52]

106. In ***People v. Dopler***,[53] the California Appellate Court held that section 649.9 does not require a prosecutor to disprove as a separate element of the crime that harassing conduct at issue concerns constitutionally protected activity. Instead, by proving the elements of section 649.9 (i.e. 1. willfully, maliciously, and repeatedly following or… harassing…; 2. making a credible threat;[54] and 3. with intent to place the person in reasonable fear of…[55]) beyond reasonable doubt, the prosecutor also proves to the finder of fact that the defendant's conduct is not constitutionally protected activity. That is because once a credible threat (or true threat) is established it could not become protected activity if the other elements have also been proved. The meaning of "threat" is thus at the core of the First Amendment protected activity and is explained in more detail in the following case, where the interrelationship between "constitutionally protected activity" and conduct that "serves no legitimate purpose" was also apparent.

107. In ***Muhammad v. Martel***, [56] the right to free speech was affirmed to be "constitutionally protected activity." Speech that includes a "true threat" serves no legitimate purpose[57] and is therefore not protected activity.

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[50] Not reported, Cal.App. 2 Dist. 2013, 13 March 2013.
[51] As cited from *Brekke v. Wills* (2005) 125 Cal. App.4th 1400, 1409.
[52] *Ibid*.
[53] Not reported, Cal. App. 4 Dist., 04 October 2012.
[54] In determining whether a threat occurred, the entire factual context including the surrounding events and the reaction of the listeners, must be considered: *People v. Falck* (1997) 52 Cal. App. 4th 287, 297-298.
[55] *People v. Uecker* (2009) 172 Cal. App. 4th 583, 593.
[56] Not reported, F.Supp.2d, 2012 WL 1980775 (N.D.Cal.), 1 June 2012.
[57] **Penal Code § 646.9 Stalking:** "(e) For the purposes of this section, "**harasses**" means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that **serves no legitimate purpose**." (*Emphasis added*).
The phrase **serves no legitimate purpose** has been given a dictionary meaning. In ***Prestwood v. Cohen*** G038044 (Cal. App., 4 October, 2007), the defendant, Cohen appealed from the issuance of an injunction prohibiting him from harassing the plaintiff Ms Prestwood and her husband and children. He had taken photographs of Ms Prestwood and his family. Cohen, a former friend of the Prestwoods who had worked with Ms Prestwood's husband, contended no substantial evidence supported the injunction. The Plaintiff failed to present evidence that the defendant's conduct of photographing Ms Prestwood lacked a legitimate purpose since he used the photos to demonstrate the plaintiff deceived another court in a pending lawsuit when she claimed she was too ill to be deposed. Thus the appellate court held that the court below had erred in granting the injunction. The defendant had argued that his legitimate purpose was to prove that the plaintiff and her husband

108. In this case, the petitioner was the ex-boyfriend of the victim, Ivory Jean Hart (Hart), who was a vice-president of Citibank. In April 2003, due to acts committed against Hart between September and October 2002 (including leaving Hart threatening telephone messages), the petitioner was convicted of stalking under section 646.9 of the Penal Code (and making terrorist threats under section 422 of the Penal Code). In August 2003, the petitioner was placed on probation and a 10-year restraining order issued against him, prohibiting him from contacting Hart and her employer.

109. Around two months after the petitioner was on probation, he filed a lawsuit against Hart. Hart believed that the lawsuit was an indication that the petitioner intended to make good on all his threats against her, including killing her. In light of this, a written 10-year protective order was filed on 13 January 2004 to the effect that the petitioner should not annoy, harass, strike, threaten, sexually assault, batter, stalk, destroy the personal property of, or otherwise disturb Hart. It also prohibited the petitioner from contacting Hart through a third party except an attorney of record.

110. Despite both, the restraining order and the protective order, the petitioner continued to annoy and harass Hart. In December 2003, he gave at least 50 hang-up phone calls to Hart. In early 2004, the petitioner telephoned Citibank's ethics hotline to report that Hart had been smoking marijuana, using nonprescription sleeping pills and Vicodin, and had marijuana delivered to Citibank. He also wrote several letters to Citibank concerning Hart's habitual marijuana use and threatened to publish a warning to Citibank's customers that Hart was addicted to drugs. Citibank had replied to the petitioner that his allegations were untrue and the matter would not be further investigated, but the petitioner continued to publicise Hart's marijuana use. Apart from writing to Citibank, he wrote to Citibank's chief executive officer in New York concerning Hart's drug use. The petitioner was arrested in late February 2004

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had perjured themselves. This led to an abuse of the discovery process as part of the suit pursued by Cohen against a company of which Mr Prestwood was the primary shareholder. The Court of Appeal agreed. The appellate court gave a dictionary meaning to the word "legitimate". It cited as follows on its meaning: "[t]hat which is lawful, legal, recognized by law, or according to law," (Black's Law Dict. (5th ed.1979) p. 811); "sanctioned by law or custom," (Webster's New World Dict. (2d College ed.1982) p. 807); "justified; genuine: *a legitimate complaint,*" (Random House College Dict. (rev. ed.1984) p. 766, original italics); or "GENUINE," "accordant with law or with established legal forms," "LAW-ABIDING," "conforming to recognized principles or accepted rules and standards." (Webster's 3d New Internat. Dict. (1993) p. 1291.)." In this case the Court was dealing with the **C**ivil Code § 1708.7. Stalking which contains very similar provisions as those in the Civil Code **§** 646.9 Stalking. **C**ivil Code § 1708.7. Stalking (4) reads: "Harass" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose."

and was remanded in custody until being released on 13 January 2005. On 24 May 2004, the petitioner was sentenced to imprisonment for a violation of the probation imposed upon him.

111. The petitioner however, continued to publicize Hart's drug use when he was in prison. On 24 May 2004, the same day when he was sentenced to imprisonment, he wrote to Citibank's chief executive officer attaching photographs of Hart and stating he was facing imprisonment because of his prior attempt to provide information to Citibank. On 25 May 2004, the petitioner left a telephone voice mail message at the County prosecutor's office stating that he would continue to publicise that Hart was a marijuana addict for the rest of his life, but he would never use violence or threats of violence. On 27 May 2004, the petitioner wrote to Citibank's chief executive officer again stating that all future communications concerning Hart's criminal behaviour would be sent directly to Citibank's customers and the media. On 7 December 2004, the petitioner wrote to the Alameda County District Attorney's office summarizing his concerns about the judicial system and Hart's illegal drug use. He wrote to the Citibank's chief executive officer on the same day, stating that he intended to expose any attempts made by Citibank to conceal evidence of Hart's criminal conduct, with his letter to the District Attorney's office attached.

112. In view of the above acts committed by the petitioner against Hart from December 2003 to December 2004, the petitioner was charged and convicted by a jury of four counts of stalking under Section 646.9 of the Penal Code, among others. The petitioner appealed against his conviction to the California Court of Appeal. One of his arguments was that section 646.9(a), (b), (c)(1) and (c)(2) of the Penal Code do not describe separate offences, but rather describe alternate punishments for the single offense of stalking. Therefore, he was erroneously convicted of the stalking counts 1, 2 and 3. The California Court of Appeal agreed but affirmed the conviction on count 4 of stalking.

113. On 21 November 2008, the petitioner started filing petitions for a writ of habeas corpus in numerous courts. One of the claims raised by the petitioner was that his conviction was in violation of his First Amendment right to free speech. He contended that all letters to various departments were protected under the First Amendment because they "narrated facts that were within [his] personal knowledge … and concerned matters of public interest and benefit to society at large".

114. The petition reached the United States District Court which examined case law of the Supreme Court of the United States and stated the law on the First Amendment's right to free speech as follows:

> The right to free speech is not absolute and the government may regulate certain categories of expression consistent with the Constitution. Virginia v. Black, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). These categories include obscenity, defamation, fraud, incitement, and speech "integral to criminal conduct." United States v. Stevens, ——U.S. ——, ——, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010). "The First Amendment ... permits a State to ban a 'true threat.' 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" Virginia, 538 U.S. at 359 (citations omitted). Whether a statement constitutes a "true threat" must be considered "in context," taking into account such factors as whether the statement was expressly conditional and what reaction it evoked from the listeners. Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

115. Thus "true threats" are not "constitutionally protected activity". Applying the law into the facts of this case, the Court held that the petitioner's letters were not protected by the First Amendment as the petitioner's conduct as displayed in the letters, explicitly included a threat to kill Hart, which had caused Hart to fear for her safety. The Court held that the petitioner's correspondence with Citibank was not protected by the First Amendment either. In 2002 and 2003, Citibank had investigated the petitioner's allegations concerning Hart's involvement in criminal conduct, and found that such allegations were meritless. The petitioner was informed of the investigation results, but continued to write letters to Citibank on the same issue. Hence, the Court agreed with the jury's findings that the petitioner's subsequent letters to Citibank in 2003, raising the same issue which had been previously

investigated and found meritless, did not even serve a legitimate purpose and thus constituted stalking within the meaning of section 646.9 of the Penal Code.

116. In ***Hurtado v. Stewart,*** [58] constitutionally protected activity was held to include complaining to the authorities about violations of the law.

117. In the case, Ms Hurtado was granted an order to stop harassment by her neighbour Mr. Stewart. Stewart successfully appealed. The alleged conduct involved Stewart taking pictures of Hurtado's house, making racial slurs, arguments, and yelling face to face to the point of physical altercation. The alleged harassment consisted of false accusations against Hurtado and her family, translated in Stewart's calling the authorities in charge of violations of code enforcement, animal control, and transportation rules. Stewart explained that he did call the authorities as he had every right to make good faith complaints about noise and code violations because the Hurtados did commit a series of violations.

118. The appellate court ruled that the court below based its finding on vague evidence, insufficient for the alleged conduct to meet the criteria of a course of conduct under section 527.6 of the California Code of Civil Procedure, which applies to anti-stalking provisions.[59] Much of the alleged harassment resulted from Stewart's apparent habit of calling code enforcement and police authorities frequently. This activity was held to be constitutionally protected activity which is excluded from the definition of "course of conduct". As Stewart testified, he was "seeking just to have the neighbors comply with the . . . local ordinances." "While understandably annoying, even extreme examples of persons complaining to authorities have been held to be protected activity under the statute."

119. Constitutionally protected activity, unless proven otherwise, is also for a legitimate purpose, as that term is used in the definition of "harassment." Thus the Court ruled that

[58] E055654 (Cal. App.4 Dist. April 16, 2013).
[59] Code Civ. Proc., § 527.6 : "(a) (1) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section." Harassment is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (§ 527.6, subd. (b).) "Unlawful violence" means any assault or battery, or stalking. (§ 527.6, subd. (b)(1); Pen.Code, § 646.9.) 'Credible threat of violence' is defined as "a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose." (§ 527.6, subd. (b)(2).) Thus, these provisions are almost identical to the ones in the Penal Code § 646.9 Stalking and the Civil Code § 1708.7. Stalking.

"since there was no evidence or claim that Stewart's purpose in this case was illegitimate, it was not harassment and cannot constitute the basis for a restraining order."

120. In ***Hunley v. Hardin*** [60] an injunction had been granted prohibiting Hunley from making personnel complaints to Hardin's employer (The Los Angeles Police Department) based on Hardin's asserted off-duty misconduct. Hunley appealed on the basis that his constitutionally protected activity of speech on matters of public importance (a recognized protected activity) had been violated. In this case, the California Appellate Court affirmed the order of injunction because Hunley harassed Hardin by misusing the police complaint system.

1.12. Nevada: Revised Statutes § 200.571- 200.601 Harassment and Stalking

121. The Nevada Revised Statutes, Title 15 (Crimes and Punishments), Chapter 200 (Crimes against the Person), contain § 200.571 to § 200.601 under the heading "Harassment and Stalking." Those sections have been amended on a few occasions.[61]

122. Harassment is committed by a person who, without lawful authority, knowingly threatens someone to cause or to do certain acts (specified in § 200.571, (1)(a)(1) to (4)) and the person receiving the threat is placed in reasonable fear that the threat will be carried out.

123. Stalking is committed by a person who, without lawful authority, willfully or maliciously engages in a course of conduct (defined in § 200. 575 (6) (a) as a pattern of conduct which consists of a series of acts over time that evidences a continuity of purpose directed at a specific person) that would cause a reasonable person to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, and that actually causes the victim to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member.

124. In Nevada, a person committing stalking or harassment for the first time is punished for a misdemeanor (a minor or summary offence) attracting up to six months' imprisonment, while for subsequent times, he is punished for a gross misdemeanor (summary or indictable offence) attracting up to one year's imprisonment.

[60] Not reported, Cal. App. 2 Dist., 2010, 27 January 2010.
[61] Nevada's Revised Statutes' Chapter 200 is accessible at http://www.leg.state.nv.us/NRS/NRS-200.html.

125. Aggravated stalking is the commission of stalking in conjunction with threatening with the intent to cause the person to be placed in reasonable fear of death or substantial bodily harm. This offence attracts at least two years'- and a maximum of 15 years' imprisonment and a fine, and is classified as category B felony.

126. "Without lawful authority" in § 200.575 (Stalking) includes acts which are initiated or continued without the victim's consent. The term does not include:

- acts which are otherwise protected or authorized by constitutional or statutory law, regulation or order of a court of competent jurisdiction, including, but not limited to:
  - Picketing which occurs during a strike, work stoppage or any other labor dispute.
  - The activities of a reporter, photographer, camera operator or other person while gathering information for communication to the public if that person is employed or engaged by or has contracted with a newspaper, periodical, press association or radio or television station and is acting solely within that professional capacity.
  - The activities of a person that are carried out in the normal course of his or her lawful employment.
  - Any activities carried out in the exercise of the constitutionally protected rights of freedom of speech and assembly.

127. § 200.591 provides that in addition to any other remedy provided by law, a person who feels aggrieved may apply for a protection order.[62] Each protection order application can only contain the name of one adverse party. Violation of such order is punishable with imprisonment terms varying according to the type of protection order (temporary or extended) applied for and the type of violation. Additionally, a person may be held in civil contempt of

[62] A protection order is filed with the Justice Courts' Civil Division. For the procedure of such filing in Las Vegas Township, Nevada, for example, see http://www.clarkcountycourts.us/lvjc/protective-orders.html . Since August 2011 e-filing is mandatory.

court and punished by fine or imprisonment term. Criminal contempt of court may also be prosecuted as a misdemeanor criminal case.[63]

1.13. South Africa: The Protection from Harassment Act 2011

128. South Africa passed the Protection from Harassment Act 2010 [64] on 2 December 2011 and published it in the Gazette three days later (Act 17 of 2011). It came into operation on 27 April 2013 as is to be designated as the "Protection from Harassment Act 2011" (PHA 2011).

129. The PHA 2011 covers civil harassment only, and extends the scope of the Domestic Violence Act, 116 of 1998 (DVA 1998) [65] to situations other than in the context of domestic relationships. The PHA 2011 provisions are very similar to those in the DVA 1998. Stalking behaviour as a crime continues to be addressed by other existing laws.

130. The PHA 2011 defines harassment as directly or indirectly engaging in conduct that the respondent [i.e. the one against whom proceeding are instituted] knows or ought to know-

> (a) causes harm (defined as any mental, psychological, physical or economic harm) or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-
>
> > (i) following, watching. pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
> >
> > (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
> >
> > (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related

[63] For a description of protections orders against stalking and harassment, see Nevada Protection Order Handbook (Revised March 2010) accessible at http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/5865/

[64] The Protection from Harassment Act 2010 ("PHA 2011") is accessible at http://www.info.gov.za/view/DownloadFileAction?id=156361

[65] http://www.info.gov.za/view/DownloadFileAction?id=70651

person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person.

131. The PHA 2011 also provides for protection orders against harassment, including interim protection orders to be applied for at magistrates' courts. Showing a *prima facie* case may be enough for the issue of an interim protection order (sections 3 and 9). For protection orders in general, the civil standard on the balance of probabilities applies (section 9(4)). However, for the purpose of deciding whether the conduct of a respondent is unreasonable in the sense of the definition of harassment, the court must, in addition to any other factor, take into account whether the conduct, in the circumstances in question, was engaged in-

- for the purpose of detecting or preventing an offence;
- to reveal a threat to public safety or the environment;
- to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or
- to comply with a legal duty, (section 9(5)).

132. Upon the court issuing a protection interim order or any other protection order, the court must make an order:

- authorising the issue of a warrant for the arrest of the respondent; and
- suspending the execution of that warrant subject to compliance with any prohibition, condition, obligation or order imposed (section 11(1)).

133. The warrant of arrest remains in force unless the protection order expires, is set aside or cancelled (section 11(2)). Should there be any breach of the protection order, the complainant may hand the warrant of arrest plus an affidavit to any member of the South African Police Service (SAPS) (section 11 (4) (a)). The SAPS is given the discretion to decide whether to make the arrest or not (see sections 11(4) (b) to (6)).[66]

[66] The court attaching a power to arrest to a protection order is a devise used in the context of domestic violence. It has been extended to harassment in South Africa.

134. Contravention of a protection order attracts an imprisonment term of up to five years or a fine (section 18).

PART 2

2. Statistics on Stalking Complaints, Prosecutions and their Outcome

135. This part addresses statistics on stalking complaints, prosecutions and their outcome. In addition, it includes an examination of surveys carried out in certain jurisdictions. We start with references to such surveys.

136. According to researchers involved in survey work to assess the prevalence of stalking, surveys can broadly be classified into two groups. Under one type of survey, individuals are asked whether they have experienced stalking as broadly defined in the questionnaires. Under the second type, individuals who have reported stalking are asked to define what they think stalking conduct amounts to. This has been expressed in the following way:

> those [surveys] which approach a sample of the population to identify whether or not individuals have experienced this type of victimisation; and those which approach individuals who have reported this type of victimisation. Both types of survey gather information on the victims' experiences, but victim report surveys are generally based on participants' own definition of themselves as stalking victims, whereas population surveys work with a pre-determined definition. Such definitions tend to be broad.
>
> …
>
> It is clear that while the various definitions may be sufficiently close to allow for core meanings, and for generally shared understanding of a range of behaviours and malevolent intentions associated with stalking, when different definitions are used in legal measures and in surveys designed to assess prevalence, this adds to the difficulty of identifying the extent and nature of stalking behaviour and in comparing prevalence and incidence rates across different jurisdictions.[67]

137. One area of little research is on the motivations of stalkers. An Australian study indicates that one line of research shows that the primary motivations are power, revenge and

[67] Scottish Executive Social Research, "Stalking and Harassment in Scotland," 15 November 2002, p 8.

insecurity.[68] Others argue that "stalker crimes are motivated by interpersonal aggression rather than by material gain or sex. The purpose of stalking resides in the mind of the stalkers who are compulsive individuals with a misperceived fixation."[69]

138. A key indicator of stalking behaviour is said to be determined by the relationship of suspect to victim (in civil harassment the relationship would be respondent to victim), such as ex-marital, dating, and work relationships, and strangers.[70] For example, work-related criminal harassment can be manifested by "unsatisfied clients, former employees or by persons protesting the type of work being carried out by the victim or his/her business (e.g. abortion clinic workers, logging companies). Criminal harassment may also occur between disputing neighbours."[71]

139. In an effort to examine relationships' and other stalking indicators, we looked at surveys conducted in the 1990s,[72] and those conducted in more recent years which are available from accessible information sources, such as in the US, the UK and Canada.[73]

140. We examined statistics obtained from different Government reports and websites and those obtained by direct contact with Government offices, law enforcement agencies, prosecutorial agencies and stalking data resource centres.

141. We finally looked at complaints in breach of harassment clauses of Editors' Code of Practices, such as that in the UK where the Code [74] binds all members of the press since 1991.

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[68] Emma Ogilvie, "Stalking: Legislative, Policing and Prosecution Patterns in Australia," Australian Institute of Criminology (2000) *Research and Public Policy Series No. 34*, p 19 ("Ogilvie").
[69] *Ibid*.
[70] Rebecca Kong, *Criminal Harassment*, Juristat Canadian Centre for Justice Statistics, Statistics Canada – Catalogue no. 85-002-XPE Vol. 16 no. 12, December 1996, p 3 ("Kong").
[71] Kong, p 3.
[72] For example, Kong's in Canada and a UK Home Office Research Study. The later focused on 167 cases sent by the police to the CPS during 1998 for a decision on prosecution. Those 167 cases were classified as follows:
-relationship between suspect and victim (stranger, neighbour, acquaintance, intimate),
-gender of the suspect, and
-type of behaviour engaged by the suspect, which included nature of cases described as: threats, face to face harassment, distressing behaviour, following, harassment of family, standing/parked outside, non-violent physical harassment, silent phone calls, obscene phone calls, "nice" letters/gifts, damage to property, violent behaviour, and other behaviour.
See Jessica Harris, "An evaluation of the use and Effectiveness of the Protection form the Harassment Act 1997" Research, Development and Statistics Directorate, Home Office (2000).
[73] Examined below.
[74] See latest version of the Editor's Code of Practice, which applies to the whole of the UK, at http://www.pcc.org.uk/assets/696/Code_of_Practice_2012_A4.pdf, accessed 06 February 2013.

It is enforced by the Press Complaints Commission (PCC),[75] formerly the Press Council. Clause 4 of the UK Code deals with harassment.[76]

142. We note that the different practices of reporting crimes make a comparison in terms of prevalence and incidence of stalking extremely difficult. This difference is also influenced by the different legislative frameworks.[77] Even inter-jurisdictional comparisons have been reported to be only marginally meaningful due to differences in absolute numbers and counting strategies, among other factors.[78] None of the jurisdictions however record cases due to news-gathering/reporting or protest/demonstration activities. For example**,** according to the England and Wales Parliamentary Undersecretary of State (Prisons and Probation) it is "not possible to separately identify those proceedings under section 2 of the Protection from Harassment Act 1997 which specifically occurred in relation to public protests."[79]

143. Besides the data provided in this Part, no other statistics on the nature of stalking complaints and prosecutions are available from the accessible information sources.

2.1. Recent Stalking Victimization Surveys - US

144. The most significant stalking and harassment survey conducted so far is the nation-wide *Stalking Victimization in the United States* (and related surveys). It is significant because it is the largest survey conducted to date and because it focuses on stalking and harassment conduct only.

145. The report *Stalking Victimization in the United States* was initially released in January 2009. Having made certain corrections in the 2009 report, the special report *Stalking Victims in the United States – Revised* (The SV Report) was published by the Bureau of Justice

[75] The PCC website is http://www.pcc.org.uk/index.html
Note that there are plans to make self-regulation of the press more effective but statutory regulation as proposed in the Leveson Report has been strongly objected: "It is my strongly held belief that only effective self-regulation can preserve freedom of expression. I have not yet seen a convincing argument for statutory regulation of the press. Indeed I have genuine and profound misgivings about directly involving the state in anything that might chill freedom of expression arbitrarily and unnecessarily." See Extracts of the Speech by Lord Hunt to the University of East Anglia on 'Regulating the Media', 29 November 2012 at http://www.pcc.org.uk/news/index.html?article=ODE1Nw==
[76] This is dealt with in Part 2.3.3 below.
[77] Ogilvie, p 97.
[78] Ogilvie, p 94.
[79] HC Deb, 5 April 2011, c796W. http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110405/text/110405w0003.htm#11040583001940. Written answer provided by Crispin Blunt, Parliamentary Under Secretary of State (Prisons and Probation), Justice.

Statistic of the Office of Justice Programs under the US Department of Justice in September 2012.[80] The data for this report are collected from the Supplemental Victimization Survey (SVS) conducted in 2006 as part of the National Crime Victimization Survey (NCVS). The interviews were conducted during the first six months of 2006; therefore, most stalking behaviors occurred during 2005.

146. The SVS measured the following stalking behaviors (classified as the nature of stalking behaviour):

i. unwanted phone calls and messages,
ii. unwanted letters and email,
iii. spreading rumors,
iv. following or spying,
v. showing up at places,
vi. waiting for victim, and
vii. leaving unwanted presents.

147. The statistical analysis of victim-offender relationship in stalking and harassment is set out in Table 6 of the SV Report,[81] which is reproduced in Table 2.1 below.

Table 2.1: SV Report (Table 6)

Table 6 *			
Victim-offender relationship in stalking and harassment			
		Percent of victims	
	All	**Stalking**	**Harassment**
Total	100%	100%	100%
Known, intimate	24.1%	28.1%	17.4%
Current intimate	7.1	8.2	5.3
Spouse	3.8	5.2	1.4!
Boy/girlfriend	3.3	3.0	3.9
Former intimate	17.0	20.0	12.1
Ex-spouse	6.2	7.8	3.6
Ex-boy/girlfriend	10.8	12.2	8.5
Known, other	39%	41.8%	34.4%
Friend/roommate/neighbor	14.6	15.2	13.5
Known from work or school	8.8	9.2	8.2
Acquaintance	8.2	9.1	6.8

[80] *Stalking Victims in the United States – Revised*, ("the SV Report") accessible at http://bjs.ojp.usdoj.gov/content/pub/pdf/svus_rev.pdf
[81] Bureau of Justice Statistics, National Crime Victimization Survey, Supplemental Victimization Survey, 2006.

Relative	7.4	8.3	5.9
Stranger	9.3%	9.0%	9.7%
Unknown	15.1%	14.2%	16.5%
Victim unable to identify a single offender**	12.5%	6.8%	21.9%
Number of victims	5,305,730	3,300,570	2,005,160

*Notes: See appendix table 5 for standard errors.
! Interpret data with caution; estimate based on 10 or fewer sample cases, or the coefficient of variation is greater than 50%.
** Includes victims who could not identify a single offender who was most responsible.

148. The category "unknown" is not defined in the SV Report. Examination of the Supplemental Victimization Survey to the National Crime Victimization Survey 2006[82] suggests that this category refers to respondents who did not know their perpetrators. As stated in the notes to Table 6, the category "victim being unable to identify" means victims who were unable to identify a single offender, including victims who could not identify a single offender who was most responsible.

149. The survey classified individuals as stalking victims if they responded that they experienced at least one stalking behavior on at least two separate occasions. In addition, the individuals must have feared for their safety or that of a family member as a result of the course of conduct, or have experienced additional threatening behaviors that would cause a reasonable person to feel fear. When victims who experienced the above behaviours ((i) to (vii)) did not report feelings of fear as a result of such conduct nor experienced actions that would cause a reasonable person to feel fear, the SVS Report characterized such individuals as harassment victims. Harassing acts by bill collectors, telephone solicitors, or other sales people were excluded from the estimates of stalking and harassment.

150. According to the revised report, the estimated number of persons who experienced behavior consistent with either stalking or harassment was 5.3 million, using population of 18 years of age or above. It was also revealed that 1.5% of the population experienced stalking during the 12-month period prior to the survey.

[82] Available at http://www.bjs.gov/content/pub/pdf/svs1_06.pdf

151. As to the nature of harassment and stalking behaviour experienced by the victims, the SV Report shows that unwanted phone calls and messages was the most common behaviour, while unwanted letters and email, was the third most common one.[83]

152. In 2010, the Center for Disease Control and Prevention conducted the National Intimate Partner and Sexual Violence Survey (NISVS)[84] which also included a survey on stalking victimization. The NISVS shows that the number of women who indicated that they had been victims of stalking at some point in their lifetime was 19,327,000,[85] and 5,179,000[86] during the 12-month period preceding the survey. In contrast, the number of male victims of stalking was 5,863,000,[87] while 1,419,000[88] was the figure during the 12-month period preceding the survey.

153. Finally, the National Center for Victims of Crime under the US Department of Justice published a problem-oriented guide for police in terms of stalking which has been recently updated.[89] This Guide indicates that nearly one in 12 women and one in 45 men are stalked at least once in their lifetime in the US and that the overwhelming majority (78 percent) of victims are women, and the majority of offenders (87 percent) are men. However, victims report only about half of stalking incidents to the police. [90]

154. The Stalking Guide states that:

> Most victims know their stalkers. Even though we often hear reports of fans stalking celebrities, survey evidence indicates that fewer than a quarter of female victims and a third of male victims are stalked by strangers. Nearly 60 percent of female victims and 30 percent of male victims are stalked by current or former intimate partners. In intimate-partner cases, fewer than half of stalking incidents occur after the relationship ends. Most of the time, the stalking occurs during the relationship.

[83] See Table 4 of the SV Report.
[84] The NISVS is accessible at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf
[85] NISVS, p 30.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.
[89] See Problem-Oriented Guides for Police - Problem-Specific Guides Series, No. 22, Stalking, Center for Problem-Oriented Policing, updated July 2012; ("The Stalking Guide") accessible at http://www.cops.usdoj.gov/Publications/07129492_Stalking_081412-508.pdf
[90] Stalking Guide, pp 5 and 6.

> Stalking and domestic violence intersect in a variety of ways. Research indicates that 81 percent of women stalked by an intimate have been physically assaulted by that person. Thirty-one percent of women stalked by an intimate have been sexually assaulted by that person. Offenders who stalk former intimate partners are more likely to have physically or sexually assaulted them before the relationship ended.[91]

155. As to why "victims report only half of stalking incidents to the police", the Stalking Guide explains that:

> Generally, those who do not report do not think the matter is criminal, do not think the police can help them, or fear that reporting will make the stalker even more dangerous. Twenty percent of victims who reported stalking stated that the police did not act regarding their complaints. Other victims may not report incidents because they may minimize the risk a stalker poses or blame themselves for the stalker's behavior.[92]

156. In order to provide an effective response to the phenomenon of stalking when it is shown to occur, analyzing local problems carefully cannot be overlooked, as generalized measures and strategies would fail to address the particular problems.[93]

2.2. Recent Survey for victims of stalking – UK

157. After the UK PHA 1997 had been in force for over 10 years, it was realized that female stalking victims were not sufficiently protected under the Act. It was a campaign run by the organisation Protection Against Stalking (PAS) and the National Association of Probation Officers (NAPO) which pointed out to the insufficiency of protection for victims of stalking. A unique survey put together by PAS supported the campaign insights.[94] By November 2011, 143 victims of stalking who had been asked by PAS to fill in a 12-point questionnaire completed the questionnaire.

[91] Stalking Guide, p 5.
[92] See p6 of the Stalking Guide
[93] Stalking Guide, pp 15 to 24.
[94] Stalking and Harassment: A Victims Voice, 10 November 2011, p 1 ("Stalking survey").

158. The results of the stalking survey were grouped into 10 categories, which included the methods stalkers use to contact the victim and the type of relationship.[95] As to the methods of stalking, the survey found that 62% of victims said phone calls were used, 51% following, 50% text messages, 50% use of third party, 30% e-mail, 25% letters, 25% breaking in and 20% where gifts were sent.

159. With regard to the type of relationship, the survey revealed that 57% were ex-partners, 13% strangers, 13% neighbours, 12% ex-colleagues, 11% an acquaintance, 6% a family member, 3% a patient and 3% a friend. Others indicated they had been on a few dates previously, or it was a partner or an ex-partner, a student and/or someone in their class. Furthermore:

> The majority of victims have had an intimate relationship with their stalker and it was when they tried to leave and separate that the stalking occurred and often escalated, starting with persistent calls and texts, followed by threats, criminal damage and violence. We know this is the most dangerous time for women fleeing abusive relationships. Early identification, intervention, prevention is crucial, informed by a risk assessment. Cases can then be managed using a collaborative and multi-agency approach, which we know works to keep women and children safe.[96]

160. The Stalking survey referred to the National Stalking Helpline, 2011, which showed that the majority of victims (80.4%) were female while the majority of perpetrators (70.5%) male, and "the majority of stalkers are known to their victims either as ex-partners or acquaintances, but some people are stalked by complete strangers."[97]

[95] (1) duration of stalking, (2) methods stalkers use to contact victims, (3) type of relationship, (4) police contact, (5) Crown Prosecution Service involvement in the case, (6) charging and sentencing, (7) the victims' experience of the criminal justice system response, (8) enhancing protection, (9) improving the victims experience, and (10) legal and practice changes.
[96] Stalking Survey, p 4.
[97] Stalking Survey, p 3.

2.3. Recent Surveys - Canada

161. A General Social Survey was conducted in Canada in 2004 to, among others, measure stalking behaviours.[98] The survey revealed that stalking victims generally know their stalkers.[99] More than 1.4 million females 15 years of age and older (11% of the population) and just under one million males (7% of the population) were stalked in the preceding five years of the survey in a way that caused them to fear for their life or someone known to them.

162. More concretely, the survey showed the following key results:

- The majority of victims (80%) were stalked by males regardless of the sex of the victim. The most common gender patterns between stalking victims – offenders were female-male (53%), followed by male-male (28%).

- The most frequent forms of stalking experienced by female victims were: obscene phone calls (47%), being spied on (28%), and being threatened or intimidated (43%).

- Victims most frequently were stalked by people classified as: friends (23%), current or ex-intimate partners (17%), and persons known by sight only (14%), followed by co-workers, neighbors and other relatives (18%). Overall, less than one quarter of stalking victims were harassed by a stranger (24% of female victims and 22% of male victims). Considering gender differences, female stalking victims were most often harassed by a friend (22%), an intimate, either current or ex-partner (20%). Similarly, male stalking victims were most often stalked by a friend (25%) or a person known by sight only (16%), but were less likely to be stalked by either a current or ex-intimate partner (11%) (Table 2.3 of the Survey).

- When considering only stalking victims pursued by a current or an ex-intimate partner, the data suggest that females are more often stalked by a former partner, either an ex-spouse or an ex-boyfriend. For both females and males, it

[98] See Kathy AuCoin, "Stalking-Criminal Harassment" in *Family Violence in Canada: A Statistical Profile 2005* prepared by the Canadian Centre for Justice Statistics, available at http://www5.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=85-224-X20050008645&lang=eng

[99] *Ibid*., p 35.

> is an ex-boyfriend/ex-girlfriend (11% of female stalking victims and 6% of male stalking victims) followed by an ex-spouse (8% of female stalking victims and 4% of male stalking victims) who appear to pose the greatest threat relative to current intimate partners.[100]

163. There is another source of information regarding stalking behaviour in Canada. Survey data from the Uniform Crime Reporting (UCR) Survey and the Adult Criminal Court Survey was compiled for the year 2009 to provide criminal harassment trends in Canada.[101]

164. It was significant that Manitoba was the province with the lowest rate of criminal harassment in 2009 (22 incidents per 100,000 population), while such province had the second highest overall violent crime rate. In contrast, Prince Edward Island (82 incidents per 100,000 population) reported the highest rate of criminal harassment, yet was among those with the lowest overall violent crime rate.

165. The data also reveals that probation was the most common sentence for criminal harassment.

166. The 2009 results showed that victims of criminal harassment were generally female. It was reported that:

> Typically, criminal harassment is a crime most often perpetrated against women. Females accounted for three-quarters of all victims (76%) of criminal harassment in 2009, compared to about half (51%) of victims of overall violent crime.

167. It was also shown that the majority of victims (69%) were harassed in their own home or at another residence, such as a friend's home. Another 11% of incidents of criminal harassment took place in an outdoor public location, such as the street, road, highway or parking lot and 4% occurred at a school or university. The remaining 16% occurred in commercial or corporate areas, transit areas and other public/non profit institutions.

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[100] *Ibid.*, pp 35-36.
[101] Shelly Milligan, "Criminal harassment in Canada, 2009", *Juristat* Bulletin, Canadian Centre for Justice Statistics, released on 3 March 2011, available at http://www.statcan.gc.ca/pub/85-005-x/2011001/article/11407-eng.pdf

168. As to the relationship between victims and those accused of criminal harassment, it tends to differ depending on the sex of victims (Chart 4 of the results). In 2009, just under half (45%) of female victims were harassed by a former intimate partner while an additional 6% were harassed by a current intimate partner. Male victims, on the other hand, were more often harassed by a casual acquaintance (37%) than by a former (21%) or current (2%) intimate partner.[102] Data table for Chart 4 is included as follows in Table 2.2:

Table 2.2: Criminal harassment in Canada, by relationship of accused to victim

Criminal harassment, by relationship of accused to victim, Canada, 2009

Relationship of accused to victim	Female	Male
	percent of total victims	
Current intimate partner[1]	6	2
Former intimate partner[2]	45	21
Family[3]	5	7
Friend	4	4
Casual acquaintance[4]	21	37
Business relationship	5	11
Neighbour	3	6
Criminal relationship	0	1
Stranger	11	12

1. Includes spouse (married or common-law), boyfriend, girlfriend and other intimate relationship.
2. Includes separated spouse (married or common-law), divorced spouse, ex-boyfriend or ex-girlfriend.
3. Includes non-spousal family members related by blood, marriage or adoption (e.g. parents, siblings, extended family members).
4. Includes acquaintances and authority figures.
Source: Statistics Canada, Canadian Centre for Justice Statistics, Incident-based Uniform Crime Reporting Survey.

2.4. UK

169. When the Protection from Harassment Bill was being debated in Parliament in 1996, it was estimated that "approximately 200 extra criminal cases a year will arise."[103] The figure was denounced to be an underestimation by the Government:

[102] *Ibid.*, pp 3-4.
[103] See HC Deb 17 December 1996 vol 287 cc836-53, col 840.

> Given the wide scope of the Bill, I was surprised to read that the Government expect approximately 200 additional criminal cases a year to arise from it. Do the Government really believe that only four additional cases a week will arise in the whole of England and Wales as a result of the Bill? I can only imagine that they are considering only stalking cases and ignoring the wider effects of the Bill, which have been described fairly graphically this evening.
>
> I have been advised by a lawyer active in this field that once the extent of the Bill is known there will be immense pressure on the police to take up the proceedings, particularly in neighbour disputes and domestic violence cases. In addition, the hon. and learned Member for Burton (Sir I. Lawrence) highlighted how important the Bill will be in cases of racial harassment. … I suggest that the Government have underestimated when they state that there will be only 200 additional cases.[104]

170. Judging from the figures in 2.4.2 below, the estimated 200 additional criminal cases was in fact an underestimation.

2.4.1. Number of "Harassment" complaints reported

171. The UK Home Office compiles and publishes recorded crime data for all "notifiable offences" (including Harassment) from all 44 police forces in England and Wales.

Table 2.3: Notifiable stalking offences in England and Wales

Number of recorded crimes/complaints[105]	**2007/2008**	**2008/2009**	**2009/2010**	**2010/2011**	**2011/2012**
Harassment (8L)	N/A	48,363	52,959	51,172	48,141
Public fear, alarm or distress (9A)	N/A	142,246	126,597	114,781	97,086
Harassment/Public fear, alarm or distress	210,152	N/A	N/A	N/A	N/A

[104] See HC Deb 17 December 1996 vol 287 cc781-862, col 803-4.
[105] The statistical year in UK runs from 1 April to 31 March the following year.
Appendix Tables – Crime in England and Wales, year ending September 2012 at http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-sept-2012/rft-crime-statistics--appendix-tables---crime-in-england-and-wales--year-ending-september-2012.xls. See Table A4, row 48-50.

(8C, no longer in use)					

172. According to the User Guide to Crime Statistics, [106] "Harassment" offences (classification 8L) are "those incidents where no other substantive notifiable offence exists, but when looked at as a course of conduct are likely to cause fear, alarm or distress." 'Public fear, alarm of distress offences' (classification 9A) are offences "where a course of conduct was not present".[107] Thus only classification 8L fits the definition of stalking in the proposed legislation in Hong Kong.

173. Until 2008/09, "Harassment" (Classification 8L) and "Public fear, alarm or distress" (Classification 9A) were recorded together as one category, "Harassment/Public fear, alarm or distress" (Classification 8C). Accordingly, statistics before 2008/2009 are not comparable with those after 2008/2009.

174. For "Harassment", the police records a crime once an action that may amount to harassment is reported to the police and that action constitutes part of a "course of conduct."[108] Thus for the purposes of harassment, a complaint alone constitutes a recorded crime.

175. As a matter of reference, the British Crime Survey showed that, in 2010/2011, 3.6% of the respondents aged between 16-59 in England and Wales had experienced stalking in the year before. [109] The figure was the same as the one for the periods 2009/2010 [110] and 2008/2009.[111] Statistics before 2008/2009 were not comparable due to change in the method of survey for stalking. According to the *Homicides, Firearm Offences and Intimate Violence 2010/11: Supplementary Volume 2 to Crime in England and Wales 2010/11*, it was estimated

[106] http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/user-guide-crime-statistics/user-guide-crime-statistics?view=Binary. See p 25.
[107] *Ibid*, p 26.
[108] http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/counting-rules/count-violence?view=Binary. See section 8L, p 43.
[109] See *Crime in England and Wales 2010/11 Findings from the British Crime Survey and police recorded crime (Second Edition)* , p.66, Table 3.01, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116417/hosb1011.pdf
[110] See *Crime in England and Wales 2009/10 Findings from the British Crime Survey and police recorded crime (Third Edition)*, p. 72, Table 3.14, available at http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs10/hosb1210.pdf
[111] See *Homicides, Firearm Offences and Intimate Violence 2008/09 Supplementary Volume 2 to Crime in England and Wales 2008/09 (Third Edition)*, p 70, Table 3.01, available at http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs10/hosb0110.pdf

that around 1,183,000 people aged between 16-59 in England and Wales were victims of stalking in the previous year, i.e. 2009-2010.[112]

2.4.2. Number of cases proceeded against and their outcome

176. The relevant statistics were not available from the statistical agencies in the UK. However, the number of persons proceeded against at magistrates courts and found guilty at all courts for offences under sections 2-5 of the PHA 1997 from 2001-2010 was available in the Hansard records of the House of Commons.[113]

Table 2.4: Offences proceeded against in UK magistrates courts

		2006	2007	2008	2009	2010
Section 2 "Offence of harassment"	Proceeded against	5,447	5,134	5,046	5,448	6,108
	Found guilty	3,768	3,745	3,931	4,368	4,740
Section 3 "Civil remedies" (breach of injunction)	Proceeded against	34	71	99	65	68
	Found guilty	15	25	47	27	29
Section 4 "Putting people in fear of violence"	Proceeded against	1,512	1,306	1,352	1,519	1,465
	Found guilty	875	814	839	787	797
Section 5 "Restraining order" (breach of restraining order)	Proceeded against	1,108	884	1,177	1,618	3,349
	Found guilty	873	738	821	1,464	2,921

177. The Report of the Independent Parliamentary Inquiry into Stalking Law Reform notes that "the Act [PHA] is being used to deal with a variety of behaviour other than stalking including domestic and inter-neighbour disputes and rarely for stalking itself."[114] This

[112] See p 101, Table 3.03, accessible at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116483/hosb0212.pdf. This estimated number of stalking victims is higher than another estimated figure of 120,000 cited in the report of the Independent Parliamentary Inquiry into Stalking Law Reform, which is available at http://www.protectionagainststalking.org/InquiryReportFinal.pdf, published in February 2012 ("Independent Parliamentary Inquiry into Stalking Law Reform"). The figure of 120,000 was cited on p 21 of the said report without reference.

[113] HC Deb, 22 June 2011, c354W-356W - Written answer provided by Crispin Blunt, Parliamentary Under Secretary of State (Prisons and Probation), Justice.
Statistics on the number of cases proceeded against, found guilty, and their sentencing were also found in the Consultation on Stalking conducted by the Home Office in 2011. However, that document only included statistics for the year 2010.

[114] Independent Parliamentary Inquiry into Stalking Law Reform, p 21.

comment was made by Jessica Harris in her research study published in 2000.[115] This study examined a sample of 167 cases concerning the PHA in four criminal justice areas sent by the police to the Crown Prosecution Service in 1998 for a decision on prosecution.[116] Through studying these sample cases and interviewing police officers and Crown prosecutors, this research identified four categories of suspect-complainant relationships, namely, (1) 'stranger' cases: the suspects did not have any contact with the complainants prior to the harassment; (2) 'neighbour' cases: the suspects lived next door to the complainants or in the immediate vicinity; (3) 'acquaintance' cases: the suspects and the complainants were casually known to each another in some way; and (4) cases involving 'intimates': the suspects were usually ex-partners of the complainants; in eight cases, the suspects were relatives of the complainants.[117]

178. The percentages of suspect-complainant relationships found in the research are as follows:[118]

i. In 41% of the cases, the suspects were intimates of the complainants. This showed that the PHA had been used to deal with domestic disputes or crises.

ii. In 41% of the cases, the suspects and the complainants were acquaintances, who might be colleagues at work, had a previous casual relationship or just knew each other by sight.

iii. 16% of the cases involved neighbour disputes.

iv. In 2% of the cases, the parties were strangers. These cases involved classic "stalking" behaviours where all complainants were female.

179. Anecdotal evidence from interviewees suggested that "the [PHA] is sometimes used to deal with harassment arising in relation to picketing during the course of industrial disputes and animal rights and other protests".[119]

[115] Jessica Harris, *Home Office Research Study 203: An evaluation of the use and effectiveness of the Protection from Harassment Act 1997*, Research, Development and Statistics Directorate, Home Office, 2000, page vi. This research paper is available at http://hlsweb.dmu.ac.uk/pgcpd/roh436/official-documents/HomeOfficeResearchStudy203.pdf
[116] *Ibid.*, p.6
[117] *Ibid.*, pp.9-10
[118] *Ibid.*, p.11

180. Thus the results of the 2000 study showed that the PHA was rarely being used to address stalking itself. As we discuss in Part 6.1.3 below, the newly introduced offences of stalking in sections 2A and 4A were a reflection of and acknowledgment of the lack of sufficient protection in the PHA for predominantly female stalking victims.

2.4.3. The Press Complaints Commission

181. With regard to complaints handled by the Press Complaints Commission (PCC), the most recent figures available are those for 2011.[120] In that year the PCC received 7,341 complaints out of which 719 were judged to raise a likely breach of the Editors' Code of Practice. In terms of percentage of possible breaches of the Code by type of complaint, "Privacy Issues" is the category used which includes breach of Clause 4 (harassment) of the Code.[121] In 2011 the percentage of complaints likely to have breached Privacy Issues was: 29.2% - Privacy issues (Clauses 3 – 9 & 11).[122]

182. The percentages of the complaints to have likely breached privacy issues (which includes harassment) for the previous four years in relation to the total complaints likely to have breached the Editors' Code of Practice are: 23.7 % - Privacy issues (Clauses 3 – 9 & 11) in 2010,[123] 21.41 % - Privacy issues (Clauses 3 – 9 & 11) in 2009, [124] 23.8 % - Privacy issues

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[119] *Ibid.*, p.11
[120] See PCC 2011 Complaints Statistics ("PCC 2011") at http://www.pcc.org.uk/assets/80/PCC_Complaints_Statistics_for_2011.pdf
[121] Clause 4 of the Editors' Code of Practice states: "4 * **Harassment**
i) Journalists must not engage in intimidation, harassment or persistent pursuit.
ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them. iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources."
*denotes: "The **public interest**
There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.
1. The public interest includes, but is not confined to:
i) Detecting or exposing crime or serious impropriety.
ii) Protecting public health and safety.
iii) Preventing the public from being misled by an action or statement of an individual or organisation.
2. There is a public interest in freedom of expression itself.
3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully how the public interest was served.
4. The PCC will consider the extent to which material is already in the public domain, or will become so.
5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child."
[122] See PCC 2011, p 2.
[123] See Statistics 2010 at http://www.pcc.org.uk/review10/statistics-and-key-rulings/complaints-statistics/what-do-people-complain-about.php
[124] See Annual Review 2009 at http://www.pcc.org.uk/review09/2009_statistics/statistics_conclusion.php

(Clauses 3 – 9 & 11: harassment represented 3.4 %) in 2008.[125] In 2007, harassment was classified within the category "Privacy and Intrusion" which represented 19.2% of the complaints (harassment represented 1.6%).[126] The following Table 2.5 shows the figures starting with 2007.

Table 2.5: Percentages of the complaints to have likely breached privacy issues (which includes harassment) in relation to the total complaints likely to have breached the Editors' Code of Practice received and handled by the PCC

	2007	2008	2009	2010	2011
Percentage of complaints	19.4% - Privacy and Intrusion (not identified by Clause no.). Harassment represented 1.6 %	23.8 % - Privacy issues (Clauses 3 – 9 & 11) Harassment represented 3.4 %	21.41 % - Privacy issues (Clauses 3 – 9 & 11) Harassment percentage not specified	23.7 % - Privacy issues (Clauses 3 – 9 & 11) Harassment percentage not specified	29.2% - Privacy issues (Clauses 3 – 9 & 11) Harassment percentage not specified

183. Where it is found that the complaint is valid, the PCC will take one or more of the following actions to enforce the Editors' Code of Practice:[127]

a. Negotiation of a remedy or an amicable settlement for the complainant, including apology, published correction, amendment of records, and removal of article;

b. Publication of a critical adjudication, which may be followed by the PCC Chairman's public criticism of a title. It is stipulated in the fourth introductory paragraph of the Editors' Code of Practice that "Any publication judged to have breached the Code must publish the adjudication in full and with due prominence agreed by the Commission's Director, including headline reference to the PCC";

[125] See Annual Review 2008 at http://www.pcc.org.uk/assets/111/PCC_Ann_Rep_08.pdf
[126] See Annual Review 2007 at http://www.pcc.org.uk/assets/80/PCC_AnnualReview2007.pdf
[127] The work of the PCC and a summary of the sanctions enforceable by it is available at http://www.pcc.org.uk/AboutthePCC/WhatisthePCC.html

c. An admonishment letter from the PCC Chairman to the editor;

d. Publicly censuring the editor for breaches of the Editors' Code of Practice; and

e. Follow-up actions to ensure that changes are made to avoid errors from being repeated and to establish appropriate steps (which may include disciplinary action, where appropriate) taken against those responsible for serious breaches of the Editors' Code of Practice.

184. The PCC's sanctions are considered powerful since the Editors' Code of Practice is incorporated into editors' and journalists' contracts of employment.[128]

185. The PCC has published investigated and adjudicated complaints since 1996 on its website.[129] A search of all adjudicated and resolved complaints by the PCC in any given period of time, since 1996 until 31st May 2013, in which breach of clause 4, among other breaches, was alleged, produces 187 results.[130] The Editors' Codebook also contains key rulings which concern alleged breaches of Clause 4 of the Editors' Code of Practice.[131]

186. Some of the adjudicated complaints where PCC has held that Clause 4 (Harassment) of the Editors' Code of Practice have been breached are summarized as follows:

Table 2.6: Cases found by PCC to breach Editors' Code of Practice

Names of Complainants	Publications	Clauses[132]	Dates of publication of adjudicated complaints / Report numbers[133]
(1) Mr. Brian Simpson[134]	Scottish Daily Mail	**4**	18/03/2011

[128] See the "Introduction to the Code of Practice" on the PCC's website, available at http://www.pcc.org.uk/cop/intro.html
[129] Available at http://www.pcc.org.uk/cases/adjudicated.html
[130] Case search by clause (Clause 4 Harassment): See http://www.pcc.org.uk/advanced_search.html?page=1&num=10&publication=x&4=on&decision=x&keywords=&cases=on, accessed 16 February 2013 (184 cases), accessed 31 May 2013 (187 cases). A brief description of the cases is also accessible through this site.
[131] See "Section Three: Intrusion – Harassment" of The Editors' Codebook, available at http://www.pcc.org.uk/assets/449/Clause_4.pdf
[132] Cases where the PCC has held that Clause 4 (Harassment) of the Editors' Code of Practice had been breached are listed in this table. Apart from Clause 4, the clause numbers of the Editors' Code of Practice where the complainants alleged breaches of these clauses are also put down in this table for reference.
[133] For some cases in or before 2006, the dates of publication of adjudicated complaints or the dates of adjudications are not shown. Instead, report numbers are shown.
[134] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=NzAwMg

(2) Nicola Shields[135]	Daily Record	1, 3, **4**	80; adjudication issued on 05/11/2009
(3) A woman[136]	Scottish News of the World	3, **4**, 5, 12	60
(4) Ms. Emily Jennings[137]	Eastbourne Gazette	**4**, 8	60
(5) Mr. Glen Swire[138]	The Mail on Sunday	**4**	54
(6) Mr. and Mrs. Kimble[139]	Bucks Herald	**4**, 5	53
(7) Ms. Sallie Ryle, Head of Media Relations North for Granada Media[140]	News of the World	**4**	53
(8) Mr. Stephen Lamport of St. James' Palace on behalf of HRH Prince William[141]	OK! Magazine	3, **4**	52
(9) Miss Annabel Goldie[142]	Scottish Daily Mirror	**4**	38
(10) A woman (discussed in the table below)	Daily Mirror	1, 3, **4**	37
(11) Mr. John Gorman (discussed in the table below)	The Sunday Times	1, **4**	36

187. There are three cases published on the PCC's website where the PCC has held that stalking pursued by journalists has breached the Editors' Code of Practice. The cases are summarized in the table below. The first case in the table occurred after the PHA was passed, whereas the second and third cases occurred before the PHA was passed.

Table 2.7: Stalking cases found by PCC to breach Editors' Code of Practice

Names of Complainants	Publications	Publication Dates	Details of breaches
(1) Sir Paul McCartney[143]	Hello!	30th May 1998	Sir Paul and his family had been stalked by photographers who took highly intrusive photographs of them in a

[135] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=NjA2MA
[136] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=MjA4OQ
[137] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=MjA4NA
[138] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=MjA0Mg
[139] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=MjAzMQ
[140] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=MjAyOQ
[141] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=MjAyMg
[142] Details of this case are available at http://www.pcc.org.uk/cases/adjudicated.html?article=MTkyNQ
[143] Details of this case are available at http://www.pcc.org.uk/news/index.html?article=MTg3Ng

			cathedral. The PCC agreed that the photographs were deeply intrusive and held that the publication of these photographs had breached Clause 3 (Privacy) and Clause 5 (Intrusion into grief and shock) of the Editors' Code of Practice.
(2) A woman[144]	Daily Mirror	26th Sept. 1996	The reporters had stalked the complainant for about two hours in order to show the newspaper's disagreement with comments made by the complainant's husband in court. The PCC disapproved the newspaper's tactics and held that Clause 8 (the former Harassment clause) of the Editors' Code of Practice was breached.
(3) Mr. John Gorman[145]	The Sunday Times	10th Sept. 1995	Mr. Gorman complained, amongst others, that he had been stalked by journalists at his flat even after he had told a journalist that he would not comment and that all enquiries should be referred to his solicitors. The PCC held that the journalists should not persist after being asked to desist. Also, public interest was no better served by approaching Mr. Gorman persistently than by speaking to his legal representatives as he had requested. The PCC held that Clause 8 (the former Harassment clause) of the Editors' Code of Practice was breached.

188. The PCC has reported that there were relatively few adjudicated harassment cases, largely because of the success of informal guidance.[146]

189. In fact, the PCC has taken considerable measures to address the problems of media harassment. First, it publishes code advice on its website to teach complainants what to do

[144] Details of this case is available at http://www.pcc.org.uk/news/index.html?article=MTkxMA
[145] Details of this case is available at http://www.pcc.org.uk/news/index.html?article=MTc4Mg
[146] "Section Three: Intrusion – Harassment" of The Editors' Codebook.

when they are harassed by a journalist.[147] Second, the PCC handles complaints from the public proactively. Upon receiving complaints from the public (often via the PCC's 24-hour helpline), the PCC's staff either advise the complainants what to say to the journalists whom they believe are harassing them or alert editors directly that complaints against them have been received.[148] Third, the PCC takes effective measures to prevent media harassment.[149] If an individual is in a vulnerable state and does not wish to speak to a journalist, the PCC can help him/her by disseminating such message to editors, even before any contact has been made by a journalist with that individual. For instance, the PCC worked with Cheshire Police to assist the family of Garry Newlove, who was murdered outside his home, in 2007. The family felt that previous contact from the media was intrusive, and was concerned about media attention in the run-up to the trial.

190. The PCC helped this family by circulating a statement from the family to editors, managing editors and lawyers, asking them not to contact the family in any way before, during or after the trial. At the same time, Cheshire Police offered their own press desk as a contact point for media organisations who wished to make interview requests with the family. As a result, the family did not receive a single direct approach from the media. The media respected the family's wishes and made interview requests via the Police, until seven months after the verdict when Mrs. Newlove was ready to receive and respond to requests directly. Apart from Garry Newlove's case, the PCC's website contains some more cases showing how it has helped prevent media harassment effectively.[150]

191. An overview of print media regulation in New Zealand, Australia, Canada, The United States and Hong Kong and Broadcast media regulation in New Zealand and Canada is provided in Appendix G.

2.5. Scotland

192. The recorded crime statistics in Scotland only include the category of "breach of peace" offences while the Scottish Crime and Justice Survey shows that in 2010/2011, around

[147] See the "Code Advice for Complainants" on the PCC's website, available at http://www.pcc.org.uk/code/advice_for_complainants.html?article=Mzg2Mw
[148] See footnote [22]
[149] See the "Examples of Successful Anti-Harassment and Pre-Publication Work" on the PCC's website, available at http://www.pcc.org.uk/aboutthepcc/examplesofsuccessful.html
[150] *Ibid.*

5% of the respondents experienced stalking or harassment in the year before the survey was conducted. The corresponding percentage was 6% in 2009/2010 (the change between 2010/2011 and 2009/2010 was largely a rounding error and was not statistically significant) and 6% in 2008/2009 (the difference between 2008/2009 and 2010/2011 is statistically significant). This suggests that there are around 160,000 to 190,000 instances of stalking every year in Scotland.[151]

2.6. Northern Ireland

193. In Northern Ireland, the recorded crime statistics are published by the Police Service of Northern Ireland. These statistics are governed by the same Home Office Counting Rules as those in England and Wales.[152]

2.6.1. Number of recorded complaints

194. "Harassment" offences (classification 8L) are "incidents where no other substantive notifiable offence exists, but when looked at as a course of conduct are likely to cause fear, alarm or distress", same as defined in England and Wales. However, for Northern Ireland, the *User Guide to Police Recorded Crime Statistics in Northern Ireland* explains that "Harassment" offences (classification 8L) is further split into harassment and intimidation offences, but the term "intimidation offences" in Northern Ireland is not an exact match for "intimidation offences" in England and Wales. Thus, the complaint numbers in the table below refer to the numbers of harassment complaints only, i.e. excluding intimidation complaints.[153] "Public fear, alarm or distress" offences (classification 9A) are not recorded in Northern Ireland.

Table 2.8: Number of reported harassment complains, Northern Ireland

	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011

[151] See 2010 /2011 Scottish Crime and Justice Survey (SCJS): Sexual Victimisation and Stalking, page 7-8. http://www.scotland.gov.uk/Resource/Doc/365722/0124384.pdf. Note that Stalking and harassment measured by the SCJS included:
• Receiving obscene or threatening correspondence, such as letters, emails, text messages or cards;
• Receiving obscene, threatening, nuisance or silent telephone calls;
• Having someone waiting outside a home or workplace on more than one occasion;
• Being followed around and watched on more than one occasion.

[152] User Guide to Police Recorded Crime Statistics in Northern Ireland,, http://www.psni.police.uk/user_guide.pdf. See p 4.

[153] *Ibid*, see pp 10, 32.

Number of complaints[154]	1,363	1,269	1,456	1,626	1,587

2.7. Australia: Queensland

195. Note that in Australia, police practices in recording stalking data vary from State to State. Only recently, there has been an effort to standardize collection, analysis and dissemination of offence data within crime and justice statistics through the *Australian and New Zealand Standard Offence Classification.*[155] (ANZSOC). Before 2011, ANZSOC was called *Australian Standard Offence Classification*[156] (ASOC), and before that, the *Australian National Classification of Offences*[157] (ANCO), published in 1985. However, after 2011 changes have not been made to the content of the classification which already existed under the various classifications practices in the different jurisdictions.

196. In Queensland, the scope of "stalking offences" in the table "Number of recorded crimes" below is found in the *Australian National Classification of Offences*[158] (ANCO).

2.7.1. Number of recorded crimes[159]

Table 2.9: Number of recorded crimes, Queensland, Australia (per 100,000 persons)

	2007/08	2008/09	2009/10	2010/11	2011/12
Number of stalking offences	581	612	595	580	535

[154] Police Recorded Crime in Northern Ireland in 2010/11, http://www.psni.police.uk/1._10_11_recorded_crime.pdf, p 6; Police Recorded Crime in Northern Ireland in 2009/10, http://www.psni.police.uk/1._recorded_crime_200910.pdf, p 5; Police Recorded Crime in Northern Ireland in 2008/09, http://www.psni.police.uk/08_09_recorded_crime.pdf, p 5; Police Recorded Crime in Northern Ireland in 2007/08, http://www.psni.police.uk/stats1_recorded_crime.pdf, p 5; Police Recorded Crime in Northern Ireland in 2006/07, http://www.psni.police.uk/recorded_crime_2006-07.pdf, p 4.

[155] See "1234.0 - Australian and New Zealand Standard Offence Classification (ANZSOC), 2011" on the Australian Bureau of Statistics' website, available at http://www.abs.gov.au/ausstats/abs@.nsf/mf/1234.0

[156] See "1234.0 - Australian Standard Offence Classification (ASOC), 1997" on the Australian Bureau of Statistics' website, available at http://www.abs.gov.au/Ausstats/ABS@.nsf/Previousproducts/5E551AD7F75ECE4DCA25697E00184C97?opendocument

[157] Copies of the *ANCO* are available from the Australian Bureau of Statistics' Library Network and some other libraries; See "Historical Publication Index – Australian National Classification of Offences, 1985" on the Australian Bureau of Statistics' website, available at http://www.abs.gov.au/websitedbs/a3220106.nsf/d57894183e061d404b25616a0004bea7/dc4bad5ac03e273d4b2562ea00100f5c!OpenDocument

[158] The Queensland Police Service used the ANCO's offence categories in preparing the crime statistics. See *Queensland Police Service Annual Statistical Review 2011/12*, pp166-167.

[159] Crimes statistics are provided by the Queensland Police Service in their annual statistical reviews.

197. The annual statistical reviews prepared by the Queensland Police Service which used the ANCO's offence categories in preparing the crime statistics, display rates per 100,000 persons.[160] This includes the figures in Table 2.9 above and Table 2.10 below.

198. The number of reported stalking offences per 100,000 persons over a 10-year period from July 2002 to July 2012 shows a significant decreasing trend of reported stalking offences. For example, there is a 9% decrease in reported stalking offences per 100,000 persons in 2011/12 when compared with the previous year.[161]

199. The annual statistical reviews prepared by the Queensland Police Service provide details of the types of relationships between offenders and victims for offences against the person which have been cleared. Details of the victims of stalking by sex/ relationship to offenders in Queensland from 2007/08 to 2011/12 are recorded in the following table.

Table 2.10: Table showing details of the victims[162] of stalking by sex/relationship to offenders in Queensland from 2007/08 to 2011/12 (per 100,000 persons)[163]

	Partner		**Ex-partner**		**Child**		**Other Family Member n.e.c.[164]**	
	Male	Female	Male	Female	Male	Female	Male	Female
2007-08	0	16	0	11	1	0	3	4
2008-09	0	15	3	15	0	1	1	8
2009-10	2	11	4	25	0	1	3	2
2010-11	0	9	0	34	0	1	1	0
2011-12	1	14	4	23	0	0	0	0

	Known to Victim – other[165]	**Unknown to Victim**	**Not Stated**	**Total**

[160] See Explanatory Notes to the relevant Annual Statistical Reviews.
[161] *Queensland Police Service Annual Statistical Review 2011/12*, p 2, graph on p 25.
[162] The statistics in this table are counts of victims, rather than offenders. If a person is a victim of more than one offence, that person may be counted several times. See *Queensland Police Service Annual Statistical Review 2011/12*, p73.
[163] The statistics provided in this table are taken from the annual statistical reviews prepared by the Queensland Police Service for the years 2007/08 to 2011/12.
[164] The abbreviation "n.e.c." means "not elsewhere classified". See *Queensland Police Service Annual Statistical Review 2011/12*, p169.

	Male	Female	Male	Female	Male	Female	Male	Female
2007-08	19	72	18	66	26	59	67	228
2008-09	36	88	23	63	5	21	68	211
2009-10	48	91	14	71	12	23	83	224
2010-11	35	87	24	73	4	14	64	218
2011-12	34	91	20	61	3	8	62	197

2.7.2 Prosecutions

200. The offences recorded in the table below refer to a different categorization from the tables in 2.7.1.

Table 2.11: Number of defendants lodged in Queensland Courts for a charge/s pursuant to Sections 359E and/or 359F of the Criminal Code Act 1899 by court and year[166]

Court	Year						Grand Total
	2006-07	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**	
Magistrates (Children's) Court	12	12	22	18	7	14	**85**
Magistrates Court	302	293	265	302	259	257	**1,678**
Children's Court of Queensland	2	-	-	2	-	1	**5**
District Court	88	75	82	86	86	83	**500**
Supreme Court	2	3	2	1	1	-	**9**
Grand Total	**406**	**383**	**371**	**409**	**353**	**355**	**2,277**

201. As there is no unique identifier enabling the identification and subsequent reporting of unique defendants, defendants have been identified based on the national Report on Government Services counting methodology, i.e. same surname, first name, date of birth, court location and date the offence was registered within Queensland Wide Inter-linked Courts (QWIC).[167]

[165] This classification includes friends, colleagues, and both professional and other acquaintances. See *Queensland Police Service Annual Statistical Review 2011/12*, p 73.
[166] Obtained by e-mail from The Queensland Courts Performance and Reporting Unit,7 March 2013.
Source: Queensland Wide Inter-linked Courts (QWIC); **Date prepared:** 28 February 2013; **Prepared by**: Chris Weier, Senior Performance Information Advisor, Courts Performance and Reporting Unit, Department of Justice and Attorney-General.
Sections 359E and 359F of the *Criminal Code Act 1899* deal with charges of 'Unlawful Stalking'.
[167] *Ibid.*

202. Due to the large size of the tables, the figures showing the following data are attached in Appendix D (1) to (3):

- Number of charges lodged in Queensland Courts pursuant to Sections 359E and 359F of the Criminal Code Act 1899 by court, section, charge title and year,[168]
- Number of defendants convicted in all Queensland Courts of a charge/s pursuant to Sections 359E and/or 359F of the Criminal Code Act 1899 by court, order and year,[169] and
- Number of charges finalised by conviction in Queensland Courts pursuant to Sections 359E and/or 359F of the Criminal Code Act 1899 by court, section, charge title, order and year[170]

2.8. Australia: Victoria

196. The annual statistics reports of the Magistrates' Court of Victoria only lists the top 20 most common charges for the periods from 2007-08 to 2011-12. Stalking is not included.

2.8.1. Recorded crimes under section 21A of the Crimes Act 1958 [171]

203. The first table below (***Stalking offences reported and detected***) shows the number of stalking offences reported to and detected by Victoria Police for each fiscal year (i.e. from the 1st of July in the preceding year to the 30th of June in the successive year) from 2007/08 to 2011/12.[172]

204. The second table (***Stalking Offences Recorded, by relationship of Victim to Offender***) shows the number of alleged offenders processed by Victoria Police for stalking-related offences from 2007/08 to 2011/12.

[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] Offences Recorded by Offence Category, Offence Code, Description and Statutory Reference by the Victorian Police are accessible at http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=72209.
[172] For explanations on the recording and classification of offences, see *Victoria Police Crimes Statistics 2011/12*, pp 3, 5, available at http://www.police.vic.gov.au/crimestats/index.html

205. The third table (***Number of alleged offenders processed for stalking-related offences***) shows the statistical information on stalking offences recorded by relationship of victim to offender, from 2007/08 to 2011/12.

206. It should be noted that not all stalking offences reported to or detected by Victoria Police are processed. The Victoria Police has provided the following clarification with regard to the two tables they provided to us (i.e. the second and the third tables):

> The *offences recorded* data is the number of offences recorded by police on our system, however these don't necessarily have offenders processed for them. And so, even though we have recorded a relationship between the victim and the offender, Victoria Police may not have processed an offender for it as yet.

207. The second table is a count of *alleged offenders* that **have been processed** for such offences.[173]

Table 2.12: Stalking offences reported and detected, Victoria, Australia

	2007/08	2008/09	2009/10	2010/11	2011/12
Number of Stalking offences under s. 21A	1,802	1,510	1,585	1,669	1,277

Table 2.13: Stalking Offences Recorded, by relationship of Victim to Offender, Victoria, Australia[174]

RELATIONSHIP	2007/08	2008/09	2009/10	2010/11	2011/12
PARENT/CHILD	1	11	7	2	11
STEP PARENT/CHILD	1	0	6	4	7
SPOUSE	17	6	7	14	15
DEFACTO	7	4	12	13	14
FORMER SPOUSE OR DEFACTO	148	218	163	188	191
SIBLING	9	3	1	2	3

[173] Obtained by e-mail from Corporate Statistics, Victoria Police, 13 June 2013.
[174] Obtained by e-mail from Corporate Statistics, Victoria Police, 06 March 2013. The Victoria Police response to the question of whether a further breakdown could be provided from the categories such as "not related / associated", "other known" or "unspecified" was that they were not able to provide such information. "Unspecified" suggests that the relationship was not determined by the statistical reporting authority but it could have included any of the other categories.

OTHER LINEAL RELATIONSHIP	14	30	23	20	23
GAY/LESBIAN DOMESTIC PARTNER	1	0	1	0	1
BOYFRIEND/GIRLFRIEND	19	18	15	22	20
FORMER BOYFRIEND/GIRLFRIEND	74	88	95	102	122
CO-RESIDENT	7	1	2	4	9
NEIGHBOUR	74	38	34	38	50
EMPLOYER/EMPLOYEE	20	12	19	14	20
ACQUAINTANCE	129	101	134	136	157
NOT RELATED/ASSOCIATED	439	246	208	238	258
OTHER KNOWN	86	77	117	99	118
UNSPECIFIED	251	268	289	276	376
TOTAL	**1,297**	**1,121**	**1,133**	**1,172**	**1,395**

Table 2.14: Number of alleged offenders processed for stalking-related offences, Victoria, Australia[175]

2007/08	2008/09	2009/10	2010/11	2011/12
983	881	1,050	1,017	1,159

2.9. New Zealand

208. From 1 July 2010, all New Zealand justice sector statistics have classified offences by the Australian and New Zealand Standard Offence Classification (ANZSOC) method where appropriate.[176]

209. Stalking is classified under "other acts intended to cause injury" (though this is not specifically mentioned in the crime statistics reports) while harassment is classified as a separate division. Both acts "other acts intended to cause injury" and "harassment and threatening behaviour" are included here.

210. According to Group 0291 of the ANZSOC,[177] "stalking" is defined as "acts intended to cause physical or mental harm to a person, or to arouse apprehension or fear in a person, through a repeated course of unreasonable conduct". This category "includes, but is not limited to, activities such as unauthorised surveillance of an individual, interfering with the

[175] Obtained by e-mail from Corporate Statistics, Victoria Police, 06 March 2013.
[176] http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/5CE97E870F7A29EDCA2578A200143125/$File/12340_2011.pdf
[177] *Australian and New Zealand Standard Offence Classification*, p 31

individual's property (or that of an associate), sending offensive material, and communicating with the person in a way that could be reasonably expected to arouse apprehension or fear".

211. Where the behaviour is not intended to cause physical or mental harm, or arouse apprehension or fear, it is categorised under Group 0531, Harassment and Private Nuisance.[178] Therefore, "stalking" incidents are not counted under "harassment and threatening behaviour".

2.9.1. Recorded crimes and apprehensions[179]

Table 2.15: Recorded stalking crimes and apprehension, New Zealand

	2007	2008	2009	2010	2011
Other acts intended to cause injury	49	53	40	50	41
Harassment and threatening behavior	12,078	12,377	14,171	13,928	12,664

2.9.2. Outcomes[180]

Table 2.16: Other acts intended to cause injury, New Zealand

	2007	2008	2009	2010	2011
Convicted	15	18	33	19	17
Diversion, s. 106	0	0	0	1	1
Not proved	41	39	52	14	34
Other	0	0	0	1	0

Table 2.17: Harassment and threatening behavior, New Zealand

[178] *Australian and New Zealand Standard Offence Classification*, p 43

[179] Recorded crimes and apprehensions data is under the domain of the New Zealand Police. The annual crime statistics reports do not specify whether they are mere complaints and /or whether further actions were pursued. But, see further below.

[180] Data is taken from the table of convicted offenders by ANZSOC available in excel format: http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx?ReportName=Justice/Convicted%20Offenders%20by%20ANZSOC.
The outcome categories are:
Convicted – only charges finalized in the District or High Court result in the offender being convicted.
Diversion (section 106) – these charges are not recorded as convictions, and include charges where: the Police offer diversion; or the person is discharged without conviction under section 106 of the Sentencing Act 2002 or section 19 of the Criminal Justice Act 1985. This occurs where, after the offender is found guilty or pleads guilty, the court considers the consequence of a conviction for the defendant outweighs the seriousness of the offence committed.
Not proved – includes charges acquitted, dismissed, discharged, not proceeded with, pardoned, struck out, or withdrawn.
Other – includes charges where: there was a stay of proceeding ; the person was found unfit to stand trial; the person was acquitted on account of insanity and an order was made; or other remaining prosecution outcomes.

	2007	2008	2009	2010	2011
Convicted	2,249	2,700	3,036	3,095	2,978
Diversion, s. 106	220	250	263	251	213
Not proved	1,848	1,923	2,093	1,814	1,623
Other	9	15	10	22	26

2.9.3. Recorded crimes under the Harassment Act 1997 (HA) and whether they were resolved or not[181]

Table 2.18: Recorded crimes under the HA, New Zealand

	Recorded / Resolved 2007	Recorded/ Resolved 2008	Recorded / Resolved 2009	Recorded /Resolved 2010	Recorded/ Resolved 2011
HA s.8 Criminal Harassment	373/246	437/307	429/290	559/359	498/349
HA s.15(1) Contravenes Restraining Order	17/16	29/24	32/28	21/17	23/18
HA s.25(1) Non Compliance With Restraining Order	6/2	6/4	4/4	11/11	7/5
HA s.27 Fails To Supply Name/Address	-	3/3	-	1/1	1/1
HA s.41 Breach Of Publication Restriction	-	-	-	-	1/0
HA Other Offences	52/27	49/24	66/30	59/18	41/18
Total	448/291	524/362	531/352	651/406	571/391

[181] Data obtained by email obtained on 21 February 2013 from Statistical Analyst, Injury and Justice Statistics - Social and Cultural Statistics Unit, Statistics New Zealand. Before a crime is recorded it has to come to the attention of police. A recorded offence is counted as a resolved offence when an offender is identified and dealt with (for example prosecuted, warned, cautioned, or diverted (i.e. not recorded as conviction)). See Statistics New Zealand at http://www.stats.govt.nz/tools_and_services/tools/TableBuilder/recorded-crime-statistics/overview.aspx#recording

2.9.4. Recorded crimes and apprehensions under the HA[182]

Table 2.19: Prosecutions under the HA

	2007	2008	2009	2010	2011
HA s.8 Criminal Harassment	67	102	75	95	84
HA s.15(1) Contravenes Restraining Order	13	19	19	11	9
HA s.25(1) Non Compliance With Restraining Order	-	-	3	10	1
HA s.27 Fails To Supply Name/Address	-	1	-	-	-
HA s.41 Breach Of Publication Restriction	-	-	-	-	-
HA Other Offences	-	-	1	-	-
Total	80	112	98	116	94

Table 2.20: Persons Warned/Cautioned

	2007	2008	2009	2010	2011
HA s.8 Criminal Harassment	159	160	192	235	228
HA s.15(1)	3	2	6	5	8

[182] The statistical data in the New Zealand tables are extracted from "Table Builder", an online tool on Statistics New Zealand's website. After entering into Table Builder's web page (available at http://www.stats.govt.nz/tools_and_services/tools/tablebuilder.aspx), one clicks on the hyperlinked words in the following sequence: "subject" → "Recorded crime tables" → "calendar year apprehensions statistics" → "National Annual Apprehensions for the Latest Calendar Years (ANZSOC)". Then, a table "National Annual Apprehensions for the Latest Calendar Years (ANZSOC)" will appear. One then clicks on the hyperlinked word "Resolution" and check the relevant boxes, i.e. "Other", "Prosecution", "Warned/Cautioned" and "Youth Aid Section". After that, one clicks on the hyperlinked word "Offence" and select appropriate categories of offences, namely, "Criminal Harassment", "Contravenes Restraining Order", "Non Compliance With Restraining Order", "Fails To Supply Name/Address", "Breach Of Publication Restriction" and "Other Offences Harassment Act 1997", through using the search function on the website. After selecting the offences categories, one clicks on the icon "View as table" or "View as chart", and then the statistical data will appear.
Note that an '**apprehension**' means that a person has been dealt with by the Police in some manner (e.g. a warning, prosecution, referral to youth justice family group conference) to resolve an offence. The number of apprehensions is not the same as the number of offenders as a person apprehended for multiple offences will be counted multiple times in the data. In some circumstances 'dealt with by the Police' may mean that the offender has been found to have a mental condition or is in custody, so no further action is taken other than to document the offence. See Statistics New Zealand at http://www.stats.govt.nz/tools_and_services/tools/TableBuilder/recorded-crime-statistics/apprehensions.aspx

Contravenes Restraining Order					
HA s.25(1) Non Compliance With Restraining Order	2	-	-	2	3
HA s.27 Fails To Supply Name/Address	-	-	-	1	1
HA s.41 Breach Of Publication Restriction	-	-	-	-	-
HA Other Offences	22	32	28	15	15
Total	186	194	226	258	255

Table 2.21: Referred to Youth Aid Section[183]

	2007	**2008**	**2009**	**2010**	**2011**
HA s.8 Criminal Harassment	1	2	1	6	4
HA s.15(1) Contravenes Restraining Order	-	-	-	-	-
HA s.25(1) Non Compliance With Restraining Order	-	-	-	-	-
HA s.27 Fails To Supply Name/Address	-	2	-	-	-
HA s.41 Breach Of Publication Restriction	-	-	-	-	-
HA Other Offences	2	-	-	1	-
Total	3	4	1	7	4

Table 2.22: Other orders and disposal [184]

	2007	**2008**	**2009**	**2010**	**2011**
HA s.8 Criminal Harassment	25	26	12	28	35

[183] "Youth Aid Section" refers to the Police Youth Aid Section as applied according to the law. See explanation provided in the paragraphs below.
[184] The resolution category of 'Other' is used for a variety of reasons, such as the alleged offender being deceased, the mental condition of the offender, and the offender already being in custody for a more serious offence.

HA s.15(1) Contravenes Restraining Order	-	2	3	1	-
HA s.25(1) Non Compliance With Restraining Order	-	4	1	-	1
HA s.27 Fails To Supply Name/Address	-	-	-	-	-
HA s.41 Breach Of Publication Restriction	-	-	-	-	-
HA Other Offences	4	2	2	2	5
Total	29	34	18	31	41

212. With regard to the classification "Youth Aid Section," it refers to the Police Youth Aid Section as applied according to the law. In New Zealand, criminal responsibility starts at the age of 10 years.[185] Children[186] and young persons[187] who have offended the law are dealt with under the Children, Young Persons, and Their Families Act 1989.[188] Section 208 of the Children, Young Persons, and Their Families Act 1989 provides a number of guiding principles. One of the principles is that "unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter".[189]

213. Therefore, depending on the nature of the alleged offence and the relevant circumstances, a child or young person apprehended by the police may be dealt with by way of a warning, be referred to the Police Youth Aid Section, or be charged/prosecuted.[190]

[185] See Section 21(1) of the Crimes Act 1961, which reads "No person shall be convicted of an offence by reason of any act done or omitted by him when under the age of 10 years.". The full text of this section is available at http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328216.html.
[186] Section 2 of the Children, Young Persons, and Their Families Act 1989 defines a "child" as "a boy or girl under the age of 14 years"
[187] Section 2 of the Children, Young Persons, and Their Families Act 1989 defines a "young person" as "a boy or girl of or over the age of 14 years but under 17 years; but does not include any person who is or has been married or in a civil union"
[188] The full text of the Children, Young Persons, and Their Families Act 1989 is available at http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM147088.html?src=qs
[189] See section 208(a) of the Children, Young Persons, and Their Families Act 1989, available at http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM152193.html
[190] See the book chapter "An Overview of the Youth Justice System in New Zealand", available at http://www.justice.govt.nz/publications/global-publications/y/youth-justice-minimum-dataset-data-integration-pilot-august-2004/2-an-overview-of-the-youth-justice-system-in-new-zealand

214. In most apprehensions recorded as being resolved by the Police Youth Aid Section in 2003, the children and young persons undertook "diversionary/alternative" actions, which included making apologies, doing community work, and making reparation or donation.[191] Apart from these, the Police Youth Aid Section may also refer the children and young persons to a youth justice coordinator for a youth justice Family Group Conference.[192]

2.10. Canada

2.10.1. Number of "criminal harassment" crimes reported and substantiated

215. The crime statistics for "criminal harassment" in Canada are made available by Statistics Canada (StatCan) for the whole country and also separately for each province.[193] The table below shows the counting for the whole of Canada.

216. The statistics indicate crimes reported to and substantiated by the Canadian police. The statistics were collected through the Uniform Crime Reporting Survey (UCRS) conducted by the Canadian Centre for Justice Statistics. Under the UCRS, crime incidents are recorded under specific offences. The offence data are then further classified into offences "reported and known to police", "unfounded" offences or "actual" offences.

217. The count of offences "reported and known to police" will include offences which upon investigation are determined to be "unfounded" as well as "actual offences". "Unfounded" means that the police investigation has established that a crime did not happen or was not attempted. An "actual" offence is one which, after police investigation, is deemed to have taken place. If, by the time of reporting, an offence has still not been established as "actual" or "unfounded", they are to be reported as "actual."[194] Thus, the term "actual incidents" does not include those complaints that have been investigated and classified as unfounded. The raw data for the number of offences "reported and known to police" (in other words, the number of "complaints") are not available online.

[191] *Ibid*., see note 5 to Table 2
[192] See book chapter "An Overview of the Youth Justice System in New Zealand."
[193] CANSIM Table 252-0051, Incident-based crime statistics by detailed violations, http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2520051&tabMode=dataTable&srchLan=-1&p1=-1&p2=9 (Press "Add/Remove data" to retrieve the relevant statistics → Step 1: select "Canada" → Step 2: select "criminal harassment" → Step 3: select "all" → Step 4: from 2007 to 2011 → Step 6: press "Apply")
[194] See Canadian Centre for Justice Statistics Policing Services Program, Uniform Crime Reporting Version 1.0 Reporting Manual, pp 2.3-2.4 at http://www23.statcan.gc.ca/imdb-bmdi/document/3302_D7_T1_V1-eng.pdf

Table 2.23: Harassment cases in Canada

Geography	Statistics	2007	2008	2009	2010	2011
Canada	**Actual incidents**	18,179	18,550	19,860	21,315	21,690
	Rate per 100,000 population	55.21	55.67	58.88	62.46	62.90
	Percentage change in rate	-13.64	0.85	5.76	6.08	0.71
	Total cleared	13,625	14,095	14,633	15,758	15,470
	Cleared by charge	7,275	7,541	7,784	7,940	7,831
	Cleared otherwise	6,350	6,554	6,849	7,818	7,639
	Total, persons charged	6,180	6,490	6,770	7,021	6,932
	Rate, total persons charged per 100,000 population aged 12 years and over	21.63	22.41	23.08	23.65	23.11

2.10.2. Number of cases proceeded against and their outcome

218. The criminal court statistics for "criminal harassment" in Canada are made available by StatCan for the whole country or on a province-by-province basis. StatCan only provides a breakdown of the criminal court cases in terms of age and sex of the defendants. [195] The table below shows the counting for the whole of Canada.

Table 2.24: Harassment cases proceeded against and their outcome, Canada

Geography	Type of decision	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011
Canada	**Total decisions**	3,182	3,099	3,185	3,200	3,239
	Guilty	1,595	1,595	1,675	1,676	1,678
	Percentage guilty	50	51	53	52	52
	Acquitted	293	265	235	250	219

[195] CANSIM Table 252-0053, Adult criminal courts, number of cases and charges by types of decision, http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2520053&tabMode=dataTable&srchLan=-1&p1=-1&p2=9 (Press "Add/Remove data" to retrieve the relevant statistics → Step 1: select "Canada" → Step 2: select "criminal harassment" → Step 3: select "Total, age of accused" → Step 4: select "Total, sex of accused" → Step 5: select "Total cases" → Step 6: select "Total decisions" → Step 7: from 2006/2007 to 2010/2011 → Step 9: press "Apply").

Geography	Type of decision	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011
	Stayed or withdrawn	1,139	1,114	1,160	1,173	1,236
	Other decisions	155	125	115	101	106

219. The data in the first table for Canada (at 2.10.1) were collected from the police, whereas the data in the second table (at 2.10.2) were reported by courts. The data in the two tables are not comparable. In the explanation to the Adult Criminal Court Survey (ACCS),[196] survey users are reminded of the difficulties in making comparisons between statistics received from courts and data gathered from other sectors of the criminal justice system, i.e. the police and correctional services. The reasons provided in the explanation to the ACCS are reproduced as follows:

> There is no single unit of count (i.e., incidents, offences, charges, cases or persons) which is defined consistently across the major sectors of the justice system. As well, charges actually laid can be different from the most serious offence by which incidents are categorized. In addition, the number and type of charges laid by police may change at the pre-court stage or during the court process. Time lags between the various stages of the justice process also make comparisons difficult."[197]

2.11. US

2.11.1. Complaints

220. While the results of the 2010 National Intimate Partner and Sexual Violence Survey (NISVS),[198] do not represent the official nation-wide number of stalking complaints reported,

[196] Available at http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=3312&lang=en&db=imdb&adm=8&dis=2. The information in the table under paragraph 136 of the First Report is extracted from CANSIM Table 252-0053, and the data in CANSIM Table 252-0053 were collected from the Integrated Criminal Court Survey (ICCS). The ICCS collects data for both the Adult Criminal Court Survey (ACCS) and the Youth Court Survey. Therefore, the Explanation to the ACCS is relevant when analysing the data in the table under paragraph 136.
[197] *Ibid.*
[198] The NISVS is referred to in Part 2.2 above.

the NISVS provides the number of victims who experienced stalking behaviour at some point in their lifetime and in the 12-month period preceding the survey.[199]

221. The survey was conducted in 50 states and the District of Columbia and was administered from 22 January 2010 through 31 December 2010.

Table 2.35: Lifetime and 12 Month Prevalence of Stalking Victimization: estimated number of adult female and male victims, District of Columbia, US

	Lifetime	12 month-period prior to the survey
Adult women	19,327,000	5,179,000
Adult men	5,863,000	1,419,000

222. Two-thirds of female victims of stalking were stalked by intimate partners. Male victims were primarily stalked by intimate partners or acquaintances.[200]

2.11.2. Prosecutions

223. The United States' Sentencing Commission website[201] provides nation-wide data and statistics of the number of prosecutions and their outcomes under different categories. One such category is "primary offence" which includes 31 such offences. Stalking is not classified as a primary offence.

224. The Criminal Justice Statistics Center (CJSC) of California Department of Justice publishes annual crimes statistics.[202] CJSC has also an online database showing tables of statistics by city and county[203] but the offence classification does not include stalking.

225. The Court Statistics Reports published annually by the judicial branch of California[204] only show the total number of prosecution/litigation, appeals at different court levels, not sorted out by offence type. Likewise, the interactive table for arrest statistics by the California Department Justice[205] does not reflect the number of stalking prosecutions.

[199] NISVS, Table 3.1.
[200] NISVS, Figures 3.1 to 3.5.
[201] http://www.ussc.gov/Data_and_Statistics/index.cfm
[202] http://oag.ca.gov/cjsc/pubs#crime
[203] http://ag.ca.gov/cjsc/datatabs.php
[204] http://www.courts.ca.gov/7480.htm
[205] http://oag.ca.gov/crime/cjsc/stats/arrests

226. While the Nevada Department of Public Safety publishes annual crimes statistics, neither stalking nor harassment is included in their annual reports. The Uniform Crime Reporting Statistics does neither reflect stalking or harassment. The offence classification only distinguishes between property crime and violent crime.

PART 3

3. Statistics on Stalking Cases involving Civil Action where Civil Remedies are Provided

227. This part addresses statistics on stalking cases involving civil action where civil remedies are provided. The introductory paragraphs in Part 2 above apply to this Part. We examined statistics obtained from different government reports and websites and those obtained by direct contact with government offices, law enforcement agencies, prosecutorial agencies and stalking data resource centres.

228. The remedies available for victims of stalking vary in the different jurisdictions, so does the practice of reporting civil remedies. This makes a comparison in terms of prevalence and incidence of stalking extremely difficult. None of the jurisdictions, however, record cases due to news-gathering/reporting or protest/demonstration activities.

229. The jurisdictions that have damages as an available civil remedy in their anti-stalking legislation are the UK, Scotland, Manitoba and California. Besides the data provided in this Part, no other statistics where damages or other civil remedies have been pursued are available from the accessible information sources.

3.1. UK

230. Section 3 of the PHA makes available for victims of harassment civil remedies, including damages and injunctions.

231. In relation to injunctions, there were 361 applications and 283 injunctions granted under section 3 of the PHA between April 2009 and December 2009, and 457 and 375 in 2010 respectively. Comparable data for previous periods are not available. The Ministry of Justice does not hold figures centrally according to the ground on which the injunctions were sought under section 3 of the PHA. This information could be obtained only through the examination of individual case files at disproportionate cost.[206]

[206] HC Deb, 5 April 2011, c797W - Written answer provided by Crispin Blunt, Parliamentary Under Secretary of State (Prisons and Probation), Justice.

232. It was also stated in the written reply made by the UK Government to the House of Lords that "the Government does not hold information indicating the grounds on which injunctions under the Protection from Harassment Act are sought." [207]

233. Section 5 of the PHA allows the courts to issue restraining orders to prohibit a person convicted under sections 2 or 4 of the same Act from further conducts of harassment or putting people in fear of violence. Under section 5(5), breach of a restraining order without reasonable excuse is an offence. Further, section 5A, which was added in 2009, allows the court to issue restraining orders even for persons acquitted under sections 2 or 4 of the PHA if it considers necessary to protect a victim.

234. The number of restraining orders issued at all courts under PHA 1997 is found in the parliamentary debates and is reproduced here:[208]

Table 3.1: Number of restraining orders issued under PHA 1997

Restraining orders issued at all courts in England and Wales under the Protection from Harassment Act 1997, in each year between 2006 and 2010					
Disposal	**2006**	**2007**	**2008** (1)	**2009**	**2010**
Restraining order issued under:					
Section 5 (issued following conviction)(2)	2,722	2,631	3,081	5,073	10,094
Section 5A (issued following acquittal)(3)	n/a	n/a	n/a	—	647
n/a = Not applicable (1) Excludes data for Cardiff magistrates court for April, July and August 2008. (2) On 30 September 2009, section 12 of the Domestic Violence, Crime and Victims Act 2004 came into force. This provision amended section 5 of the Protection from Harassment Act 1997. This amendment enables the court to impose a restraining order in a much wider range of circumstances than previously. Under these rules, restraining orders can be granted following conviction for any offence. (3) On 30 September 2009, section 12 of the Domestic Violence, Crime and Victims Act 2004 came into force. This added an additional provision (section 5A), which allows a court to impose a restraining order on acquittal if it considers it necessary to protect a person from harassment by the defendant.					

[207] HL Deb, 8 March 2010, c23W - Written answer provided by Lord West, Parliamentary Under-Secretary (Security and Counter-terrorism).
[208] HC Deb, 20 December 2011, c1132W.

3.2. Australia: Queensland

Table 3.2: Number of restraining orders pursuant to Section 359 of the Criminal Code Act 1899 issued in Queensland Courts by court and year[209]

Court	Year						Grand Total
	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	
Magistrates (Children) Court	1	1	3	1	1	2	**9**
Magistrates Court	55	59	60	65	65	51	**355**
District Court	24	25	15	20	33	29	**146**
Grand Total	**80**	**85**	**78**	**86**	**99**	**82**	**510**

3.3. Australia: Victoria

235. Civil remedies in the form of Personal Safety Intervention Orders (PSIOs) are available for the purposes of protecting the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats; and promoting and assisting in the resolution of disputes through mediation where appropriate (section 1 of the Personal Safety Intervention Orders Act 2010). A breakdown of the PSIOs resulting from stalking behaviour is not available:[210]

Table 3.3: PSIOs finalised, Victoria, Australia

	2007/8	2008/9	2009/10	2010/11	2011/12
Number of PSIOs applications finalized	6,589	7,333	7,733	8,344	9,224

3.4. New Zealand

236. A victim of harassment can apply for a restraining order under section 9 of the HA and such order may be granted if the victim shows that the harassment behaviour has caused him/her serious distress. Such application is made in the District Court.[211] Unfortunately, there is no information available as to the number of such remedies which have been applied / granted so far.

[209] Obtained by e-mail from The Queensland Courts Performance and Reporting Unit,7 March 2013.
Source: Queensland Wide Inter-linked Courts (QWIC); **Date prepared:** 28 February 2013; **Prepared by**:Chris Weier, Senior Performance Information Advisor, Courts Performance and Reporting Unit, Department of Justice and Attorney-General.
[210] See 2011-2012 Annual Report, The Magistrates' Court of Victoria, p 94.
[211] Details can be found at http://www.justice.govt.nz/courts/civil/civil-disputes/restraining-orders

3.5. Manitoba, Canada

237. The Manitoba Domestic Violence and Stalking Act and the Domestic Violence and Stalking Regulations came into force in September 1999. The Act provides a wide range of civil remedies for victims of domestic violence and all forms of stalking (regardless of the nature of the relationship of the stalker respondent to the victim). The victim can apply for a "protection order" from a Justice of the Peace (the respondent may apply to the Court of Queen's Bench to have the order set aside), or a "prevention order" from the Court of Queen's Bench of Manitoba, or sue for damages under the tort of stalking.

238. There is no official information on the number, nature or outcome of cases proceeded under the Domestic Violence and Stalking Act. A brief look at the CANLII database however, shows that most protection orders and appeals from prevention orders concerned stalking within the domestic sphere.

239. A search of the phrase "The Domestic Violence and Stalking Act" in the CANLII database produces 71 results.[212] Although this may not reflect the total number of cases that in fact reached the courts as not all cases are reported, we provide a breakdown of those 71 results. 64 are judgments and 7 are statutes. In the 64 judgments, 3 concern criminal law[213] and 61 concern civil law. The nature of the 61 judgments is set out in the table below:

Table 3.4: Table setting out the nature of the 61 judgments concerning The Domestic Violence and Stalking Act found in CANLII database

Case	Nature
51 judgments	Concerning family or domestic disputes

[212] The search was conducted on 31 May 2013. The results are available at http://www.canlii.org/eliisa/noteUpSearch.do?origin=%2Fen%2Fmb%2Flaws%2Fstat%2Fccsm-c-d93%2Flatest%2Fccsm-c-d93.html&translatedOrigin=%2Ffr%2Fmb%2Flegis%2Flois%2Fcplm-c-d93%2Fderniere%2Fcplm-c-d93.html&jurisdiction=ca&jurisdiction=bc&jurisdiction=ab&jurisdiction=sk&jurisdiction=mb&jurisdiction=on&jurisdiction=qc&jurisdiction=nb&jurisdiction=ns&jurisdiction=pe&jurisdiction=nl&jurisdiction=yk&jurisdiction=nt&jurisdiction=nu&legislation=legislation&caselaw=courts&boardTribunal=tribunals&language=en&searchTitle=The+Domestic+Violence+and+Stalking+Act%2C+CCSM+c+D93&searchPage=eliisa%2FadvancedSearch.vm&sortOrder=date&requestedPage=1&origin=%2Fen%2Fmb%2Flaws%2Fstat%2Fccsm-c-d93%2Flatest%2Fccsm-c-d93.html&translatedOrigin=%2Ffr%2Fmb%2Flegis%2Flois%2Fcplm-c-d93%2Fderniere%2Fcplm-c-d93.html

[213] *R. v. Fairchuk* 2003 MBCA 59 (CanLII); *R. v. C.L.F.* 2002 CanLII 46526 (MB PC); and *R. v. Fairchuk* 2002 CanLII 24656 (MB PC).

4 judgments[214]	Concerning neighbourhood disputes
1 judgment[215]	Concerning disputes [216] between mayor of a municipality and a resident of that municipality
1 judgment[217]	Concerning disputes between staff members of a counselling centre and a patient receiving counselling services in that centre
1 judgment[218]	Concerning disputes between a landlord and a tenant
2 judgments[219]	The relationships between the parties are unclear
1 judgment[220]	The judgment concerns a dispute between a lawyer and a client on the issue of costs after the lawyer had acted for the client in the proceedings under The Domestic Violence and Stalking Prevention, Protection and Compensation Act (latter known as The Domestic Violence and Stalking Act).

240. In *Baril v. Obelnicki*,[221] statistics showing the number of applications for protection orders under The Domestic Violence and Stalking Prevention, Protection and Compensation Act (latter known as The Domestic Violence and Stalking Act) and the number of orders granted were adduced as evidence in the proceedings. Paragraph 97 of that judgment states that:

> The statistics corroborate the Attorney General's contention that the granting of a without notice order is a genuine exercise of judicial discretion and not a rubber stamp. In the first 18 months' experience with [The Domestic Violence and Stalking Prevention, Protection and Compensation Act (latter known as The Domestic Violence and Stalking Act)], a total of 2,198

[214] *Roberts v. Buzan* 2009 MBQB 5 (CanLII); *Mackey v. Vaterlaus* 2007 MBQB 180 (CanLII); *Baril v. Obelnicki* 2007 MBCA 40 (CanLII); and *Baril v. Obelnicki* 2004 MBQB 92 (CanLII).
[215] *Strang v. Fegol* 2011 MBQB 310 (CanLII).
[216] There were mainly tax disputes, the subject of other cases: *Fegol v. St. Clements (Rural Municipality)* 2010 MBQB 52 (CanLII), 2010 MBQB 52, [2010] M.J. No. 66 and 2010 MBCA 87 (CanLII).
[217] *Ballingall-Scotten v. Wayne* 2005 MBQB 12 (CanLII).
[218] *Chaboyer v. Thera* 2002 MBQB 81 (CanLII)
[219] *Steinmann v. Kotello* 2012 MBCA 30 (CanLII) and *Hitch v. Nickarz* 2005 MBCA 111 (CanLII)
[220] *Fecio v. McDonald* 2004 MBQB 136 (CanLII)
[221] 2007 MBCA 40 (CanLII), discussed in Part 4 below.

> applications for protection orders were made. Of these, a total of 1,480, or 67.3 per cent, were granted. Over time, the percentage of applications with orders granted declined. Seventy-nine per cent were granted in January to March 2000, but the percentage granted declined to 57.6 per cent during the same period in 2001. See Manitoba Justice, *Report of the Working Group – Review of Implementation of The Domestic Violence and Stalking Prevention, Protection and Compensation Act* (May 2001).[222] With respect to non-cohabitants, there were 146 applications for protection orders during the 12-month period ending June 2003, but only 62 orders were granted.

241. The provinces of Alberta and Ontario only provide civil remedies for stalking within the sphere of domestic violence.

3.6. US

242. It has been recently confirmed in an article which is probably the only comprehensive study on civil harassment orders in the United States, that there is no single reliable source that tracks the total number of civil harassment petitions in the United States.[223] However, the author of the article suggests that the volume of civil harassment litigation is large. He based this suggestion on his judicial statistics compilation of five states' 2011 statistics "that separately enumerate civil harassment petitions." The number of these petitions is compared to the number of domestic violence petitions, resulting in the latter being larger. The table ("Civil Harassment Petitions Filed in 2011 for States with Available Statistics") showing the compilation is reproduced as follows:

Table 3.5: Civil Harassment Petitions Filed in 2011 for US States with Available Statistics

Jurisdiction	Civil Harassment Petitions Filed (per 100,000 population)	Domestic Violence Petitions[224] Filed (per

[222] This Report is not accessible through the Internet.
[223] Aaron H. Caplan, "Free Speech and Civil Harassment Orders" (2013) *64 Hastings Law Journal* 781 ("Caplan").
[224] "Civil harassment statutes and domestic violence statutes are designed to be complementary but non-overlapping statutory regimes. Most civil harassment statutes contain language ensuring that they do not apply within relationships covered by domestic violence statutes, channeling those matters into family court. …, aggression can be both more likely and more dangerous within an intimate relationship. The dynamics of the relationship may increase batterers' reliance on violence and intimidation as means of domination, while the fact of an intertwined life and its disparities of power may make it difficult for victims to extricate themselves from the situation. By contrast, civil harassment orders may be filed between any two people, whether or not their

		100,000 population)
Minnesota (pop. 5,303,925)	9918 (187)	10,965 (207)
Nevada (pop. 2,700,551)	4931 (183)	11,583 (429)
South Dakota (pop. 814,180)	1952 (240)	2508 (308)
Utah (pop. 2,763,885)	777 (28)	4902 (177)
Washington (pop. 6,724,540)	11,027 (168)	18,666 (278)
Five-state total (pop. 18,307,081)	23,674 (156)	37,041 (266)

243. The author of the article reasons that "if the five-state rate of 156 civil harassment petitions per 100,000 population held true across the twenty-three states with civil harassment statutes[225] (which have a total population of approximately 140.6 million), there would be approximately 219,700 petitions filed annually."[226] He also confirms that state-level statistics do not indicate the percentage of filed petitions that are granted.

3.6.1. US: California

244. Under the California Civil Code § 1708.7, a person who commits the tort of stalking is liable for damages, including, but not limited to, general damages, special damages, and punitive damages. However, the number of civil cases recorded in the annual Court Statistics

relationship is especially prone to violence or resistant to self-help." Caplan, 788.

[225] The author does not mean the civil stalking statutes, which are only available in 12 states (See Appendix A). The author refers to the civil harassment statutes (similar to the California Civil Procedure statute §527.6, discussed in Part 1.11 and Part 3.61) including stalking-type language in their definitions of harassment, or vice versa. "The remedies authorized by the statutes are typically open-ended, allowing courts wide latitude to "enjoin the harassment," no matter what form that might take. Most specify some content that is preferred for the orders, such as a requirement to stay a certain distance away from the petitioner, not to communicate with the petitioner directly or through third parties, and not to keep the petitioner under surveillance. Once an order is issued, most states require the court to forward the order to a statewide database accessible by law enforcement. Violations may be punished as contempt of court, as a separate crime, or both." Caplan, 793.

[226] Caplan, 793.

Reports only considers the total number of civil cases without specific breakdown of type of civil case or type of damages awarded.

245. With regard to protective orders that may be issued by the sentencing court under the Penal Code § 649.9, the California Courts Protective Order Registry launched in 2010[227] is a statewide repository of protective orders containing both data and scanned images of orders that can be accessed by judges, court staff, and law enforcement officers. Such information is not available to the public for now.

246. The California Civil Procedure statute §527.6 provides for civil harassment restraining orders of a 3-year duration to persons who have suffered harassment.[228] Knowingly violating this order may be punished by a fine or by up to one year imprisonment, or both. However, statistics for the number of this type of injunctive relief is also not available.

3.6.2. US: Nevada

247. Four types of protection orders (temporary, modified temporary, extended and modified extended) can be granted by a Justice Court (a court at the lower end of the judicial system in Nevada) against stalking and harassment behavior under the N.R.S. § 200.591. The definition of stalking and harassment in the N.R.S. § 200.571 and 200.575, as discussed in Part 1 above, is relied on when applying / granting these orders.

248. Under the N.R.S. § 200.591(3), a temporary order can be granted ex parte and will last up to 30 days, or if an extended order is petitioned, until the hearing date for the extended order within those 30 days (N.R.S. § 200.594(1)). After the temporary order is served on the alleged stalker, he can request for removal of the order or a variation before the scheduled hearing, but has to give the alleged victim a 2-days notice of the new hearing (N.R.S. § 200.594(2)). An extended order can be granted for up to 1 year (N.R.S. § 200.594(3)).

[227] http://www.courts.ca.gov/documents/ccpor.pdf.
[228] §527.6: "(a) (1) A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section."
Harassment is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff" (subdivision (b)).

249. Only statistics for Protection Orders issued in 2006 and 2007 are available from the Nevada Department of Public Safety.[229] They do not specify whether the orders were issued in domestic or non-domestic violence contexts.

Table 3.6: Protection Orders Issues in Nevada

2006	Temporary order	Modified temporary order	Extended order	Modified extended order
Number	13,427	1,499	1,510	338

2007	Temporary order	Modified temporary order	Extended order	Modified extended order
Number	10,268	1,139	2,967	239

250. The way of reporting has changed since 2008, making comparisons even more difficult. Requests filed for and disposition of Protection Orders of non-domestic violence (i.e. harassment and stalking orders) to and by a Justice Court, without specifying the type of order, are available from the Nevada Judiciary Annual reports as follows:

Table 3.7: Requests filed and disposition of Protection Orders, Nevada, US

	2008[230]	**2009**[231]	**2010**[232]	**2011**[233]
Number of requests filed for protection orders	5,693	5,687	5,321	4, 931
Number of dismissals / non-trials[234]	N/A	N/A	N/A	86

[229] http://nvrepository.state.nv.us/po.shtml. The 2006 Protection Orders Report, pp 3-6, is accessible at http://nvrepository.state.nv.us/ucr/PO/2006_PO.pdf. The 2007 Protection Orders Report, pp 3-4, is accessible at http://nvrepository.state.nv.us/ucr/PO/2007_PO.pdf.
[230] See Table A7 of the 2008 Annual Report, accessible at http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/688/
[231] See Table A7 of the Appendix to the 2009 Annual Report, accessible at http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/2897/
[232] See Table A7 of the Appendix to the 2010 Annual Report, accessible at http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/5424/
[233] See Table A7 of the Appendix to the 2011 Annual Report, accessible at http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/7761/

Number of judgments / non-trials	N/A	N/A	N/A	3,253
Trial disposition	N/A	N/A	N/A	1,077

[234] Notes: **When to Count Dispositions**: A civil case is considered disposed when adjudication of the matter occurs. For statistical purposes, final adjudication is defined as the date judgment is entered.
Dismissals, Non-Trial: A disposition subtype that include voluntary, statutory, and stipulated dismissals. Dismissals granted on a defendant's motion and cases transferred to other jurisdictions are also included.
Judgments, Non-Trial: A disposition subtype that include stipulated, default, and summary judgments. Judgments on arbitration awards are also included.
Trial Dispositions: A disposition subtype that include bench and jury trials in which cases were resolved as a result of a trial.

PART 4

4. High Profile or Random Cases of Stalking involving News-Gathering Activities

251. This part addresses high profile or random cases of stalking involving news-gathering activities. It should be noted that trial cases are unlikely to be reported, in particular when charges are tried summarily.

252. From studying cases in the six jurisdictions, it has become apparent that the more precise the language used to define anti-stalking laws, the less likely there are to be challenges to those laws. In some instances legislation has been amended due to challenges. Likewise, if the laws are not designed to regulate only physical bodily conduct and also target speech or content, then constitutional challenges based on violations to the freedoms of speech and expression are more likely. Another feature is that the more precise the defences or exemptions are that protect freedom of the press/publication, the less likely it is that news/information-gathering activities will be targeted.

253. The only jurisdiction with cases where news-gathering activities have been targeted by the anti-stalking legislation is the UK. Those cases have been pursued under the civil harassment provisions of the UK PHA, mostly injunctions. 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. Likewise, there are no reported cases arising out of news activities pursued under civil harassment in the other jurisdictions, except the UK. In the following paragraphs of this Part we attempt to explain the reasons behind this phenomenon.

254. As we have seen in Parts 2 and 3, there is a lack of statistics available that identify the nature of the complaints or court cases arising out of news activities. While, for example, Victoria recorded stalking offences by relationship of victim to offender that shows categories such as "not related/associated", "other known" or "unspecified", which leaves the possibility of reporters being included,[235] it remains unclear whether news-gathering is a significant motive of stalking in those cases. Even when there is data showing the

[235] We inquired with the source of the data (i.e. Corporate Statistics, Victoria Police, as shown in Part 2 above) whether they could provide information as to who might be included in those categories. They replied that they were unable to give "any more information than what has been provided, the categories shown are the only details we have available" (e-mail 11 March 2013).

relationship between offender and victim, the characteristics of the stalker are not revealed. This is also true in the other jurisdictions.

255. Given that prosecutors have a duty of confidentiality,[236] there is no obligation on their part to provide information to the media regarding any case. However, there are some incidences available in the public domain, such as in blogs, which identify criminal complaints relating to stalking journalists or people involved in news- or information-gathering activities, sometimes called citizen-journalism. We provide examples of these situations as available in this Part. Part 7 includes similar scenarios, also as available in the different jurisdictions. We have tried to avoid any overlap.

4.1. UK

256. The PHA 1997 is being used against the media. The first cases came along to complain of harassment in the form of publication of articles by newspapers, the leading case being *Thomas v. News Group Newspapers*. This type of claim has recently become more difficult to sustain, under the ruling in *Trimingham v. Associated Newspapers*. These judicial developments were important in setting down the guidelines for interpreting the statutory defences under the PHA, including crime prevention and reasonable conduct, especially when freedom of expression and media activities are at stake. Cases in Northern Ireland largely follow the approaches in England and Wales.

257. *Trimingham* is an especially significant case as it links the interpretation of the "reasonable conduct" defence under section (1)(3)(c) of the PHA to the Human Rights Act 1998, and lays down a "necessary and proportionate" approach at least in the context of harassment by publication of articles.

258. Tugendhat J said in *Trimingham* that "There are a number of cases where interim injunctions have been granted against journalists and photographers to prohibit them from door-stepping, or besetting, the home of a person they wished to photograph or interview."[237]

[236] One example of this duty of confidentiality imposed on prosecutors is evidenced in statutory form in Queensland: section 24A of the Director of Public Prosecutions Act explicitly imposes such duty of confidentiality. Lawyers do also have such duty while the Police may be impeded to reveal the course of their investigations.
[237] [2012] EWHC 1296 (QB), para 99.

259. In relation to celebrities, a trio of injunctions taken out by Lily Allen, Amy Winehouse and Sienna Williams against paparazzi journalists was publicized in 2009 and described as "the first instances of civil claims" brought under the PHA, targeting newsgathering activities. They sparked academic interest too. Since then, there have been at least two other cases with published judgments relating to celebrities taking out injunctions against paparazzi, *Ting Lan Hong & KLM v. XYZ* and *Stone v. WXY*. One of the problems is that these injunctions are often taken out without named defendants.

260. As all the cases identified in relation to news activities involve civil proceedings, a couple of things should be noted in relation to applications under the PHA. Firstly, while the general rule in civil proceedings is that hearings will be heard in public,[238] exceptions apply to a number of types of proceedings, including applications under the PHA, which will be listed in the first instance in private[239] unless the judge orders otherwise.

261. Secondly, as most cases under the 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 Practice Direction to Part 25 of the Civil Procedure Rules.[240] The second point is a reminder that the merits of the case are not argued in applications for injunctions. The third and last matter relates to the granting of injunctions. Once an injunction has been granted, it does not necessarily mean the 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.[241]

262. Concerns over the freedom of speech and of publications connected with activities that may affect lawyers' day-to-day interactions as well as those involved in blogging activities are evolving.

[238] Civil Procedure Rules, r. 39.2.
[239] Practice Direction to Part 39 Civil Procedure Rules, para. 1.5.
[240] This is discussed in Part 5 below re case *RWE Npower*.
[241] See below *Stone*.

4.1.1. Thomas v. News Group Newspapers Ltd & Simon Hughes[242]

263. Case Background: This was an appeal from the judgment of Lambeth County Court's judge Cox on 7 March 2001. By that judgment he refused an application by the appellant, News Group Newspapers (News Group), to strike out the particulars of claim. The application turned on the meaning of "harassment" under the PHA 1997.[243] The judge recognised that this issue was one of general importance and gave permission to appeal. He directed that the appeal should be transferred to the Court of Appeal.

264. On 6 July 2000 News Group published in their newspaper "The Sun" an article written by the second appellant Simon Hughes (Hughes). It was headed "Beyond a Joke - Fury As Police Sarges Are Busted After Refugee Jest"[244] and described an incident of police

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[242] [2001] EWCA Civ 1233.

[243] The relevant sections of the PHA at the time were cited by the Court as follows:
"1. Prohibition of harassment
(1) A person must not pursue a course of conduct-
(a) which amounts to harassment of another, and
(b) which he knows or ought to know amounts to harassment of the other.
(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows-
(a) that it was pursued for the purpose of preventing or detecting crime,
(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.
2. Offence of Harassment
(1)A person who pursues a course of conduct in breach of section 1 is guilty of an offence.
The section then goes on to deal with the penalty.
"3. Civil remedy:
(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.
....
7. Interpretation of this group of sections
(1) This section applies to the interpretation of sections 1 to 5.
(2) References to harassing a person include alarming the person or causing the person distress.
(3) A 'course of conduct' must involve conduct on at least two occasions.
(4) 'Conduct' includes speech."

[244] The article read (*Emphasis added*):
"Two police sergeants have been demoted to constables over a 'private' remark about an asylum-seeker. Mark Pursey and John Saunders also face losing a total of more than £100,000 after their pay and pensions were cut.
They were carpeted by bosses after **a black clerk at their station complained about the way they treated a Somali woman trying to reach an asylum centre in Croydon, South London**.
The clerk claimed she overheard racist jokes about the Somali woman who was not in the room at the time.
The clerk alleged Saunders, 42, said:
'She found her way 8,000 miles here from Somalia - surely she can find her way f***ing back'.

officers being demoted because of racist jokes regarding a female Somali refugee who had gone to their police station looking for a refugee centre. Esther Thomas, a black civilian clerk at the police station, overheard those jokes and had an exchange with the police officers in question. She took the jokes seriously and reported the exchange to her superiors. As a result, the officers were found guilty of 'behaving in a derisive and racially discriminatory manner' and were demoted. The article caused a number of readers to write to *The Sun* to the effect that while not condoning racism, the police officers should not be punished for their jokes. Extracts of the letters were published by *The Sun* on 12 July 2001.

265. Two days later, a follow-up article was published in *The Sun*, again written by Hughes, which included the following passage about the three officers who had been disciplined: "All three were hauled in front of a disciplinary tribunal after a black civilian clerk complained about a series of exchanges at Bishopsgate last July."

266. The clerk Esther Thomas claimed she received race-hate messages because of the articles. She brought a civil claim pursuant to section 3 of PHA 1997 against News Group claiming that the articles amounted to harassment and caused her distress and anxiety. The Statement of Claim included the following paragraphs:

But Saunders insisted he only said:
'She found her way here 8,000 miles from Somalia - surely she can find her way four miles to Croydon'.
A fellow cop said last night: 'It was essentially light-hearted banter in private and the Somali never heard it. This is political correctness gone mad.'
The incident happened last July at Bishopsgate in the City of London.
The Somali - called Muna Ahmed - said she had been brought to England from France by a man who then robbed her and stole her passport.
She was given meals as cops arranged for her to get to Croydon and gave her money for fares - more than many UK forces would have done.
Pursey and two other officers were in an office away from the front desk discussing transport arrangements for the woman when Saunders arrived.
According to **clerk Esther Thomas** he then made his racist remark.
She told Pursey: 'If she was a blonde 6ft Australian you would have treated her differently'. Pursey replied: 'I'd have taken her out to dinner'. She hit back: 'You'd like t5o shoot us all'. Pursey said: 'I'd have you shot if you don't get on with your work'.
Esther Thomas **reported the exchange to her bosses**.
And last month the cops were found guilty of 'behaving in a derisive and racially discriminatory manner'.
Lose Dad-of-two Pursey was also convicted of two procedural lapses.
The pair, who plan to appeal, were reduced to PCs and their annual salaries were slashed by £6,000 a piece. Their pensions will also be reduced.
Dad-of-two Saunders hoped to hold his rank for nine more years and will now lose £54,000.
Pursey planned to serve another six and will lose £36,000.
A woman cop was also found guilty and fined a maximum £7000 after saying of plans to help the Somali: 'Are we running a taxi service?' A fourth officer was cleared."

> 6. The articles written by Mr Hughes, approved of by the Editor and published by the newspaper amount to a course of conduct which amounts to harassment of the Claimant. The article was written in an indignant tone which was designed to elicit a reaction.
>
> 7. The course of conduct caused the Claimant to be harassed by the Sun's readers. The course of conduct of itself amounted to harassment. The Claimant claims damages for breach of section 3 of the Protection from Harassment Act 1997.
>
> 8. The course of conduct was not reasonable. The Claimant did not have to be described as being black nor should her name and place of work be published. The facts stated in the articles were not accurate. In fact, the police officers were found guilty of race discrimination after both the Claimant and PC Bidmead, and others, gave evidence against the officers. The article incited racial hatred.
>
> 9. The articles caused the Claimant to be terrified and scared to go to work. She felt vulnerable to being physically attacked at work or en route to and from work. The Claimant has since transferred by her own choice to a new place of work.

267. At the lower court, the appellants had argued that, as a matter of statutory interpretation, the meaning of "harassment" in the PHA could not extend to a series of publications in a newspaper. In support of that submission they sought to rely on statements in Parliament when the Bill was being debated under the principle in *Pepper v. Hart* [1993] AC 593. The judge did not consider that that principle was engaged, for he did not find the provisions of the PHA to be ambiguous. He rejected the appellants' argument of interpretation and dismissed their application to strike out the claim.

268. Case Development: On appeal, the above argument was abandoned. Instead, the appellants conceded that under the definitions of the PHA, publication of press articles was capable of amounting to harassment albeit in only very rare circumstances. The Court determined that the issue was whether it was arguable that the publications in question

constituted "harassment" having regard to the effect that the respondent Thomas alleged they had upon her.

269. The starting point for the Court was to proceed on the basis that the appellants were correct in their contention that the mischief which led to the PHA was the practice of stalking.[245] At the heart of the appellants' case was the effect on the interpretation and application of the PHA on the Human Rights Act 1998 (HRA) and in particular Article 10, freedom of expression.

270. Both parties recognised "the importance of the right of freedom of expression and, in particular, press freedom. Both parties recognised that the duty to give effect to this right is an important consideration to any court when considering whether an offence or civil tort has been committed contrary to the 1997 Act."[246]

271. The appellants submitted that the PHA should not generally be applied to press publications, as that would give rise to judicial censorship. The Court recognised that the appellants' submission was powerful and cited it as follows:

> It is anathema to the concept of freedom of expression to make it subject to proof by the person who seeks to exercise the freedom that s/he has acted reasonably. That injects precisely the subjective element of 'approval' which militates against a true 'freedom'.
>
> The interpretation advanced by the Respondent (and accepted by the Court below) means that newspapers and broadcasters will be caught in the net of S.1(1) simply on the basis that articles they publish cause the subject distress (see PFHA s7(2). Such a wide definition raises the spectre that legitimate subjects of newspaper reporting will be able to ask any County Court for an injunction to restrain publication leaving it up to the newspaper to satisfy a County Court judge that the terms of its article are reasonable. In turn, that raises the practical reality that unless the newspaper submits its proposed article to the Court in order to demonstrate its reasonableness (ie to discharge

[245] However, the Court said that "Once it is conceded, however, that the 1997 Act applies to activities which go beyond stalking, the fact that the stalking was the principal mischief at which the Act was aimed, affords only limited assistance," [2001] EWCA Civ 1233, para 1.16.
[246] [2001] EWCA Civ 1233, para 1.26.

> its burden of proof), the injunction will be granted. Such a situation is intolerable and represents a state of affairs little short of judicial censorship and/or prior restraint: it is manifestly contrary to Article 10.[247]

272. The appellants also argued that the defence that the conduct complained of is reasonable is not adequate to accommodate the right of freedom of speech, which entitles the press to make comments about people which are not reasonable.

273. The Court considered two questions: (1) what facts have to be alleged in order to plead an arguable case of harassment; (2) what is the nature of the defence that the conduct was reasonable within section 1(3)(c)? The following table summarizes the answers by the Court:

Table 4.1: Reasoning in the *Thomas* decision

The nature of harassment	The nature of reasonable conduct
- No comprehensive definition of harassment in section 7 of the PHA. - Many actions that foreseeably alarm or cause a person distress could not possibly be described as harassment. Section 7 deals with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect. - "Harassment" describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable (this is the threshold of seriousness). The practice of stalking is a prime example of such conduct. - Section 1(3) (c) of the PHA ("that in the particular circumstances the pursuit of the course of conduct was reasonable") places the burden of proof on the defendant; the claimant however has to plead facts which are capable of amounting to harassment. - A pleading, which does no more than allege that the defendant newspaper has published a series of	- When considering whether the conduct of the press in publishing articles is reasonable for the purposes of the PHA, the answer does not turn upon whether opinions expressed in the article are reasonably held. - The question must be answered by reference to the right of the press to freedom of expression. - Protection of reputation is a legitimate reason to restrict freedom of expression. Subject to the law of defamation, the press was, prior to the PHA, entitled to publish an article, or series of articles, about an individual, notwithstanding that it could be foreseen that such conduct was likely to cause distress to the subject of the article. This is in respect of the civil law. - The PHA has not rendered such conduct unlawful. In general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. - The Court did not attempt any categorisation

[247] [2001] EWCA Civ 1233, para 1.27.

articles that have foreseeably caused distress to an individual, will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment.	of the types of abuse of freedom of the press which may amount to harassment. - The parties agreed that the publication of press articles if calculated to incite racial hatred of an individual, provided an example of conduct which is capable of amounting to harassment under the PHA. - The test of whether a series of publications constitutes harassment requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed.[248] - Thus, the test for harassment is objective: "before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare."[249]

274. Outcome: Lord Phillips MR, with whom the other two judges concurred, held that when the three publications were considered together, Thomas pleaded an arguable case that the appellants harassed her by publishing racist criticism of her which was foreseeably likely to stimulate a racist reaction on the part of their readers and cause her distress. As such News Group's and Hughes's appeal to strike out the claim was dismissed.

275. The case was transferred to the High Court with an undertaking that, if successful, News Group's and Hughes's would not seek to recover more costs than they would be entitled to recover had the matter proceeded in the County Court, where it started. The case was to be listed as a multi-track case, which means that the claim must have been more than

[248] The test was redefined in *Trimingham v. Associated Newspapers*, discussed below, to further consider the link between the Human Rights Act's freedom of expression and freedom of private life, and the PHA.
[249] [2001] EWCA Civ 1233, para 1.35.

£15,000 (this was for cases started before April 2009, after which the threshold amount was raised to £25,000).[250]

276. However, it is unknown whether the claim was indeed heard, and if so whether it eventually succeeded or not; or whether there was a settlement between the parties. No further judgment has been located. Given the duty of confidentiality imposed on lawyers, we have not pursued the matter with the lawyers involved in the case.

277. Public Sentiment: As the first action for civil remedies under the PHA 1997 against the media, this case attracted widespread attention (especially from the media themselves). It was reported, mostly in a critical tone, by national press such as the BBC,[251] The Telegraph[252] and The Guardian.[253] There were criticisms from the press in The Telegraph,[254] The Guardian,[255] Press Gazette,[256] and from civil society organizations such as MediaWise.[257] The criticisms were mainly directed towards the erosion of press freedom. They also brought interest to the fact that there was no public interest defence. Many criticisms shared the concern of counsel for *The Sun* in the case itself, namely that courts could become judicial censors of the press.

4.1.2. Howlett v. Holding[258]

278. Case background: The claimant was a former Labour MP. The defendant flew banners from his aircraft containing abusive and derogatory words aimed at her, dropped defamatory leaflets over the surrounding area, and put her under secret video surveillance. The claimant relied on the PHA to seek an injunction to restrain the defendant from carrying out the behaviour described.

[250] It was reported that Thomas was seeking £50,000 in damages: "Appeal court clears way for press harassment cases", *The Guardian*, 19 July 2001.
[251] "The Sun to be sued for harassment", *BBC,* 18 July 2001 http://news.bbc.co.uk/2/hi/uk_news/1446136.stm
[252] Joshua Rozenburg, "Court allows race-hate victim to sue Sun", *Telegraph,* 19 July 2001, http://www.telegraph.co.uk/news/uknews/1334549/Court-allows-race-hate-victim-to-sue-Sun.html
[253] Clare Dyer, "Sun can be sued for distress, court rules", *The Guardian*, 13 March 2001, http://www.guardian.co.uk/media/2001/mar/13/pressandpublishing.privacy; Society Guardian, "Sun "confident" in stalker appeal", *The Guardian*, 14 March 2001, http://www.guardian.co.uk/society/2001/mar/14/raceequality.
[254] Joshua Rozenburg, "Gone to the press", *The Telegraph,* 26 July 2001, http://www.telegraph.co.uk/news/uknews/1335295/Gone-to-press.html
[255] Dan Tench, "Privacy on parade", *The Guardian*, 20 August 2001, http://www.guardian.co.uk/media/2001/aug/20/mondaymediasection4
[256] "Harassment in a newspaper article", *PressGazette*, 8 August 2001, http://www.pressgazette.co.uk/node/27583
[257] "A step too far", *MediaWise*, 14 March 2001, http://www.mediawise.org.uk/a-step-too-far/
[258] [2006] EWHC 41 (QB).

279. Case development: Although not a case that arose out of media context, it held that acts of "aerial harassment" and surveillance are capable of constituting harassment, which does have implications for news-gathering activities. For example, it might be more difficult for investigative journalists or other persons gathering information to try to use the defence of crime prevention under section 1(3)(a) of PHA 1997 because "The defence of preventing crime is not designed "to enable any Tom, Dick or Harry to set himself up as a vigilante and harass his neighbours under the guise of preventing or detecting crime."[259]

280. The Court held that "s.1(3)(a) was indeed framed with law enforcement agencies in mind and that s.1(3)(c) was directed towards others carrying out the miscellaneous functions described. Even if that is too rigid a construction, a private citizen before being able to avail himself of s.1(3)(a) would at least have to show that there was, objectively judged, some rational basis for the surveillance. Here there was none."[260]

281. Outcome: The injunction was granted.

282. Note that in the recent decision by the Supreme Court in *Hayes (FC) and Willoughby* (discussed in Part 4.1.8 below), the majority extended the protection of section 1 (3) (a) to private persons.

4.1.3. Callaghan v. Independent News & Media Ltd[261]

283. Case Background: There were two actions in this case. Under the first action, the first plaintiff, Henry Callaghan, claimed to be harassed by articles published by the defendant newspapers. He sought an injunction under Article 3 of the Protection from Harassment (Northern Ireland) Order 1997, to restrain the defendant, whether by itself, its servants or agents or otherwise from publishing any unpixelated photographic images of the first plaintiff from which he could be identified and publishing any information identifying the first plaintiff in any way. The main issue at the trial of the first plaintiff action related to whether the defendant could or could not publish an unpixelated photograph.

284. The second action (involving a second plaintiff) was not relevant to the PHA Oder 1997.[262]

[259] [2006] EWHC 41 (QB), para 31.
[260] [2006] EWHC 41 (QB), para 33.
[261] [2009] NIQB 1.

285. Callaghan had committed murder in 1987 and had raped his victim either while she was dying or dead. The tariff period of his sentence expired in 2008 but he was subject to remaining in custody or release on license.

286. He brought the civil action on the basis that as a sex offender who had committed a most heinous crime there was, inter alia, a risk to his life if unpixelated photographs of him were published by the defendant. The defendant wished to publish those photographs so that members of the public could identify Callaghan and were therefore enabled to take precautions in respect of the risk that he posed. However, the existence of a general risk of harm to sex offenders was expressly accepted by the defendant during trial.

287. The defendant had published a number of articles, not only in relation to Callaghan, but also in relation to (a) a number of other life sentence prisoners who could be released back into the community and (b) the general policy question as to whether there should be publication of all details in relation to sex offenders upon their release into the community so that members of the public can identify the offenders and take precautions in relation to the risks that they pose.

288. The articles featuring Callaghan commenced on 12 February 2006. On that date the defendant published an article under the title "Jailed sicko who abused dying woman to compete in run" and "Sex killer let out to train for marathon". This and all the articles published by the defendant said that the first plaintiff posed a significant risk to the public. That he was *and remains* a very sick individual, a psycho, a sex beast and evil. Apart from one short acknowledgement published on 10 February 2008 that Callaghan had been assessed by professionals within the criminal justice system as suitable for inclusion in day release, the articles lacked any balance in relation to the detailed assessments that had been carried out in respect of Callaghan. The language employed by the defendant in its articles is replete with references to “killers on the loose”, “back on the streets”, “evil Callagan”, “sex beast”, “notorious sex killer”, and “sex beast killer”.

[262] It involved the Northern Ireland Office (NI Office), the second plaintiff, as the body responsible for operating the prisons in Northern Ireland. The NI Office sought a declaration that the defendant newspaper may not lawfully publish photographs of the first plaintiff without obscuring all of his distinguishing features (“an unpixelated photograph”). The second plaintiff further sought a declaration that the defendant may not lawfully publish a photograph of any serving prisoner who is or who has been assessed at the second plaintiff's Prisoner Assessment Unit in Belfast (address provided), unless all distinguishing features of that person were obscured, without giving the second plaintiff 48 hours notice of the intention to publish the same.

289. Information as to the news-gathering; i.e. here, how the photographs of Callaghan were taken was included in the judgment. What was revealed was that after Callaghan had been moved from prison to the Prisoner Assessment Unit, the defendant arranged for a photographer to take photographs of the first plaintiff in a public place outside the Prisoner Assessment Unit. On 1 February 2008 one of the defendant's photographers took photographs of the first plaintiff in a café and also took photographs of him in a shopping centre. One of the defendant's journalists approached the first plaintiff in the café and in the shopping centre.

290. Seven days later, the first plaintiff learnt that the defendant intended to publish an article about him together with the photographs which they had taken of him. He applied for an interlocutory injunction on 8 February 2008 to prevent, inter alia, the publication of an unpixelated photograph.

291. There was an interlocutory application[263] which came down to the question as to whether the defendant should be restrained until the trial of the action from publishing any unpixelated photograph of the first plaintiff. The judge, who was the same who heard the present application, granted the interlocutory injunction in those terms until the trial of the action. The defendant remained at liberty to publish many other details in relation to the first plaintiff including, for instance, his name, date of birth and the details of the crime which he had committed.

292. Two days after the interlocutory injunction had been granted, the front page headline in the Sunday Life read "Life ordered not to publish pictures of killers and rapists". "Banned". The various articles in that edition of the paper continued to describe the first plaintiff as posing a significant ongoing risk to the public.

293. Case Development: Relying on *Thomas*, the judge in the present action held that in relation to the taking of photographs, the surveillance and the threatened publication of unpixelated photographs, when combined with the content of the published articles, which Callaghan anticipated would be published, amounted to harassment.

294. In relation to the taking of photographs and the threatened publication by the defendant of unpixelated photographs in connection with press articles calculated to incite

[263] *Callaghan v. Independent News & Media Ltd* [2008] NIQB 15.

hatred of and animosity and hostility towards Callaghan, such conduct was capable of amounting to harassment under the PHA 1997 Order.

295. However, in so far as Callaghan's statement of claim sought an injunction restraining the defendant from pursuing any conduct which amounts to harassment, the judge considered that the relief sought was too imprecise. Accordingly in relation to harassment the only issue which the judge addressed related to the question of taking and threatening to publish unpixelated photographs against the background of the articles which the defendant published.

296. The defendant tried to argue that the publication of an unpixelated photograph of the claimant was for the purpose of detecting or preventing crime and/or that it was reasonable conduct. However, the Court dismissed the defence of crime prevention under section 1(3)(a) of PHA 1997, largely adopting the reasoning in *Howlett v. Holding*.

297. The judge held that the tone and content of the articles were calculated to and did engender considerable public hostility and animosity towards the first plaintiff; that there would be elements of the public informed by these articles who will perceive the first plaintiff as posing a present and substantial risk to the safety of any woman who is in contact with him; that the articles did not provide any balance by explaining for instance the supervision by the authorities of the first plaintiff in the community and the detailed steps taken to assess and address the risks that he posed to the public before there was any question of release on strict licence conditions.

298. Furthermore, the judge also found that the articles failed to contain any information as to the risks that could be created to the public by the identification of the precise whereabouts of sex offenders at a stage when they were being rehabilitated back into the community.

299. Outcome: An injunction was granted against the defendant Independent News & Media Ltd. on the basis of misuse of private information, but the judge held that the application of the principles under the PHA Order 1997 produced the same result. The defendant accepted that if Callaghan was entitled to an order on the basis of misuse of private information, he would also be entitled to the same order under the PHA Order 1997.

4.1.4. Ting Lan Hong & KLM (A child) v. XYZ & Ors[264]

300. The wife and child of the celebrity Hugh Grant successfully applied for an injunction under section 3 of the PHA 1997 against paparazzi photographers and other media. They were being followed and photographed; and journalists stayed outside their home. The wife was neither able to meet with friends nor take the child outside. It was also argued that the life of the child was made very miserable. Tugendhat J accepted the evidences and on that basis found it "necessary and proportionate" to grant the injunction.

4.1.5. Trimingham v. Associated Newspapers Ltd[265]

301. Before this case, there was no trial of a claim in harassment under the PHA 1997 against a newspaper in England.[266] *Thomas* only proceeded to applications to strike out the claim. In *Trimingham* the Court also redefined "reasonable conduct" by reference to the Human Rights Act 1998.

302. Case Background: Ms Trimingham complained of a series of newspaper articles and photos published by Daily Mail and the Mail (of which the defendant Associated Newspapers is the publisher) on Sunday newspapers and of the website Mail online, in a period of about four months.[267] The articles and photos concerned her affair with Mr Chris Huhne MP

[264] [2011] EWHC 2995 (QB).
[265] [2012] EWHC 1296 (QB).
[266] However, there was one trial in Northern Ireland which failed. In that case, *Thomas* was extensively relied on. ***King v. Sunday Newspapers Ltd*** [2010] NIQB 107 involved the defendant newspapers who had written a series of 29 articles about the plaintiff accusing him of involvement in serious crime and disclosing allegedly private information. His claim for harassment (under legislation similar to the PHA) related not just to the allegedly private information, but to all the matters reported in the articles. The subject of the privacy complaints included a photograph, an address and information that the plaintiff (a Loyalist) had a Catholic partner. At first instance, Weatherup J held that there was a course of conduct targeted at the plaintiff which had, and was calculated to have, the effect of causing alarm and distress to the plaintiff. The issue was whether the articles amounted to reasonable conduct (para 42). The judge held that they did amount to reasonable conduct, notwithstanding inaccuracies and the inclusion of private information, because the truth of the central theme of the articles was not an issue. The Court of Appeal held (in [2011] NICA 8) at paras 38 and 39 that "Particularly in light of the fact that the appellant [King] declined to institute defamation proceedings to challenge the correctness of the thrust of the robust allegations of serious criminality made in the articles, we conclude that the judge was correct to conclude that the appellant had not made out a case of harassment … We have differed from the judge on the question whether the respondent was wrong to have published details of the identity of the partner and the photograph of the partner. To that limited extent we allow the appeal. While we have differed from the judge's reasoning in deciding to prohibit a publication of the religion of the partner, we do not differ from him in the result. We conclude that the judge was correct in deciding that the appellant had not made out a case of harassment." Case, as cited in Trimingahm.
[267] The articles complained of were attributed to a large number of different journalists, apparently 38. However, Ms Trimingham made no allegation against any individual journalist or editor of the state of mind required by section 1 of the PHA. Counsel for Associated Newspapers did not accept that a claim in harassment could be

(Liberal Democrat), and her former lesbian civil partnership. She also relied on the publication of reader's comments on Mail Online. In particular, she complained of the references in the articles to, and the comments to her appearances and sexual orientation. She sought an injunction to restrain further publication of photographs and certain other information. The application for injunction was made under three grounds: infringement of right to privacy, misuse of private information, and under section 3 of the PHA 1997. It was admitted that Trimingham could not pursue a claim in libel, as most of the information about her affairs was true.

303. Case Development: Tugendhat J considered the interaction between the freedom of expression and the freedom of private life protections under the Human Rights Act 1998 (HRA) and the PHA 1997. He held that:

> The court is required to follow the guidance of the House of Lords in Re S (a child) (identification: restriction on publication) [2004] UKHL 47 at [17], [2004] 4 All ER 683 at [17], [2005] 1 AC 593, as follows: (i) neither article [Article 10, freedom of expression, and Article 8, freedom of private life] as such has precedence over the other; (ii) where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test—or 'ultimate balancing test'—must be applied to each. Section 1(3)(c) of the 1997 Act requires the court apply that test to 'the pursuit of the course of conduct'.
>
> .., it is no part of the court's role to decide whether what is published in a newspaper is reasonable in any other sense, still less whether the judge agrees with what a newspaper publishes.[268]

304. In considering the effect of a course of conduct which consists of speech, Tugendhat J said that the court may have to decide what meaning the words convey. For example, in this case, Ms Trimingham alleged that the word 'bisexual' was pejorative when used by the

advanced against a company such as the defendant on the basis of the allegations pleaded in Ms Trimingham's particulars of claim. In the event, the judge did not have to make a decision on this point (see paras 96-97).
[268] [2012] EWHC 1296 (QB), paras 55-56.

defendant. In deciding what words mean, the court should put itself in the position of a reasonable person. In the case of harassment by written words there are two relevant persons: the writer and the subject of what is written. It is the effect on the subject which the writer knows, or ought to know, that may give rise to liability.

305. The requirement that the court interpret the PHA so that "harassment must not be given an interpretation which restricts the right to freedom of expression," alluded by Lord Nichols in *Thomas*, required the court to give effect to sections 1(1) and (2) of the PHA (what a reasonable person in possession of the relevant information would think would amount to harassment) as well as section 1(3)(c) ("that in the particular circumstances the pursuit of the course of conduct was reasonable"). A reasonable person within the meaning of section 1(2) must be a person who adheres to the values in the Convention rights.[269]

306. The principal issues in the present case were indicated by the court as follows:

(1) Was the distress that Ms Trimingham suffered the result of the course of conduct, in the form of speech that she complained of?

(2) If so, ought the defendant to have known that that course of conduct amounted to harassment? (3) if so, has the defendant shown that the pursuit of that course of conduct was reasonable (in the sense defined in *Thomas*'s case)?

(3) To both questions (1) and (2) there were subsidiary questions: was Ms Trimingham a purely private figure or not? and, either way, was she in other respects a person with a personality known to the defendant such that it ought not to have known that the course of conduct amounted to harassment?

307. How Tugendhat J responded to the above issues is discussed next.

308. For the purposes of section 1(2) of the PHA, none of the witnesses ought to have known that what he or she was writing amounted to harassment of Ms Trimingham. But the

[269] Tugendhat J cited at para 78, what Nicol J said in *Ferdinand v. MGN Ltd* [2011] EWHC 2454 at [64]: "Freedom of expression, after all, is one of the human rights guaranteed in the Convention because it is an integral part of the foundation of a democratic state and pluralism has long been recognised by the Strasbourg Court as one of the essential ingredients of a …While I accept that the subjective perception of a journalist cannot convert an issue into one of public interest if it is not … the court's objective assessment of whether there is a public interest in the publication must acknowledge that in a plural society there will be a range of views as to what matters or is of significance in particular in terms of a person's suitability for a high profile position.'

important person was the defendant and whether the defendant ought to have known that what he or she was writing amounted to harassment of Ms Trimingham. A reasonable person in the possession of the same information as the defendant, namely about Ms Trimingham's job and her past career as a journalist, could reasonably consider, that she was tough, a woman of strong character, not likely to be upset by comments or offensive language.

309. As to the issue of causation, Ms Trimingham has suffered distress, but not distress caused, or that the defendant ought to have known that it would be caused, by the course of conduct which Ms Trimingham complained of. For example, she gave no evidence upon which the effect of the defamatory words could be distinguished from the effect of the offensive or insulting words, or the effect of the conduct of the defendant, from the effect of the conduct of other persons.

310. The words 'bisexual' and 'lesbian' are factual words which are not normally to be understood as pejorative by a reasonable person. This is besides the point that any word can acquire a pejorative meaning in a particular context, but in this case no reasonable reader of the words complained of would understand them in a pejorative sense. What the defendant expressed hostility to, is not her sexuality but her conduct (deceiving her civil partner).

311. Considering the question for the purposes of section 1(3)(c), if an unusual event occurs involving sexual behaviour of a public figure, and one of the participants is homosexual, it is not of itself unreasonable for a newspaper to refer to that fact. Nor is it unreasonable to refer to those facts on as many occasions as the substance of the story is repeated and referred to, to explain subsequent events of public interest. And if a journalist is criticising a person for deceitful, unprofessional or immoral behaviour in a sexual and public context, it is not of itself unreasonable to refer to that person as homosexual if in fact they are, and it is their sexual conduct which is one of the factors giving rise to the newsworthy events.

312. The law applied was "for the court to comply with section 3 of the HRA [i.e. that legislation must be compatible with Convention rights], it must hold that a course of conduct in the form of journalistic speech is reasonable under s 1(3)(c) of the 1997 Act unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in art 10(2), including, in particular, for the

protection of the rights of others under art 8. The word 'targeted' is not in the statute. I take Lord Phillips [in *Thomas*] to be using it to give guidance as to what is meant in s 7(3) by the words 'conduct in relation to a … person': those words are to be interpreted restrictively to comply with s 3 of the Human Rights Act 1998".[270]

313. The judge held that discussion or criticism of sexual relations which arise within a pre-existing professional relationship, or of sexual relationships which involve the deception of a spouse, or a civil partner, or of others with a right not to be deceived, are matters which a reasonable person would not think would be conduct amounting to harassment, and would think was reasonable, unless there are some other circumstances which make it unreasonable.

314. One circumstance, which may make such a course of conduct unreasonable, is if it interferes, to the extent above explained, with the freedom of private life of the claimant. But, Ms Trimingham's right in that respect became very limited, not only because, she is not a purely private figure, but also because she herself has been open about her sexuality and her sexual relationships.

315. On whether it was 'unreasonable' within section 1(3)(c) of PHA for her critics, in particular the defendant, repeatedly to refer to her sexuality, and on a few occasions to her appearance and other information about her, the judge noted that in contemporary British society there are some varieties of sexual conduct where there is no consensus as to what is wrong, true or right. The consequence is that the law must not penalise the expression of views that may offend, shock or disturb sectors of the population. Where pluralism and toleration apply, the right to freedom of expression must be taken seriously.

316. Repetitious publications of the words complained, by itself is not unreasonable within section 1(3) (c).

317. Each time the defendant named Ms Trimingham, it did so in a story in which the main character and target was Mr Huhne. Ms Trimingham was named only because of the very important secondary role she played in the events relating to Mr Huhne. She was not even named by the defendant in all its articles about Mr Huhne, but only in less than half of them. The judge said "I would not wish to say that it is impossible that a secondary character to a

[270] [2012] EWHC 1296 (QB), para 53.

story, such as Ms Trimingham, might ever succeed in a claim for harassment for speech directed to the primary character. If such a case occurs, the court will have to consider it on its own facts."[271]

318. Balancing all the factors mentioned, it was not necessary or proportionate for the court to make any injunction in the terms sought by Mr Trimingham, or to make a finding of breach of the PHA against the defendant.

319. In conclusion, it was held that discussion and criticism of sexual relations arising out of pre-existing professional relationships, or of sexual relationships involving deception of a spouse or civil partner, would constitute reasonable conduct. However, using the threshold of seriousness in *Thomas* of "oppressive and unreasonable", it was also accepted that repeated mocking of someone's sexual orientation would almost inevitably be so oppressive as to amount to harassment.

320. In addition, Trimingham had also complained that the newsgathering activities themselves constituted harassment by "speaking or attempting to speak to people with whom she mixes in her private life". She had claimed to be distressed by her friends talking to the journalists on anonymous bases about her private life. The Court rejected this complaint on the basis that Trimingham expected publicity and "there can be little publicity without journalists making enquiries".

321. The link between the Human Rights Act 1998 and the PHA 1997 may extend to news-gathering activities. In the case of *Ting Lan Hong & KLM (A child) v. XYZ & Ors* (see above), Tugendhat J used in his short judgment the terms "necessary and proportionate" to grant an injunction against paparazzi journalists, which may indicate that he used an approach similar to that in *Trimingham*.

322. Outcome: The application failed on all grounds. Trimingham originally sought to appeal to the Court of Appeal, but recently dropped it.[272]

[271] 2012] EWHC 1296 (QB), paras 269-271.
[272] Andrew Pugh, "Chris Huhne's partner Carina Triingham drops appeal over rejected Daily Mail privacy and harassment claim", *PressGazette*, 19 February 2013, http://www.pressgazette.co.uk/chris-huhnes-partner-carina-trimingham-drops-appeal-over-rejected-daily-mail-privacy-and-harassment

323. Public Sentiment: As a result of the high profile scandal between Trimingham and Mr Huhne, and its reputation as the first trial of a claim against a media organization brought under the PHA 1997, the case was extremely widely reported by the media in the UK. However, although the media organization won the case, there were concerns that this case confirmed the possibility of the use of the PHA 1997 against media organizations.[273] Many issues were left unclear for the media, for example, what kind of conduct would amount to both "oppressive and unreasonable".

4.1.6. Stone & Anor v. WXY (Person Or Persons Unknown)[274]

324. The full title of the case is "Lara Stone, David Walliams (Claimants) v. 'WXY' (person or persons unknown responsible for pursuing and/or taking photographs of the Claimants outside their home and in other places during March to May 2010)." The claimants are so-called celebrities.

325. Case background: This application was heard on 30 October 2012. It was an application for one Mr Jani Jance (Jance), a freelance photographer, to be joined as a defendant in existing (albeit dormant) proceedings by the claimants under section 3 of the PHA. Those proceedings had been launched in May 2010 with the primary objective of preventing harassment of the claimants at around the time of their wedding, due to take place on 16 May of that year, although the only defendant(s) who could be made the subject of a claim at that time had to be characterised as 'WXY'. At that stage, and apparently for some time thereafter, the claimants were unable to identify any of the paparazzi by whom it was alleged they were then being pursued.

326. In this application, it was explained that Jance was identified to have played at least a limited role at that time. Jance admitted that he attended on the instructions of his agency on one occasion, when he took two or three photographs of the claimants. According to Jance's evidence, however, they were not of sufficient quality or interest for him to be able to make any use of them. He did not accept he either then or subsequently harassed the claimants or done anything otherwise illegal.

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[273] Callum Galbraith, "Trimingham case could be first of many harassment claims against the media", *PressGazette*, 1 May 2012, http://www.pressgazette.co.uk/wire/8865 ; Siobhain Butterworth, "Trimingham case is an example of value judgment obscuring legal ones", *The Guardian*, 28 May 2012, http://www.guardian.co.uk/law/2012/may/28/trimingham-value-judgment-harrassment

[274] [2012] EWHC 3184 (QB).

327. On 14 May 2010, the judge had granted an interim injunction under section 3 of the PHA in favor of the claimants against WXY "to give the Claimants some measure of protection during the period when there was particular media interest in them."[275] Besides that sentence, there is no other explanation for granting the injunction.

328. The claimants served the order of the interim injunction on some of the well-known paparazzi agencies and, thereafter, either because of the order itself or because interest in the couple may have tailed off to some extent, it seemed that the harassment abated.

329. The judge acknowledged that it is inappropriate for a claimant to seek interim relief and then to sit back and take no further step in the proceedings in question, treating the interim injunction as affording the same benefits as a permanent order.

330. Later, the claimants were able to identify Jance as one of the original "pursuers", and what was now sought was to introduce him into the litigation as an individual defendant and then bring the proceedings to a close by way of converting the existing order into a permanent injunction. That course was opposed by Jance.

331. Case Development: The question to be answered, according to the judge, was whether it was desirable to join Jance to the existing dormant proceedings as opposed to pursuing him by means of a separate claim (if that was indeed to be pursued on the assumption that a claim could be justified against Jance). He said that Jance "should not be introduced into the dormant litigation in the capacity of a scapegoat on to whose shoulders can be loaded responsibility for all the wrongdoing said to have taken place in early 2010 – together with a bill for the costs of the action."[276]

332. No particulars of claim had been served since the early stages of the proceedings and no proper description was given in the title, which contained the vague terms "and in other places". The judge said:

> A point is also taken as to the adequacy of the definition attaching to WXY. The proper test is to be found in *Bloomsbury Publishing Group Plc v News*

[275] [2012] EWHC 3184 (QB), para 3.
[276] [2012] EWHC 3184 (QB), para 11.

Group Newspapers Ltd [2003] 1 WLR 1633 at [21], *per* Sir Andrew Morritt V-C:

> The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not.

That formulation has been adopted in numerous subsequent cases. Specifically, here, objection is taken to the inclusion of the words "and in other places", since it is not only vague but would embrace photographing the Claimants in public places, despite it being made clear on 14 May 2010, and also before me in 2012, that the Claimants are not objecting to photographs in public as such – provided there is no harassment.

333. Furthermore, it was argued that the order itself was intended to impose an exclusion zone extending to 100 metres around their homes, but did not identify the prohibited locations (even in a confidential schedule). The claimants were aware of Jance's identity for over a year "as being one of the photographers who in the weeks leading up to their wedding, prior to the order being obtained, loitered outside their home on a virtually daily basis for the purpose of trying to take photographs of them".

334. As indicated earlier, the interim injunction had originally been granted in May 2010 against Defendants characterized only as "WXY". The Claimants had been unable to identify any of the paparazzi for some time thereafter, but once Jance was identified, he was served with a copy of the judge's order. This happened in June 2011 and thus Jance was directly bound by its terms since then. Normally, an interim injunction lasts until its variation, discharge or until the court has made a final decision. Stone appeared to have accepted in one of her witness statements that Jance had stopped photographing her. There had been no application to commit him for a breach of the order since he was served.

335. There was no recent course of conduct alleged within the meaning of section 7 of PHA. The only incident referred to prior to the date when Jance was served with the order, and after the granting of it on 14 May 2010, related to one incident when the claimants were riding their bicycles in certain location when Jance came across them, by chance, and photographed them from two different spots as they were riding towards him. The judge did

not accept that this was unlawful, or inconsistent with the terms of the order. There was no evidence that this caused anxiety, alarm or distress. Apparently, copies of these photographs were published but the claimants raised a complaint in respect of those photographs with the agents. It was unknown whether there was an agreed disposal between the agents and the claimants.

336. There appeared to have been a few other similar incidents but the judge said "Again, one struggles to infer any incident of harassment or otherwise unlawful conduct."[277]

337. Outcome: The judge rejected the application to join Jance in the dormant proceedings. He said he was not persuaded that "it is positively 'desirable' for any reason to have him joined as a separate individual defendant in the existing but dormant proceedings. Accordingly, the application is dismissed."[278]

338. No further reported case was found relating to the claimants against Jance or other journalists or their agencies.

4.1.7. Injunctions taken out by Lily Allen, Sienna Williams, Amy Winehouse and others

339. It was reported in 2009 that celebrities Lily Allen, Sienna Williams and Amy Winehouse obtained injunctions against paparazzi journalists under the PHA 1997.[279] This attracted serious academic comment.[280]

340. According to the newspapers (as the legal proceedings were not reported), the injunction order in relation to ***Winehouse*** prohibited leading paparazzi agency Big Pictures from following her. The order also referred to any "persons unknown" seeking to photograph the musician outside her home and in other public places if they had pursued her. All photographers were also forbidden from taking pictures of her in her home or the home of any members of her family or friends.

[277] [2012] EWHC 3184 (QB), para 27.
[278] [2012] EWHC 3184 (QB), para 29.
[279] Ben Dowell and James Robinson, "Amy Winehouse wins court ban on paparazzi at her home", *The Guardian*, 1 May 2009, http://www.guardian.co.uk/music/2009/may/01/amy-winehouse-big-pictures-paparazzi-privacy; Dominic Ponsford, "Lily Allen uses harassment law to curb paparazzi", *Press Gazette*, 16 March 2009 http://www.pressgazette.co.uk/node/43344.
[280] See for example Andrew Scott, "Flash Flood or Slow Burn? Celebrities, Photographers and Protection from Harassment", *LSE Law*, Society and Economy Working Papers ("A. Scott") 13/2009, http://eprints.lse.ac.uk/24560/1/WPS2009-13_Scott.pdf.

341. On behalf of Winehouse, it was declared that "Every time she got in her car she was chased or was jostled."[281]

342. With regard to ***Lily Allen***, Big Pictures and Matrix Photos gave undertakings not to harass the singer. In addition, an injunction restraining further harassment of her by other unnamed paparazzi photographers was obtained.

343. There was also an undertaking in relation to actress ***Sienna Miller*** that Big Pictures would not pursue her – by car, motorcycle or on foot – or "doorstep" her at her home or that of her family. It was further reported that:

> The tailing of Miller between June and September last year during her alleged relationship with actor Balthazar Getty, soon after she broke off a relationship with the Welsh actor Rhys Ifans, resulted in the publication of 23 photographs. Darryn Lyons, the flamboyant Australian owner of Big Pictures agency, and Big Pictures agreed to pay £37,000 damages and court costs to settle the harassment claim.[282]

344. Public sentiments: It would appear that using the PHA 1997 to claim injunctions in the context of paparazzi activities is evolving as a recent phenomenon in the UK:

> It is surprising that these first instances of civil claims brought under the Act to constrain newsgathering excess have occurred so long after the introduction of the Protection from Harassment Act… Use of the act in practice may have been significant but – on account of its lying 'below the judicial horizon' – its extent and degree of effectiveness may have remained invisible and under-appreciated. An alternative, perhaps more obvious explanation is that the Act has simply not much been used, and that the recent orders mark a novel, if belated development.[283]

[281] Ben Dowell and James Robinson, "Amy Winehouse wins court ban on paparazzi at her home", *The Guardian*, 1 May 2009.
[282] *Ibid.*
[283] A. Scott, p 21.

345. The above cited academic comment seems neutral about the injunctions themselves, while noting that it is possible that it was within the Parliament's intention to include such kind of journalistic activities into the definition of harassment.

346. In general, news reports covering injunctions against paparazzi also appear to be in a rather neutral tone,[284] with the exception of tabloid paper Daily Star. While paparazzi agencies "lamented the erosion of press freedom", the main reason for the lack of criticism might be that the injunctions were not taken out against journalists or news agencies as such, but against notorious paparazzi agencies, such as Big Pictures (involved in Allen's, Williams' and Winehouse's). These agencies hire only paparazzi photographers to take photos of celebrities, and sell these photos, but they do not engage in journalistic reporting. Paparazzi activities have also had a bad reputation in the UK since the death of Princess Diana in 1997.

347. An article in the Guardian stated that the injunctions taken out by Lily Allen, Sienna Williams and Amy Winehouse in 2009 revealed a "growing frustration with picture agencies and their methods".[285] It seems that the article is prepared to blame the paparazzi photographers for their techniques, and cite comments such as "over-enthusiastic amateurs ruining it for the rest" and "the pack [i.e. the paparazzi industry] has become much worse".

348. In 2011, singer ***Cheryl Cole*** also took out a harassment injunction against paparazzi. Natalie Peck, a doctoral researcher, wrote a post about it[286] on a leading blog on media called Inforrm (International Forum for Responsible Media). It became the most popular post in that quarter.[287] The tabloid Daily Star harshly criticized Cole's injunction, describing it as "bizarre", "crackpot", and "threatening anyone who takes her photo with jail".[288] The Daily Star also quoted media lawyer Ambi Sitham for saying that the injunctions are "likely to come under much criticism". However, Peck pointed out in her Inforrm post that the injunction was pretty much in line with the previous injunctions taken out by celebrities such

[284] Guardian (Ting Lan Hong): http://www.guardian.co.uk/media/2012/jul/18/hugh-grant-baby-paparazzi; Guardian (Amy Winehouse): http://www.guardian.co.uk/music/2009/may/01/amy-winehouse-big-pictures-paparazzi-privacy; Hollywood Reporter (Ting Lan Hong): http://www.hollywoodreporter.com/news/hugh-grant-paparazzi-pledge-baby-mother-11592; The Independent (Sienna Miller): http://www.independent.co.uk/news/media/press/miller-launches-landmark-bid-to-banish-the-paparazzi-980242.html

[285] http://www.guardian.co.uk/media/2009/may/04/celebrities-paparazzi

[286] http://inforrm.wordpress.com/2011/07/07/harassment-and-injunctions-cheryl-cole-%E2%80%93-natalie-peck/

[287] http://inforrm.wordpress.com/2011/10/24/law-and-media-round-up-24-october-2011/

[288] http://www.dailystar.co.uk/news/view/197889/Cheryl-Cole-takes-out-injunction/

as Lily Allen and Amy Winehouse, and that the activities of those paparazzi photographers could amount to harassment in law.

349. Another Inforrm post about Ting Lan Hong's injunction taken out in 2011 also opined that the harassment by paparazzi photographers is a "longstanding problem".[289]

350. Thus, it appears that using the PHA 1997 to claim injunctions in the context of paparazzi activities has been evolving in the UK in recent years.

351. However, the police may also intervene. A newspaper reported one case in which a celebrity made a complaint to the police. The Canadian rockstar ***Bryan Adams***, who lived in London in 2008, made a complaint to the police about crazy fans door-stepping him for autographs.[290] The report however does not reveal any details except that he wished to keep a low profile but became concerned after a mother and son, possibly from Romania, started turning up at his west London home after asking for his autograph in a restaurant.

352. Why injunctions are pursued as opposed to seeking assistance from the police?: Some influential factors that would seem to make celebrities turn to injunctions instead of making complaints to the police may be rooted in the ease with which injunctions are granted. For example, injunctions can be pursued ex-parte and on urgent basis; they can be served on the whole paparazzi agency rather than on individual reporters who may not be easy to identify. There are injunctions which not only impose a restraint on publishing certain information but also on disclosing the very existence of the injunction, the so called super-injunctions. Another type is one in which the names of either or both parties are anonymised (represented by letters), called anonymised injunction. Another possible explanation is that celebrities may not wish to be seen by the public as taking a heavy hand against the media industry, which would be the case if they pursue a criminal case that could be reported and be protracted, with the further disadvantage of the need to prove the case beyond reasonable doubt. Presumably celebrities do not seek retribution against the paparazzi but the cessation of the problem. As these advantages of injunctions also apply to other alleged victims, we will return to this topic in Part 5.

[289] http://inforrm.wordpress.com/2011/11/18/case-law-ting-lang-hong-v-persons-unknown-hugh-grant-a-baby-and-the-paparazzi/
[290] http://www.independent.co.uk/arts-entertainment/music/news/bryan-adams-makes-harassment-complaint-1048274.html

353. Government response: On 23 May 2011, the Attorney General announced to the House of Commons that a Joint Committee would be established to consider the operation of the law concerning privacy and injunctions given the widespread use of injunctions which the media condemned as "judge-made law."[291] The Committee was appointed in July 2011 and a first report was published in March 2012. The Committee considered the evolution of the law on privacy, developed particularly since the Human Rights Act 1998. It examined whether the current laws on privacy and injunctions were working. It also considered issues relating to media regulation, among others.

354. On the balance between the rights to privacy and freedom of expression, the Committee concluded that the courts were striking a better balance between the right to privacy and the right to freedom of expression, based on the facts of the individual cases they examined. They did not recommend a statutory definition of privacy and they disagreed with criticisms that privacy law had been "judge made" and had not parliamentary authority.

355. With regard to injunctions, the Committee said:

> Many injunctions have been taken out by celebrities, largely because they are more able to afford them than most people. The press are often the defendants to injunctions, or at least are served with them. However, there can be other parties to injunctions: individuals who are enjoined by an injunction not to discuss private information.
>
> …
>
> There are also concerns that super-injunctions[292] can impede individuals from gaining access to funding for legal representation and from reporting malpractice or criminality to the relevant authorities.

[291] Joint Committee on Privacy and Injunctions, published 27 March 2012, Chapter 1 ("Joint Committee on Privacy and Injunctions"). The report is available at http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/27302.htm. The oral and written evidence is available at http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/JCPIWrittenEvWeb.pdf.

[292] A "super-injunction" is an injunction which not only imposes a restraint on publishing certain information but also on disclosing the very existence of the injunction. An injunction where the names of either or both parties are anonymised (typically letters are used to represent names) is an "anonymised injunction". See para 26 of Joint Committee on Privacy and Injunctions.

> When an injunction is granted the court should consider fully its effect on individuals restrained by the injunction, such as the effect on their ability to seek legal advice or funding for legal representation, or to report relevant matters to the authorities. [293]

356. In relation to the privacy of celebrities and public figures, the Committee concluded that:

> …those who actively seek publicity, especially for gain, should accept that this will mean enhanced interest in their private lives by the media. This should not, however, mean that they sacrifice all rights to privacy. The degree of public exposure of an individual, and the extent to which they have sought it and gained from it, are relevant factors for the courts to take into account in determining a privacy claim. This will depend on the facts of the particular case.
>
> We reject the view that because an individual exposes his or her children to publicity the children become fair game for the media. We believe that parents who expose their children to public gaze for their own commercial gain or publicity are irresponsible and make it harder for them to defend their children's right to privacy in other circumstances. However, even in those instances there must be exceptional reasons for it to be in the public interest for the media to publish information affecting the privacy of children.[294]

357. In conclusion, the Committee only recommended, and the Government accepted that the courts be more attentive to the particular facts in each case.

4.1.8. Hayes (FC) (Respondent) v. Willoughby (Appellant)[295]

358. The Supreme Court of the UK, by majority of four to one (Lord Reed dissenting) has recently dismissed the appeal of a person who harassed his former employer based on the employer's companies having been found by the High Court to have been involved in conspiracy, malicious falsehood and copyright infringement. The action by the employer was

[293] Joint Committee on Privacy and Injunctions, paras 66-69.
[294] *Ibid.*, paras 80-81.
[295] [2013] UKSC 17.

brought under the PHA for damages for harassment and for an injunction to restrain its continuance. At issue was the interpretation of section 1(3)(a) of the PHA, the "purpose of preventing or detecting crime" defence. We include this judgment because it has implications for news activities.

359. This case highlights that the choice between an objective and subjective test, which had been applied indistinctly by the High Court in various cases, is not the correct test for determining purpose in a section 1(3)(a) defence. Rather, the Supreme Court felt that it is necessary to have a control mechanism, which is to be found in the concept of rationality. "The effect of applying a test of rationality to the question of purpose is to enable the court to apply to private persons a test which would in any event apply to public authorities engaged in the prevention or detection of crime as a matter of public law."[296]

360. The connection with journalistic activities was mentioned by Lord Reed in his dissenting opinion. The fact that under the PHA 1997 a person must justify a genuine course of conduct is problematic since it could "inhibit not only the activities of the numerous public agencies with responsibilities relating to the prevention or detection of crime, but also other activities of other persons such as investigative journalists."[297] Moreover, he warned that as result of the majority judgment, the activities of investigative journalists will be susceptible to challenge in the courts.

361. Case Background: The appeal arouse out of an action for damages for harassment and for an injunction to restrain its continuance. The question at issue was in what circumstances such an action could be defended on the ground that the alleged harasser was engaged in the prevention or detection of crime.

362. Mr Willoughby was employed by one of Mr Hayes's companies. The two men fell out and Mr Willoughby engaged in harassment behaviour described as sending numerous letters to the Official Receiver, the police and the Department of Trade and Industry (the relevant departments) about Mr Hayes' management of his companies. The campaign against Mr Hayes was based on allegations of fraud, embezzlement and tax evasion, which were in

[296] [2013] UKSC 17, para 15.
[297] [2013] UKSC 17, para 29.

turn based on another of Mr Hayes' companies having been found by the High Court to be involved in conspiracy, malicious falsehood and copyright infringement.

363. The relevant departments' investigations revealed no basis in the allegations, but Mr Willoughby continued to press the relevant departments. He accompanied his harassment conduct with what the trial judge called unacceptable intrusions into Mr Hayes's privacy and personal affairs.

364. At trial, Mr Willougby's conduct was found to constitute harassment under section 1(1) of the PHA 1997 as his words and acts constituted a course of conduct, linked by a common purpose and subject-matter, causing alarm, distress and anxiety to Mr Hayes. However, it was found that he had a defence under section 1(3)(a) because he genuinely believed in the allegations involving Mr Hayes and wished to persist in investigating them.

365. The Court of Appeal unanimously allowed Mr Hayes's appeal (Moses LJ giving the judgment), granted an injunction and remitted the matter to the county court to assess damages. The appeal was allowed on two main grounds: (1) only the purpose of the conduct not the purpose of the alleged harasser was relevant, and in this case it was not reasonably or rationally connected to the prevention of crime; and (2) the prevention of crime had to be the sole purpose of the alleged harasser, and the intrusions on Mr Hayes's privacy were not related to that purpose.

366. Case Development: The Supreme Court found that the starting point of any analysis of this question was the absence of a general rule as to how purpose was to be established when it was relevant to a crime or civil wrong.[298]

367. The Supreme Court did not accept the distinction drawn by the Court of Appeal; i.e. between the purpose of a course of conduct and the purpose of the alleged harasser. The reason being that the acts share the purpose of the perpetrator. Instead, the question is "by what standard that person's purpose is to be assessed."

368. The Court noted the discrepancy among High Court decisions as they made a choice between an objective and subjective test when determining the defence in section 1(3)(a) of

[298] Furthermore, "When purpose is relevant to the operation of a statutory provision, the question will depend on the construction of the statute in the light of the mischief to which it is directed. When it is relevant to a rule of common law, the answer will normally be found in the object of the rule."[para 9].

the PHA. For example, in *EDO MBM Technology Ltd v. Axworthy,*[299] Paul Walker J held that the test of purpose was subjective. The trial judge in the present case agreed with him (this was also the position of the Appellant). On the other hand, Tugendhat J in *KD v. Chief Constable of Hampshire*[300] thought that the test was whether the conduct was objectively justified as a means of preventing or detecting crime, at any rate when it infringed the victim's rights under article 8 of the European Convention on Human Rights. And, Eady J in *Howlett v. Holding*[301] thought that there must be "objectively judged some rational basis" for it.

369. In relation to a test of reasonableness, the Court mentioned that it did not form part of the defence in section 1(3)(a), as such test was in other sections of the PHA 1997, and that it would also render the general defence of reasonableness in section 1(3)(c) otiose.

370. The Court was of the view that in the context of section 1 (3) (a), the purpose is a subjective state of mind but that some control mechanism is required, even if it falls short of what is objectively reasonable. The necessary control mechanism is to be found in the concept of rationality, which is not the same as reasonableness. Reasonableness, it was said, is an external, objective standard applied to the outcome of a person's thoughts or intentions. The Court noted that:

> A test of rationality, by comparison [to the test of reasonableness], applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse. For the avoidance of doubt, I should make it clear that, since we are concerned with the alleged harasser's state of mind, I am not talking about the broader categories of *Wednesbury* unreasonableness, a legal

[299] [2005] EWHC 2490 (QB), paras 28-29.
[300] [2005] EWHC 2550 (QB) at [144].
[301] [2006] EWHC 41 (QB), para 33.

> construct referring to a decision lying beyond the furthest reaches of objective reasonableness.[302]

371. Thus an alleged harasser must (i) have thought rationally about the material suggesting the possibility of criminality (i.e. in good faith, logically, and in the absence of arbitrariness, capriciousness and perverse logic); and (ii) have formed the view that the conduct said to constitute harassment was appropriate for the purpose of preventing or detecting crime. He must have thus applied his mind to the matter. "If, on the other hand, he has not engaged in these minimum mental processes necessary to acquire the relevant state of mind, but proceeds anyway on the footing that he is acting to prevent or detect crime, then he acts irrationally."[303]

372. Outcome: Applying the above test, Mr Willoughby's conduct in pressing his allegations on the relevant departments was found to be irrational. As a result his appeal was dismissed.

373. Although not deciding the matter on whether the purpose specified in section 1(3)(a) must be the sole purpose of the alleged harasser, the Court hinted that there might be other purposes but that in order to succeed under the defence in section 1(3)(a), that purpose must be the predominant one. The Court said

> a person's purposes are almost always to some extent mixed, and the ordinary principle is that the relevant purpose is the dominant one.[304]

374. The dissenting opinion: Lord Reed agreed that section 1(3)(a) was not subject to any requirement that the pursuit of the course of conduct, for the purpose of preventing or detecting crime, should have been reasonable. However, bearing in mind that the PHA covers both criminal and civil harassment, Lord Reed rejected the idea that Parliament intended to impose a rationality requirement, for three reasons:

(i) Parliament did not provide for any rationality test,

[302] [2013] UKSC 17, para 14.
[303] [2013] UKSC 17, para 15.
[304] [2013] UKSC 17, para 17.

(ii) a statute should not be construed as extending criminal liability beyond the limits which Parliament itself enacted it, and

(iii) criminal liability would turn on the subtle distinction between irrationality and unreasonableness, which could create particular difficulties in giving clear directions to juries.

4.1.9. AM v. News Group Newspapers and Persons Unknown[305]

375. Case background: This was an urgent interim injunction applied under section 3 of the PHA on out of hour's duty (late in the evening of 15 February 2012) which was granted, and notified immediately to a number of media organizations, but not to known individuals. The events had happened earlier on that same day. The injunction was granted to prohibit journalists from harassing the landlord of Abu Qatada.

376. Case development: The evidence adduced on 15 February 2012 was contained in witness statements indicating that a person identified as Anthony from *The Sun's* newspaper made a telephone call to the claimant, visited his house and asked a few questions in connection to the claimant's renting a house to a family related to Abu Qatada (a Palestinian Muslim of Jordanian citizenship, also known as Omar Othman, who was on bail pending a deportation hearing).[306] The claimant responded that he would call Anthony back and told him not to go to his house. Later, unidentified media turned up to the claimant's house and knocked at his door, took photographs and asked further questions.

[305] [2012] EWHC 308 (QB).

[306] In *The Wife and Children of Omar Othman v. The English National Resistance and Britain First, The English Defence League, The South East Alliance, The English volunteer Force and Persons Unknown who are intending to assemble outside the home of the claimant, including individuals associated with "March for England"* [2013] All ER (D) 290 (QB) (25 February 2013), one of the injunctions granted to the claimants was a non-harassment injunction that prevented a number of organisations from protesting against Oman Othman within 500 meters of the claimants' home. The evidence that the defendants were intending to assemble and demonstrate outside the home of the claimants was in the websites of some of the defendants, which contained threatening comments relating to the proposed protest, such as "Abu Qatada off our streets", "All Muslims are terrorists", "murdering scumbag", "go back to Jordan" "just murder him", and 'forget all this just kill him' (i.e. Omar Othman). Some of this chanting and shouting lasted for up to 6 hours. The judge referred to those comments as "powerful evidence" that some of the defendants had done so in the past. These protests had terrified particularly Otham's young children. The defendants contended that their rights to freedom of expression and peaceful assembly were infringed if the injunction was granted. The judge said that because those rights interfered with the rights of others, the infringement of the defendants' rights were justified in favour of the claimants'. As such, the judge said that the claimants had adduced adequate evidence to show that they were likely to succeed at trial. In those circumstances, the injunction was granted

377. The injunction order contained publishing and restraint on harassment restrictions. The latter restrictions were:

> (1) Harassing, pestering, threatening or otherwise interfering with any occupier or invitee within the house or garden of the claimant's address;
>
> (2) Entering, attempting to enter or approaching within 100 yards of the claimant's address;
>
> (3) Communicating or attempting to communicate with the claimant by any medium.

378. A hearing took place on 20 February 2012. No defendant was present, nor represented. The court heard that in the editions of *The Sun* newspaper dated 17 February, both the paper version and the online version published a story relating to the applicant,[307] very properly not naming the applicant. The court said that the interest of the newspaper and the public in the applicant derived solely from the fact that he found himself the landlord of Abu Qatada.

379. A claim form was issued and the matter came before Tugendhat J. He indicated that the order made by the judge sitting out of hours had been prepared in haste and not in accordance with the requirements of the civil procedural rules.[308] The Judge only made modifications to the ex-parte injunction order.

380. Outcome: The order was continued in favour of the applicant. The matter was to proceed in the usual way by making service of the statement of claim.

4.1.10. Instances of stalking with police intervention

381. The following instances of harassment illustrate the duty the police are under when a complaint is made: the police must investigate. Not all the incidents described in this section reached the courts, nor do all involve the media sector. Some involve news- or information-

[307] Although there was no order for anonymity, the court said that publicly to name the applicant was likely to be a breach of the terms of the order; therefore, the applicant's name was not included in the judgment.
[308] In particular, the Civil Procedure Rules Practice Direction Part 25A or the Practice Guidance on Interim Non-Disclosure orders issued by the Master of the Rolls in August 2011. Omission of a number of undertakings was one issue. The Practice Guidance is accessible at http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf.

gathering activities trough social media. When the cases reportedly reached the courts, this could not be verified, which can be explained on the grounds that not all cases that reach the courts are reported; in particular, those in the lower courts, and those where defendants plead guilty.

382. It is noted that according to December 2012 interim guidelines on prosecuting cases involving communications sent via social media (the interim guidelines),[309] an initial assessment should be made by prosecutors of the content of the communication and the course of conduct in question so as to distinguish, among others, between communications which specifically target an individual or individuals and which may constitute harassment or stalking within the meaning of the PHA or which may constitute other offences, such as blackmail.[310] If communications sent via social media target a specific individual or individuals, they will fall to be considered under the PHA where they amount to a course of conduct within the meaning of section 7 of that PHA, in which case the Legal Guidance on Stalking and Harassment should be followed.[311] The latter guidelines do not include specifics on how to deal with stalking involving reporters.

383. The interim guidelines are subject to the results of a consultation process on prosecuting cases in relation to communications sent via social media, results of which might be available by the end of 2013.

384. Content of website may constitute harassment: In 2002, the owner of the "Parking Clowns" website, which aimed at ridiculing the parking policies of the Canterbury City Council and its "over zealous [traffic] wardens", decided to shut down the website after he was repeatedly contacted by the police regarding the photographs of traffic policemen published on the website.[312] The police claimed that they were concerned that people were "harassed" by the content of the website. It was reported that the presence of photographs of traffic wardens was deemed to be an offence under the PHA.

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[309] "Interim guidelines on prosecuting cases involving communications sent via social media", issued by the Director of Public Prosecutions on 19 December 2012, accessible at The Crown Prosecution Service website, http://www.cps.gov.uk/consultations/social_media_consultation.html

[310] *Ibid*, para 12.

[311] *Ibid.*, para 19. Crown Prosecution Service: The Guidance for Prosecutors – Stalking and Harassment ("Guidance for Prosecutors") , accessible at http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a02b.

[312] Tim Richardson, "Protest site shut over alleged police "intimidation"", *The Register*, 24 September 2002, http://www.theregister.co.uk/2002/09/24/protest_site_shut_over_alleged/

385. Under the interpretation section of the PHA, a course of conduct must involve, in the case of conduct in relation to a single person, conduct on at least two occasions in relation to that person (section 7(3) (a)). Thus if the photographs were posted on more than one occasion, there is a possibility of a section 2 offence arising, other elements being present. It would have to be shown that the posting on more than one occasion and not the mere presence of the photographs was calculated to produce alarm or distress (section 7(2)) and that the responsible person knew or ought to have known such conduct amounted to harassment (section 1(1)(b)).

386. This is an example of the broadness of the PHA that could be used to curtail freedom of speech, as well as a tool of censorship: "What started as a local site dealing with concerns over local parking regulations has now erupted into something that touches major issues such as freedom of speech and censorship."[313]

387. Investigation of Richard Millett for harassment: British citizen Richard Millett is a leading blogger of "anti-Israel activities." In 2012, he filmed the protests by the Palestine Solidarity Campaign, and posted photos and videos on his blog. He claimed that a member of the Palestine Solidarity Campaign "tried to get him prosecuted for harassment". The police called Millett to the police station and questioned him over gathering of the information, such as his filming and matters that he wrote on his blog.[314] The Jewish Chronicle reported that the police intended to serve him with a warning letter, but that the UK Lawyers for Israel Group advised Millett not to accept the letter and requested the police to review the case. The police eventually decided not to take any further action.[315]

388. Millett said on his blog that he was put through a "torrid few months" over this investigation.[316] The UK lawyers for Israel Group claimed that police had been used to create a chilling effect on supporters of Israel.[317]

389. Prosecution of Alan Murray for harassment in Northern Ireland: Alan Murray is a blogger in Belfast, Northern Ireland. His blog is named Holylands Warzone,[318] which

[313] *Ibid.*
[314] http://richardmillett.wordpress.com/2012/05/22/soas-update/
[315] http://www.thejc.com/news/uk-news/66358/blogger-emerges-anti-israel-ordeal
[316] http://richardmillett.wordpress.com/2012/05/22/soas-update/
[317] http://www.thejc.com/news/uk-news/66358/blogger-emerges-anti-israel-ordeal
[318] http://www.holylandswarzone.blogspot.com

highlights the violence, vandalism and religious divisions in a university district named Holylands in Belfast.[319] According to Alan's own account, as reported in another blog, he was arrested in 2008 for criticizing two people in the residents' committee in Holylands on his blog.[320] The police cited articles from his blog as the basis for the accusation of "harassment". The Guardian reported he was charged and prosecuted for "intimidation," included intimidation on the internet, [321] but Alan claimed that he was in fact charged under the "protection from harassment order".[322] He was later acquitted of all charges at Belfast's Magistrates' Court.[323] Alan's case was also reported in other blogs.[324]

390. Arrest and charge of Paul Lesniowski for filming the SmashEDO protests: EDO MBM is an arms manufacturer in Brighton, and is alleged to have produced arms for the war in Iraq. SmashEDO is a campaign against EDO, and claims that it has aided UK's "crime of aggression" in Iraq. According to an Indymedia report, Lesniowski was a legal observer at the SmashEDO protests, and he was wearing a markedly yellow bright jacket to indicate this. He was filming the handling of a female protestor by a security guard. However, the security guard, who refused to identify himself during the protests, turned out to be "protected persons" under an interim injunction and protestors were prohibited from photographing them.

391. Thus, as it turned out that Lesniowski's act was in breach of the interim injunction which had been granted under section 3 of the PHA, the security guard called the police. Lesniowski was arrested, bail was initially denied and he was kept in prison for a total of 5 days. [325] The Crown Court overturned the magistrate's decision, and allowed bail. [326] According to SmashEDO, charges against him were later dropped.[327]

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[319] http://www.guardian.co.uk/uk/2008/jul/06/northernireland.civilliberties
[320] http://malachiodoherty.com/2008/06/26/save-the-blog/
[321] http://www.guardian.co.uk/uk/2008/jul/06/northernireland.civilliberties
[322] http://www.holylandswarzone.blogspot.hk/2008/07/update-validation.html
[323] http://www.guardian.co.uk/uk/2008/jul/06/northernireland.civilliberties
[324] http://sluggerotoole.com/2008/06/27/power-of-arrest-used-against-belfast-blogger/
[325] EDO Injunction Prisoners Support, 'Free Paul Lesniowski' *Indymedia* (London, 16 June 2005), available at http://www.indymedia.org.uk/en/2005/06/314311.html.
[326] 'EDO Injunction prisoner released' *Indymedia* (20 June 2005), available at http://www.indymedia.org.uk/en/2005/06/314555.html
[327] http://smashedo.org.uk/oldsite/news.html: "Charges have now also been dropped against the person remanded for 5 days in Lewes Prison last June for filming a security guard while the interim injunction was in place." See also EDO Injunction Prisoners Support, 'Free Paul Lesniowski' *Indymedia* (London, 16 June 2005), available at http://www.indymedia.org.uk/en/2005/06/314311.html

392. Arrest of Gerard O'Sullivan under PHA: Gerard O'Sullivan was a video-journalist working for Undercurrents, an online alternative video news agency based at Oxford. On 18 April 1999, while covering an anti-vivisection protest in Oxfordshire, he was arrested under section 2 of PHA. According to O'Sullivan, he was filming the police roughly handling a female protestor when the police took away his camera and arrested him. An article by Paul O'Connor, the co-founder of Undercurrents, claimed that this was the first criminal case of a journalist being arrested under PHA.[328] This could not be verified. No information can be found as to what happened to O'Sullivan after the arrest.

393. This case was included in the Hong Kong Journalist Association's response in 2001 to the Consultation Paper on Stalking, stating that the information came from the UK National Union of Journalists.[329] It was also recorded as part of a documentary named Breaking News produced by Undercurrents.[330]

394. Potential harassment complaint for Rutland Anti-Corruption Group: The Rutland Anti-Corruption Group (RACG) is a small political party formed by 3 independent local councilors at the Conservative-controlled Rutland County Council. RACG was formed in 2012 to push forward transparency and openness in the Rutland County Council as they alleged that the Council withheld important financial or other information about certain projects going on in the locality. The Council denied such allegations and that RACG was trying to use Freedom of Information requests to obtain what they wanted. [331]

395. Although the three members of RACG claimed that they were asking legitimate questions, the Council leader said that the volume of requests was "costly and pointless". [332] The Council's chief executive, Helen Briggs, raised concerns over continued aggressive email correspondence from RACG to officers, continual accusations of corruption, volume of email traffic to individual officers and RACG's refusal to use scrutiny panels and attend

[328] http://undercurrentsvideo.blogspot.hk/2011/12/breaking-news-police-arresting.html
[329] http://www.legco.gov.hk/yr00-01/english/panels/ha/papers/650e02.pdf
[330] http://www.undercurrents.org/breakingnews.html. See 6:00-7:00.
[331] http://www.rutland-times.co.uk/news/local/new-political-group-set-up-called-the-rutland-anti-corruption-party-1-3442121
[332] http://www.bbc.co.uk/news/uk-england-leicestershire-20909851

meetings with the chief executive.[333] The Council sought legal advice from a law firm, Bevan Brittan, which produced a report listing the possible options for the Council to take.[334]

396. The report suggested a primary cause of action in defamation. In addition, the report also suggested that RACG's actions would "very likely" amount to harassment, and recommended that the Council report RACG's actions to the police. Although it was admitted that the police was unlikely to prosecute RACG (the report claimed that the police "tends only to pursue the most serious cases"), it was suggested that the police might visit RACG and request them to moderate their behavior. The report also suggested them to take out an injunction under PHA against RACG, which would be "effective but require a relatively low standard of proof".

397. The Council resolved to make an injunction claim under the PHA against RACG, and deferred other actions including the one in defamation,[335] which would have made Rutland County Council the first local council in the UK to sue in defamation since this became possible in 2011.[336]

398. The saga made its way to national press in the BBC, initially due to its possibility as the first defamation action by a local council. Tim Parker, political reporter at BBC, warned that this could create a chilling effect over local councilors who "have ever fired off a heat-of-the-moment email" and who "feels that after two or three exchanges, they still aren't getting the answers they're looking for".[337]

399. It seems possible that the same implications for newsgathering activities could ensue for those journalists who are persistent in emailing the government for information. Although the Council deferred any police complaint under the PHA, it was nonetheless considered a possible action. As the events are still unfolding at the time of writing, it remains to be seen whether the Council would finally take action through the police.

[333] http://www.rutland-times.co.uk/news/local/rutland-county-council-could-sue-its-own-councillors-1-4641555
[334] http://www.rutland.gov.uk/pdf/13-2013%20RACG%20-%20Appendix%20A%2010%2001%2013%20v2.pdf
[335] http://www.bbc.co.uk/news/uk-england-leicestershire-20981759
[336] http://www.bbc.co.uk/news/uk-england-leicestershire-20909851
[337] http://www.bbc.co.uk/news/uk-england-leicestershire-20909851

4.1.11. Table of cases

400. A table showing cases found from accessible sources is produced below, which includes some additional cases to the ones reported in this Part. It would be difficult to provide even a rough number of total cases, due to the following factors.

401. With regard to criminal cases, offences under the section 2 and section 2A of PHA are summary offences. Summary offences are primarily dealt with in Magistrate's Courts. Unfortunately, magistrates' decisions are seldom, if ever, published.[338] Thus, unless the cases went on appeal, no information from judiciary sources is available. Apart from judicial resources, some other cases could be found through the news. However, reliance has to be placed on alternative news sources or citizens' media that cover issues mainly related to social, political or environmental campaigns.

402. In relation to civil cases involving injunctions, they are applied in the High Court but the UK judiciary still does not publish all High Court judgments since 1997. In one submission to the Joint Committee on Privacy and Injunctions in the UK Parliament, it was mentioned that the PHA is "frequently relied upon by applicants for super-injunctions".[339] The frequency is though unknown. As pointed out earlier, "super-injunctions" are injunctions which not only impose a restraint on publishing certain information but also on disclosing the very existence of the injunction.[340]

Table 4.2: Table showing the cases arising out of news-activities under the UK PHA

Case	Civil	Crim	Remarks
Thomas v. News Group Newspapers[341]	✓		See Part 4.1.1 above.
King v. Sunday Newspapers[342]	✓		Harassment claim in Northern Ireland failed but injunction granted under privacy claim. Publication of claimant's certain personal details prohibited. See Part 4.1.5, explained in footnote.

[338] 'Judges, Tribunals and Magistrates | Judgments | 2013 - Judiciary' *Judiciary of England and Wales*, available at http://www.judiciary.gov.uk/media/judgments/2013: "Court judgments are available for the most senior courts, typically Court of Appeal decisions."
[339] Mark Burby – written evidence, Joint Committee on Privacy and Injunctions – Evidences, see p.98 at www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/JCPIWrittenEvWeb.pdf
[340] See discussion on injunctions below.
[341] *Thomas v. News Group Newspapers Ltd & Anor* [2001] EWCA Civ 1233, http://www.bailii.org/ew/cases/EWCA/Civ/2001/1233.html

Case	Civil	Crim	Remarks
Injunctions taken out by Sienna Millers, Lily Allen and Amy Winehouse in 2009 and	✓		See Part 4.1.7 above.
Injunctions taken out by *Cheryl Cole in 2011 against paparazzi*	✓		See Part 4.1.7 above.
Ting Lan Hong & KLM (A child) v. XYZ & Ors [343]	✓		See Part 4.1.4 above.
AM v. News Group Newspapers Ltd & Ors [344] *and its associated injunction: The Wife and Children of Omar Othman v. The English National Resistance and Britain First, The English Defence League, The South East Alliance, The English volunteer Force and Persons Unknown who are intending to assemble outside the home of the claimant, including individuals associated with "March for England"* [345]	✓		See Part 4.1.9 above. See Part 4.1.9, explained in footnote.
WXY v. Gewanter [346]	✓		Injunction granted to prohibit publication of information about certain sexual allegations on a website.
Trimingham v. Associated Newspapers Ltd [347]	✓		See Part 4.1.5 above.
Callaghan v. Independent News & Media Ltd[348]	✓		See Part 4.1.3 above.

[342] *King v. Sunday Newspapers Ltd* [2011] NIQB 126, http://www.bailii.org/nie/cases/NIHC/QB/2011/126.html ; [2011] NICA 8, http://www.bailii.org/nie/cases/NICA/2011/8.html

[343] *Ting Lan Hong & KLM (A Child) v. XYZ & Ors* [2011] EWHC 2995 (QB) http://www.bailii.org/ew/cases/EWHC/QB/2011/2995.html

[344] *AM v. News Group Newspapers Ltd & Ors* [2012] EWHC 308 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2012/308.html

[345] [2013] All ER (D) 290 (QB) (25 February 2013), available at Lexis Nexis. See also 'Abu Qatada's family wins injunctions against demonstrators' *BBC* (London, 25 February 2013), available at http://www.bbc.co.uk/news/uk-21578936

[346] *WXY v. Gewanter & Ors* [2012] EWHC 496 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2012/496.html

[347] *Trimingham v. Associated Newspapers Ltd* [2012] EWHC 1296 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2012/1296.html

Case	Civil	Crim	Remarks
Stone & Anor v. WXY (Person Or Persons Unknown)[349]	✓		See Part 4.1.6 above.

4.2. Australia

403. The anti-stalking statutes in Queensland and Victoria contain specific exemptions/defences protecting protests/demonstrations and news/information gathering- and communicating activities. Litigation arising from newsgathering or demonstrations has not been reported. The main body of the case law in Australia has consisted of domestic violence cases,[350] problems with relationships[351] and neighbourhood disputes.[352] It has been observed that "in Australia, stalking is most commonly an extension of domestic violence legislation."[353]

404. In an Australian study published in 2000,[354] the issue of who could be legitimately defined as stalker was raised. However, no reported cases could be found to answer this question. It was suggested that if cases existed, they were dismissed rather than went to appeal, as a result of which no record was available. Where a challenge over the breadth of the legislation was made, it did not focus on legitimate bahaviour but on the abuse of the legislation, for example the legislation being used to cover neighbourhood disputes or intimate relationships being confused with stalking.

405. An explanation for the absence of cases arising out of news activities, besides the existence of specific defences, may be the existence of prosecution guidelines which instruct prosecutors on the most appropriate charges. This is the case in Queensland where the Office of the Director of Public Prosecutions' Guidelines[355] indicate that in some situations summary charges will often be more appropriate than their indictable counter-parts. For example, instead of the indictable offence of stalking under section 359E of the Criminal Code Act 1899, the offence of "improper use of telecommunications device" under section 85ZE of the

[348] [2009] NIQB 1.
[349] [2012] EWHC 3184 (QB).
[350] Sally Kift, "Stalking in Queensland: From the Nineties to Y2K" [1999] *Bond Law Review* 11(1), 144.
[351] Yvette Nash and et al, "Assessment of the Impact of Stalking Legislation", September 1999, accessible at http://www.aic.gov.au/media_library/conferences/rvc/dussuyer.pdf
[352] Karen Sampford, "Stalking Law Reforms Research Bulletin 7/98" (1998), accessible at http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/researchBulletins/rb0798ks.pdf
[353] South African Law Reform Commission Stalking (Project 130) Discussion Paper 108 (2004), para 3.52.
[354] Ogilvie, pp 72-73.
[355] The set of guidelines is accessible at http://www.justice.qld.gov.au/_

Crimes Act 1914 will be the most appropriate summary charge. This is of course if the charge involves a telecommunication device, which is medium being increasingly used. It should be remembered that one of the acts of unlawful stalking in section 359E of the Queensland Code includes "contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology."

406. In Victoria, the Office of Public Prosecutions has issued a number of prosecution polices.[356] While none is specific to stalking, the Policy on Human Rights draws attention to the Charter of Human Rights and Responsibilities Act 2006, making Victoria the only Australian state to have enacted such type of statutory instrument. Such Act imposes an obligation on all public authorities, including prosecutors, to act in a way that is compatible with human rights, making it unlawful to act in a way incompatible with such rights. Under the Charter, it is also unlawful for a public authority to fail to give proper consideration to a relevant human right in making a decision, including a decision to prosecute a person charged with an offence. The Guidelines on Policy Application of the Model Litigant require all Victoria's Departments and agencies to conduct litigation in a specified manner, including an obligation to avoid litigation wherever possible; making settlements; and not relying on technical defences unless there is prejudice to the interests of the relevant Department or agency.

407. The case discussed below, though not related to news-gathering, highlights what the proper interpretation of stalking charges in the context of taking photographs should be under the Victorian Crimes Act.

4.2.1. R v. Anders[357] (taking photographs)

408. Case Background: The defendant was prosecuted and found guilty of stalking under section 21A of the Victorian Crimes Act 1958 by the County Court of Melbourne. The facts alleged that his course of conduct consisted of keeping an 11-year-old stranger under surveillance by photographing or appearing to photograph him over a four-day period during the Christmas and New Year week as he went to or emerged from a toilet block at a local park. The defendant appealed.

[356] See http://www.opp.vic.gov.au
[357] [2009] VSCA 7.

409. Case Development: It was argued by the defendant that the taking of photographs did not amount to stalking any more than looking at a victim. Further, it was submitted that no injury or threat of injury could ensue after the defendant's look at the victim or the use of a camera.

410. The Court of Appeal of the Victoria Supreme Court noted that:

- the offence of stalking involves a pattern of conduct evidencing a continuity of purpose in relation to the victim and committed with the proscribed intent;
- the offender must have the intent to perform the acts associated with and directed towards the victim and which comprise a course of conduct which includes the conduct particularised in section 21A(2) – in this case particular (f) – 'keeping the victim under surveillance';
- the offender must also have the subjective intent specified in section 21A(3) (a) or the circumstances must satisfy the objective test set out in section 21A(3)(b); and
- the 'course of conduct' must be directed towards a particular victim with that continuing intent.

411. It was observed by the Court that the use of cameras for keeping a watch over the victim could amount to surveillance and to a course of conduct if it occurred on a sufficient number of occasions with a continuity of purpose and a necessary intent relating to the victim.

412. The Court concluded that an intention to stalk the victim was not found at the trial in the present case, where the conviction was grounded on the basis of photos of young boys which could be taken at random and coincidentally photographed the victim on more than one occasion. A continuous purpose had not been proved by the prosecution.

413. Outcome: During oral argument, the Director of Public Prosecutions "properly conceded that the conviction must be quashed." As such, a verdict of acquittal was entered by the appellate court in favour of the defendant.

414. While the purpose behind the photo-taking was not to gather news, the case can be an indication on how courts could determine a similar factual situation involving journalistic photographing. Thus a reporter taking random pictures of not just one person but several ones could not be charged with surveillance by photographing under section 21A (2) (f).

4.3. New Zealand

415. We start with an *obiter* comment made by Judge Potter in ***Beadle v. Allen***[358] to the effect that investigative journalism could be a lawful purpose under section 17 of the Harassment Act 1997 (defence to prove that specified acts done for lawful purpose) for civil harassment.

416. We also note that the Privacy Act 1993, which sets out 12 information privacy principles on how agencies may collect, store, use and disclose personal information, in effect exempts from the term "agency" news activities or new medium. Section 2 of the New Zealand Privacy Act 1993 provides that news activity means –

a. The gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purposes of dissemination to the public or any section of the public:
b. The dissemination, to the public or any section of the public, of any article or programme of or concerning—
    - News;
    - Observations on news;
    - Current affairs.

417. Such exemption is not available under the Harassment Act 1997.

418. In ***Hosking v. Runting***,[359] a case involving a reporter photographing celebrities' children where the crux was whether there was a tort of privacy, the Court of Appeal mentioned in passing that interference with privacy arising from a fear for the safety of the

[358] [2000] NZFLR 639, at 657. This case is discussed in Part 5 below.
[359] [2005] 1 NZLR 1.This case involved an appeal against a decision in the High Court for dismissing an application for an injunction by the appellant, the Hoskings, restraining the defendant, Pacific Magazines from publishing their photographs. The appeal was dismissed as the court could not see any substantial likelihood of anyone with ill intent seeking to identify the children from magazine photographs.

complainant should be covered by the Harassment Act 1997. The Court though recognised that the key feature of a harassment claim was that the complainant must establish a pattern of behavior rather than a single incident. The case, before judgment was delivered, attracted concerns over the freedom of expression.[360]

419. The following cases although not strictly related to news/information gathering to be directed at large audiences and which are of public importance, highlight the difficulties in interpreting the object of the legislation. There is a lot of overlapping between the elements of defamation and the elements of civil harassment. The line between content of expression and context in which speech is made seems to be blurred.

4.3.1. Brown v. Sperling[361](Making adverse statements on online blogs)

420. Case background: This was an application by Ms. Flannagan and Ms. Brown, for restraining orders pursuant to the Harassment Act 1997. The applicants sought an order not only restraining the respondent from posting any future material about them on her blog site, but also an order requiring her to remove material about them that she has posted to the blog site in the past.

421. The Respondent created a web log or blog under the name Wonderful Now. The interrelationship among the various parties arose initially from contact between Ms Brown and Ms. Sperling. Ms. Brown had an affair with a married man which lasted shortly. Later Ms. Sperling posted a number of blog articles with adverse comments to her blog about Ms. Brown about her morals, her mental health and stability, her truthfulness. All this could be categorized as defamatory. Ms. Brown sought assistance from Ms. Flannagan, a lawyer. Efforts were made to try and persuade Ms. Sperling to withdraw some of the posts. Things turned worse and Ms. Flannagan became a target of Ms. Sperling's blog posts. Both applicants claimed that Ms. Sperling's blog articles greatly affected their lives and became considerably stressed as the result of the postings.

422. Case development: The threat of legal proceeding for restraining order under Harassment Act 1997 did not deter Ms. Sperling nor did it quench her enthusiasm for blogging about the applicants. She continued to publish posts about the proceedings, actions

[360] See "Hosking case stirs fears over press freedoms", The New Zealand Herald, 28 February 2003, accessible at: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3198293
[361] [2012] DCR 753 (District Court Auckland).

of the applicants and their practice of serving documents by email. Ms. Sperling even posted the affidavit that she filed in Court on her blog. Ms Sperling was unrepresented and did not appear at the hearing. Apart from filing an affidavit she took no steps in the proceeding.

423. Outcome: The application was dismissed. Although the court ruled that Ms. Brown and Ms. Flannagan were harassed by Ms. Sperling within the meaning of the definition contained in section 3 of the Harassment Act, the blogger published a post to an unidentified audience and did not intrude into the "space" or apprehension of a person who might be offended by it or about whom it might be written.

424. The following issues were addressed.

425. *Whether blog posts fell within the ambit of the Harassment Act 1997:* As a means of performing a specified act, the court held that because the definition of harassment did not limit the possible methods of communication, evidenced by the words "in any other way", it was clear that the legislature considered that harassment was a matter of perception by the victim, and could occur in a variety of ways.

426. The broad words used by the legislature could encompass online harassment such as via email, news group, IRC chat and instant messaging programs. This therefore opened the door for this statute to apply to online harassment, and as a general proposition the Harassment Act could apply to the Internet. The generality of this statement would depend on the type of protocol or Internet application used. Thus the court was of the view that the Harassment Act can combat at least some forms of online harassment. The court however, noted that broad or unqualified generalizations about "internet harassment" should not be made.

427. The court was of the view that posting information on a blog fell within the ambit of the word "material" in section 4(1)(e) of the Act [362]where it was intended that other persons would be able to view it and/or also that its contents would be drawn to the attention of the Applicants. It was implicit within the various definitions of a "specified act" that the victim of the harassment particularly when it was harassment by communication - was aware of the

[362] Section 4(1)(e) provides that it is a specified act by giving offensive material to that person or leaving it where it will be found by, given to, or brought to the attention of the person

nature of the actions or communication to engage the provisions of section 16. But a person could not be harassed if he was unaware of the specified act or acts.

428. *The content of the blog posts*: According to the District Court Judge, the issue of offensiveness or whether or not the material offends had to be considered having regard to the objects of the Act in particular section 6(1)(a),[363] which requires a contextual approach to be taken to the behavior.

429. *Whether the distress was caused by the behavior of Ms. Sperling:* The court considered the English case of *Trimingham v. ANL*[364] where the court held that there had to be a causal link between a person suffering distress and the conduct complained of.

430. In the present case, the communication flow stopped with the posting. The blogger might take further steps to bring the post to the attention of another person who would direct it to the applicant or might convey the communication to the applicant. If this happens a causative link could be established. But the static or passive blog post could not, in the Court's view, be causative of distress and it could not be said to be so if a person accessed the material by their own act of choice. By that act that person had taken the communication flow out of the control of the blogger and had assumed control of it so the causal link could not be established.

431. *Freedom of expression*: The court considered *Beadle v. Allen*, discussed below in Part 5.

432. Public sentiments over the case: A hot debate over the decision of the case ensued by persons associated with both parties on issues such as the new controls on social media content.[365]

[363] Section 6 **Object** (1) states "The object of this Act is to provide greater protection to victims of harassment by— (a) recognising that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context."
[364] [2012] EWHC 1296.
[365] See "Implications of recent internet gagging attempt" posted in on 23 June 2102 at http://www.thepaepae.com/implications-of-recent-internet-gagging-attempt/24396/ and "What's the big deal?", Flannagan, lawyer and Jacqueline Aperling, blogger, at http://halfdone.wordpress.com/2012/08/17/madeleine-flannagan-lawyer-and-jacqueline-sperling-blogger-whats-the-big-deal/

433. Similar cases to *Brown v. Sperling* touching upon freedom of expression and social media control include:

> ***McGaw v. Khal***[366] also involved a blog but a restraining order was granted. The Judge considered that the material went beyond vigorous, colourful and disrespectful language and was intended to unsettle and distress the applicant.
>
> ***Snelgrove v. Murray***[367] where the issue was whether a blog post or posts could be used as an element of a breach of a restraining order. In determining that the evidence was admissible and that authorship of the blog was a matter for the jury, the judge had no difficulty in accepting that a blog could be used to breach a restraining order.

4.3.2. McGaw v. Khal

434. This case concerned two parties which had fallen out in respect to a debt owed to a company of which the applicant was a director. Proceedings were commenced in the Disputes Tribunal following which the respondent received a telephone call from the respondent and subsequently received advice advising her that an internet site had been set up to attack her, her family and her business. On a number of pages on the website, which appears to have been a blog, unfounded comments and claims were made about the applicant in respect of herself, her family and her business.

435. The court considered that the wording in s 4(1)(d) and (e) of the Harassment Act[368] should cover the telephone calls and the material on the website over which the respondent had control. In respect of the activity on the website, although the respondent attributed a number of the comments on the website to third parties, the court observed that it was clear that he had control of the blog and that he had encouraged others to make comments. The Judge considered that the materials on the website could be said to be offensive in nature and that the pattern of behaviour consisted of both, the telephone calls and the comments on the website.

[366] DC North Shore CIV-2010-044-001093, 27 July 2010.
[367] DC Tauranga CRI-2007-070-003652, 14 November 2008 .
[368] Section 4 of the Harassment Act deals with the meaning of the specified acts. Section .4(1)(d) provides that it is a specified act by making contact with the person (whether by telephone, correspondence or in any other way); Section 4(1)(e) provides that it is a specified act by giving offensive material to that person or leaving it where it will be found by, given to, or brought to the attention of the person.

436. On the issue of freedom of expression, the court held that the material went beyond vigorous, colourful and disrespectful language and was intended to unsettle and distress the applicant which drew the attention of the Harassment Act. Therefore, the court made a restraining order.

437. *McGaw* was distinguished in *Brown v. Sperling* on the grounds that the totality of the conduct in *McGaw* which included the use of the telephone and the comments on the website was taken into consideration, while in the *Sperling* case, all contact has been by various Internet based protocols; meaning that all acts involved took place on the blog through the Internet and there was no contact to bring it to the attention of the alleged victim. In the judgment of *Sperling*, the court considered that blogs present a different method of communication to continued contact by e-mail or instant messaging. The way in which a blog is used may determine whether or not there has been a specified act and the association of blogging together with other conduct that could constitute a specified act in *McGaw*. Thus, the factual distinction between the two cases rendered the different outcomes.

4.3.3. Snelgrove v. Murray

424. This case involved a private prosecution against the defendant for breaches of a restraining order pursuant to section 25(1) of the Harassment Act.[369] The case in question was an application pursuant to section 344A of the Crimes Act seeking rulings as to the admissibility of evidence to be led by the informant. This was not, therefore, a case about whether or not a blog could be a vehicle for harassment but whether a blog post or posts could be used as an element of a breach of a restraining order.

438. In determining that the evidence was admissible and that authorship of the blog was a matter for the jury, the judge had no difficulty in accepting that a blog could be used to breach a restraining order. Thus, the concern of whether blogging behaviour would fall under section 4(1) of the Harassment Act was not at issue in that case.

4.4. Canada

[369] Section 25(1) of the Harassment Act provides Every person commits an offence who, without reasonable excuse, (a)does any act in contravention of a restraining order; or (b)fails to comply with any condition of a restraining order.

439. While there have been constitutional challenges to the criminal harassment provisions in the Canadian Criminal Code (CCC), and while those provisions do not contain specific defences protecting news activities, no reported case was found to have been related to such activities. There are a few reasons which may explain this phenomenon.

440. Firstly, 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).

441. Secondly, the bar for proving criminal harassment may be too high to include 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.

442. Thirdly, 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. Because of the broad nature of freedom of expression as a blanket protection for all expression (including media expression), statutes and legislation regarding the media are usually negative (restrictive) in nature. For example, the CCC contains certain limits on freedom of speech, including blasphemous libel (section 296), defamatory libel (sections 297-317), and hate propaganda (sections 318-320). Thus, it is hard to find positive laws that protect the rights of media and the press.

443. However, positive protection for the media can be found in section 423.1, as indicated above. Another protection lies in defences against criminal and civil defamation suits, the laws of which are set out in provincial Libel and Slander Acts or Defamation Acts.[370] A

[370] For example, in the Province of Ontario, it is the Libel and Slander Act, 1990, accessible at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90l12_e.htm.
In Canada, there are effectively 4 ways to defend against a defamation charge: (1) truth, (2) consent, (3) fair comment, and (4) privilege. The latter two are particularly relevant. Fair comment is a defence that allows for

further protection is section 430 of the CCC - mischief - focused 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" (this exemption is also found in section 423, Intimidation). In ***R v. Tremblay***[371] (more fully discussed in Part 5 below), the Ontario Court of Appeal confirmed that the purpose of this provision was "to clearly recognize, protect, and preserve public debate and free speech" and gave a non-exhaustive series of examples of persons entitled to its protection — pollsters, election enumerators, political candidates, sales people, peaceful picketers, solicitors of funds, political advocacy groups and the media.

444. Fourthly, 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.[372] 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 (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 (12).

445. On the other hand, 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

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comments on public matters (usually being critical of the conduct of public figures) where the comment is an expression of the author's honest belief, is based on fact, and is made without malice. Privilege is a defence that applies specifically to media, and allows otherwise defamatory comments to be made and published in certain forums and on certain occasions. For example, to foster open and frank debate, the public proceedings of Parliament and provincial legislatures, city and municipal councils, school boards and other official public bodies – as well as their committees and subcommittees – are privileged. The media privilege will not provide protection however, in situations where the comment was made with malice.

[371] 2010 ONCA 469 (CanLII).

[372] The CEP Journalism Code of Ethics is accessible at http://www.cepmedia.ca/index.php?option=content&task=view&id=164&Itemid=68

section 264). In ***R v. Lucas***,[373] a defamatory libel case involving picket signs alleging the appellant engaged in incest, the Supreme Court remarked only in *obiter* that the alleged statement could potentially also constitute criminal harassment under section 264 if it were made only to the defamed person.[374]

446. The cases discussed in this Part involve the courts' examination of form and content of expression in the criminal harassment provisions and/or provincial civil harassment provisions. They may have a bearing on both news/information activities as well as protest and communication activities.

4.4.1. R v. Sillipp[375]

447. Case background: The accused raised constitutional challenges to section 264 under the Canadian Charter of Rights and Freedoms (The Charter). The case was heard before the Court of Queen's Bench of Alberta. The Court restricted the challenge to s. 264(1), (2)(a) and (2)(c), as the only provisions concerned in the case.

448. One of the challenges was that the wording of section 264 was too vague and overreaching being capable of catching the morally innocent as well as the blameworthy. In rejecting this argument, the Court observed that section 264 required a need to prove that the accused knew that his conduct would cause the victim to be harassed.

449. The challenge on the ground of freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication", was made under section 2(b) of the Charter.

450. Case development: The Court first considered whether the conduct described in section 264(1), (2)(a) and (2)(c) were within the meaning of "expression" protected by the Charter. It held that the conduct under s. 264(2)(a) ("repeatedly following from place to place the other person or anyone known to them) and s. 264(2)(c) ("besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be), in the context of section 264, was capable of conveying a meaning, thus having a "content" of expression.

[373] [1998] 1 SCR 439.
[374] [1998] 1 SCR 439, para 87.
[375] 1995 CanLII 5591 (AB QB), 1997 ABCA 346.

451. The Court then dealt with whether the "form" of expression described in the provisions were protected by the Charter. It held that it is an element of the offence that the "psychological integrity, health or well-being" of the victim is substantially interfered. The conduct described in the provisions therefore had a "component" of violence, which was not a protected form of expression. As such, the Court held that the type of expression as contemplated by section 264 was excluded from protection by section 2(b) of the Charter.

452. In case it was wrong on the above, the Court considered whether section 264 interfered with freedom of expression. The Court gave an affirmative answer, as the purpose of section 264 is "to control attempts by persons to convey meanings of latent physical violence and direct psychological violence to other persons by restricting the form of such an expression which is tied to its content".

453. In determining whether the interference was within "reasonable limits" as provided in section 1 of the Charter, the Court first considered whether section 264 addressed a concern that is "pressing and substantial in a free and democratic society". It noted that the underlying concern of section 264 was to protect women who are stalked, and that it sought to protect the fundamental freedoms of personal choice and action. Citing evidence showing the seriousness of the problem of stalking in the United States, the large number of cases brought under section 264 since its enactment, and overwhelming support in Canada for the criminalization of stalkers in national polls, the Court was of the view that the concern about the behavior which section 264 sought to curtail was both pressing and substantial in a free and democratic society.

454. Second, the Court considered whether the use of section 264 was proportionate to its ends. Counsel for the defence argued that section 264 had "the potential of restricting many activities including picketing and other labour activity as well as various forms of protest behavior", as the persons doing these activities "frequently behave so as to harass others and cause them to fear for their safety". It was argued that this would have an "unacceptable dampening effect upon such picketers and protestors, in fully exercising their right to freedom of expression, even though in doing so the target person or persons would experience substantial interference with their psychological integrity, health or well-being".

455. In rejecting the above concern, the Court was of the view that section 264 provided many built-in safeguards, in the sense of the elements of the offence, namely:

1. The conduct must fall into one of the four forms of behavior described in section 264(2)(a) to (d);
2. The accused must have intended to do such acts;
3. The accused must be acting without lawful authority;
4. The victim must be harassed by such acts;
5. The accused must know that his acts would cause the victim to feel harassed;
6. The acts must cause the victim to fear for his own safety and the fear must be reasonable.

456. The Court was of the view that the third element concerning lawful authority eliminates the risk of lawful labour picketers being caught.

457. The Court then addressed the issue of whether section 264 was carefully drafted to minimize impairment of the freedom of expression. It first considered whether remedies were available in the Criminal Code to deal with stalkers. The Court first considered section 423 (Intimidation), which "creates the offence of intimidation [which] requires specific intent to compel another person to abstain from doing something that person has a lawful right to do or to do something which he has a lawful right to abstain from doing by use of seven different described forms of behavior".

458. The Court was of the view that section 423 was directed to a different object than section 264, and, even though the two offences might overlap to a certain degree, the Court did "not see how one could modify s. 423 to achieve what s. 264 seeks to achieve". The same reasoning was applied to other section of the Criminal Code such as section 177 (trespassing at night), section 265(1)(b) (threatening an assault), section 372(2) and (3) (harassing phone calls). As for section 810 (arrest without warrant on a complaint of domestic harassment), it was observed that section 264 was drafted to be gender neutral and "not confined to matters between men and women".

459. Next, the Court considered whether the word "harass" was drafted too widely or vaguely. Giving a negative answer, it interpreted "harassed" not as being "vexed or annoyed"

but as "being tormented, troubled, worried continually and chronically, being plagued, bedeviled and badgered".

460. Considering the "great importance of Parliament's objective", the "discounted value of the expression at issue", and the interpretation of the words, the Court held that section 264 constitutes a "minimal impairment of freedom of that form of expression with which we are concerned in this case".

461. Outcome: It was held that section 264 was proportionate to the aim, which it believed was a "most important one in our society".

462. The accused unsuccessfully appealed to the Court of Appeal of Alberta, which was of the view that section 264(2)(a) and (c) does not engage freedom of expression. This perhaps implies that the conduct described in those two provisions (following, besetting; and watching) are not considered "expression" as the lower court had considered. This aspect was not clarified by the highest appellate court, as leave to appeal to the Supreme Court of Canada was denied.

463. The Queen's Bench of Alberta's reasoning has been adopted in later cases.[376] One particular aspect of the ruling is perhaps that the element of "without lawful authority" in the offence of criminal harassment "eliminates the risk of lawful labour picketers being caught."

464. In ***R v. Shapira***[377] it was held that "lawful authority" can only come from the state through court order, legislative approval or executive power, but not the victim's own permission.[378] In determining whether there is lawful reason for the accused to communicate with the victim, the nature of the relationship, for example any working relationship, would have to be considered.[379]

[376] For example, *R v. Krushel*, 2000 CanLII 3780 (ON CA) and *R v. Doody*, 2000 CanLII 9953 (QC CA).
[377] (1997), 203 A.R. 299 (Prov. Ct.).
[378] See Canadian Department of Justice, 'Criminal Harassment: A Handbook for Police and Crown Prosecutors', http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/part3b.html
[379] *Ibid.*

4.4.2. R v. Davis[380]

465. Case background: The accused was charged with one count of criminal harassment, under section 264 of the Criminal Code. He was an ex-boyfriend of the victim. The case was heard in the Court of Queen's Bench of Manitoba.

466. Case development: The defence included challenges to the constitutional validity of section 264(2)(b) (which defines "repeatedly communicating with, either directly or indirectly, the other person or persons known to them" as constituting a conduct of criminal harassment) in violation of the Canadian Charter on three grounds:

(i) that it violates section 7 of the Charter (the morally innocent should not be punished) for being vague and overloaded;

(ii) that it violates section 2(d) (freedom of association) of the Charter; and,

(iii) that, the prosecution having conceded that section 264(2)(b) violates the freedom of expression, it exceeds the reasonable limits provided in section 1 of the Charter.

467. The Defense claimed that by prohibiting an individual from communicating with the victim, the legislation limited with whom the accused could associate. The Court decided that the prohibition did not impose such limitation and that it limited only the category of communication allowed. The Court preferred to handle this challenge under freedom of association.

468. On freedom of expression, the Court adopted *R v. Sillipp* in holding that the objective of section 264 relates to concerns which are pressing and substantial in a free and democratic society. The rational connection between the prohibited conduct and the objective was not challenged.

469. The Court then dealt with whether section 264 impaired the freedom of expression as little as possible (the minimal impairment test). It was of the opinion that, as a matter of interpretation, it is an element of the offence that the communication must cause the complainant to be harassed. Thus the legislation does not prohibit all communication, but

[380] 1999 CanLII 14505 (MB QB).

only such which harasses the complainant and reasonably causes fear. All of this would have to be considered in the context of the past relationship between the parties and the past history of their relationship.

470. Finally, the Court assessed whether the effect of section 264 was proportional to the objective. The Court understood that there are descending degrees of protection of freedom of expression depending on the nature of expression. By analogy to hate propaganda and defamatory libel, it held that expressions of criminal harassment are at the lower level of protection. The proportionality test was thus satisfied.

471. Outcome: The accused was thus rightly convicted.

4.4.3. Baril v. Obelnicki[381]

472. This case shows that the infringement on freedom of expression can be justified according to the social value of the type of expression. If the type of expression is of low value or has no valid social purpose and causes harm to others, restrictions on expression will require little by the way of external justification. However, the court did not provide examples of types of expression with no valid social purpose.

473. Case background: This case concerned the constitutionality of certain provisions in the Domestic Violence and Stalking Act (DVSA) in Manitoba. The case was first ruled upon by the Court of Queen's Bench of Manitoba,[382] and eventually overturned on appeal by the Manitoba Court of Appeal.

474. Ms Baril applied for a Protection Order under subsection 4 of the DVSA through a telephone hearing with a justice of the peace, during which she alleged that Mr Obelnicki stalked her. The hearing was ex parte, meaning Mr Obelnicki was neither notified nor involved in that hearing. After the Protection Order was issued, Mr Obelnicki applied for judicial review on the merits of the order pursuant to subsection 12 of the DVSA. At the same time he filed a separate application to review the validity of the DVSA.

[381] 2007 MBCA 40.
[382] 2004 MBQB 92.

475. This discussion focuses on the review application of the legislation. One of Mr Obelnicki's challenges was that "portions of the Act" violated section 2(b) (freedom of expression) of the Canadian Charter of Rights and Freedoms.

476. The relevant portions of the Act included subsections 6(1) and 7(1) of the DVSA which govern the granting of a protection order without notice by a justice of the peace. Subsection 12(2) provides that "[a]t a hearing, the onus falls on the respondent to demonstrate, on a balance of probabilities, that the protection order should be set aside." Subsection 12(3) allows initial evidence provided by the applicant to be used as evidence at the hearing, so that the applicant is not required to provide additional oral evidence or file affidavits.

477. Case development: The motions court judge found that portions of the Act, specifically subsections 6(1), 7(1) and 12(2) and (3), unjustifiably violated the Charter rights of Mr Obelnicki – in particular section 2(b) freedom of expression and section 7 liberty rights of the Charter. In so finding, the judge struck out subsections 12(2) and (3) of the DVSA, but decided to let the rest of the statute stand on the conditions that Mr Obelnicki be entitled to a fair review of the ex parte protection order within a reasonable period of time, and that Ms Baril's belief of the continuation of stalking or domestic violence be an objectively reasonable belief.[383]

478. While the Manitoba Court of Appeal agreed with the motions court judge that the content of the protective order in subsection 7(1) violated Mr Oblenicki's freedom of expression, the appellate court also found that the type of expression contemplated, in this case those actions that fall within the statutory definition of stalking, was of low value. The Court found that restrictions on expression that have little or "no valid social purpose, and indeed causes harm to others, will require little by the way of external justification".[384] Therefore, it was not difficult for the Court of Appeal to find that the violation of freedom of expression could be justified under a section 1 analysis.[385]

479. On the reversed onus provision in subsection 12(2) of the DVSA, it could be read down to only provide an evidentiary burden instead of a full burden that forces the

[383] 2004 MBQB 92.
[384] 2007 MBCA 40, para 61.
[385] *Ibid* at paras 62-64.

respondent to show that the protection notice was granted in error. In other words, an order could be set aside "on the basis of absence of full disclosure or based on the weight of all the evidence adduced at both the without notice and review hearings".[386] This would allow the provision to be read in compliance with the Charter, without having to strike it down.

480. Outcome: In conclusion, the Court of Appeal found that the impugned provisions in the DVSA, specifically subsections 6(1), 7(1), and 12(2) and (3) did not have to be struck down for the act to conform to the Charter. The infringement of freedom of expression was justified under section 1 of the Charter.

4.5. US

481. The US Supreme Court has ruled that "as generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offence with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[387]

482. In several US states where the constitutionality of stalking provisions was successfully challenged on the ground of vagueness, the legislation was amended "to address the particular issue identified."[388]

483. California's and Nevada's anti-stalking statues contain exemptions not only generally for constitutionally protected activities but also specifically for protests and news-gathering activities. As such, it is not difficult to imagine that those activities have not been targeted by the anti-stalking statutes.

484. For example, with regard to California's it was noted that its anti-stalking statute was most likely not unconstitutionally overbroad because the wording of the California Penal Code § 646.9 suggested that the law was specifically designed to regulate conduct, not speech.[389]

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[386] *Ibid* at para 5.
[387] *Kolender v. Lawson* 461 U.S. 352 (1983), 357 S. Ct.1855, 1858, as cited in *Pallas v. State* 636 So 2nd. 1358, (1994) Fla. App. 3 Dist.
[388] Scottish Executive Social Research, "Stalking and Harassment in Scotland," 15 November 2002, p 29.
[389] Robert Miller, "Stalk Look: A First Look At Anti-Stalking Legislation" (1993) 50 *Washington and Lee Law Review* 1303, 13 18, accessible at http://scholarlycommons.law.wlu.edu/wlulr/vol50/iss3/11/

485. While the main reason for the scarcity of harassment or stalking cases relating to news-gathering seems to be the existence of specific exemptions, we attempt to provide further reasons.

486. Under the terms of the First Amendment ("Congress shall make no law...abridging the freedom of speech, or of the press"), reporters who cover the news have been generally protected.[390] Although such protection has extended to freelance photographers, it has been questionable whether their activities covering the lives of celebrities qualify as news.[391]

487. The press has defended their rights on the grounds of newsgathering and the courts have shown that they do "intend to protect the gathering of news to the extent necessary to adequately keep the public informed, but not to the extent of allowing access to information to which the public would not normally be entitled."[392] However, the focus of the courts has perhaps been more on the right to privacy, which although not recognized in the US Constitution, "has developed to protect against four main types of invasions: (1) intrusion into solitude, (2) public disclosure of private facts, (3) depiction in a false light, and (4) commercial exploitation of a person's name or likeness, also called appropriation. Although other areas of the law distinguish between public and private figures in determining the standard that applies for recovery, the right of privacy applies equally to public and private figures, at least in theory. In practice, celebrities as public figures tend to have a much harder

[390] Jamie E. Nordhaus, "Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?"(1999) The University of Texas at Austin School of Law Publication – 18 *The Review of Litigation 285*, 287.
[391] *Ibid.*
[392] *Ibid*, 292, citing *City of Oak Creek v. Peter Ah King* (23 February 1989), Supreme Court of Wisconsin; and *Richmond Newspapers v. Virginia* 448 U.S. 555 (1980) U.S. Supreme Court.
In *Ah King*, the appellant had been found guilty of disorderly conduct in violation of City of Oak Creek Municipal Ordinance. One of the issues on appeal was whether the appellant as a news gatherer had a right of access to the scene of an airplane crash beyond the general public's right to access under the First Amendment to the US Constitution. The majority of the Court found in the negative, while the dissenting opinion concluded that "in determining the scope of news gatherers' access to accidents, the court can and should take into consideration the media's role as the "eyes and ears" of the public at large. …Time, place and manner restrictions on access to the site of an accident which are properly applicable to the general public may not be appropriate when applied to the media."
In *Richmond Newspapers,* the Appellant Richmond Newspapers, appealed to have a judicial order for closure of a criminal trial to the press and the public overturned as a violation of the First Amendment. The Court held that The First Amendment guarantees both the public and the press a right to attend criminal trials. However, this right is not absolute and may be outweighed where the judge finds an overriding interest that cannot be accommodated by less restrictive means. In this case, the majority of the Court found that the judge had failed to show an overriding interest for excluding the public and press, thus, the decision to close the courtroom was reversed.

time recovering for an invasion of privacy than private individuals. This discrepancy is a result of the narrow scope of matters that are considered private in the life of a celebrity."[393]

488. With regard to the intrusion of privacy tort in California for example, while photographing a person in a public place is not generally an invasion of privacy, it is generally recognized that conduct repeated with such persistence and frequency as to amount to a "course of hounding the plaintiff, that becomes a substantial burden to his existence" may constitute an invasion of privacy. On this theory, California courts have upheld prohibitions against photographing and videotaping. "Conduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion."[394]

489. Other reasons for the scarcity of harassment or stalking cases relating to news-gathering may be rooted in the prosecution's political sensitivity of the matter which may lead to a stricter threshold before issuing charges. Another reason may originate in the US legal system which has a tradition of deferred and non-prosecution agreements. In terms of civil claims, some people may settle for more lenient alternatives rather than bringing a case before the court, with those settlements not being made public. This could be the case of celebrities whose main objective is only to stop the offending activities of, for example, paparazzi, while still trying to maintain a good relationship with the agents who control those paparazzi.

490. The cases discussed here cover aspects related to the First Amendment.

4.5.1. United States v. Cassidy[395] (criticizing a religious leader through Twitter)

491. This recent case is not directly linked to newsgathering or protest/demonstration activities but it has ramifications for public speech in general in the light of new forms of communication emerging. It is relevant in considering how people criticizing a public figure in public can be prosecuted as stalkers while the First Amendment may be violated.

[393] *Ibid*, 287, 288.
[394] *Smith v. Hance* D047471 (Cal. App., 4 May 2007).
[395] 814 F. Supp. 2d 574, 579 (D. Md. 2011) (2011, Federal District Court, Maryland).

492. Case Background: Alyce Zeoli, the complainant, was considered as a reincarnated leader of the Tibetan Buddhist religion and had led a religious group. She was an avid user of Twitter and had 23,000 followers. William Lawrence Cassidy, the defendant, joined the religious group under a pseudonym, whilst claiming to be a reincarnated Buddhist as well as having lung cancer. Cassidy was expelled from the group after it was found out that he lied. Over the subsequent months, Cassidy then made 8,000 tweets and other online criticisms of Zeoli.

493. Cassidy was charged with infringing section 2(A) 18 U.S.C. § 2261A,[396] the federal anti-stalking statute. In January 2009, he had, with the intent to harass and cause substantial emotional distress to a person, used 'an interactive computer service ... to engage in a course of conduct that caused emotional distress to that person, to wit: the posting of messages on www.twitter.com and other Internet websites concerning [Alyce Zeoli].'[397] The prosecution did not rely on the statutory portion concerning threats or intimidation.

494. The Defendant, among others, filed a Motion to Dismiss the Indictment in which he argued that 18 U.S.C. § 2261A(2)(A) violated the First Amendment.

495. Case Development: With regard to the constitutional safeguards of freedom of speech, the Court took into account First Amendment cases noting that certain "well-defined and narrowly limited classes of speech" remain unprotected by the First Amendment. This type of unprotected speech is limited to:

(a) obscenity,
(b) defamation,
(c) fraud,
(d) incitement,
(e) true threats, and
(f) speech integral to criminal conduct.

[396] 'Whoever - (2) with the intent - (A) to kill, injure, harass, or place under surveillance with intent to kill, injure, **harass,** or intimidate, or **cause substantial emotional distress** to a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States; shall be punished as provided in section 2261(b) of this title.' (emphasis added)

[397] Criminal Complaint, *United States v.William Lawrence Cassidy,* accessible at http://www.volokh.com/wp/wp-content/uploads/2011/08/cassidycomplaint.pdf

496. None of the above types of speech were involved in the present case. Speech that does not fall into the above exceptions remains protected.

497. Moreover, the ban of the twitter threats was a content-based restriction "because it limits speech on the basis of whether that speech is *emotionally distressing* to (Alyce Zoeli)." A content-based restriction was not permissible because the government could not show that it was necessary to serve a compelling state interest. In any event, the complainant could simply block or disregard the tweets of Cassidy.

498. Importantly, the judge made it clear that posting a twitter message about a person constitutes communication on a public platform rather than a one-to-one communication to that person. The judge further noted that:

> the First Amendment protects speech even when the subject or manner of expression is uncomfortable and challenges conventional religious beliefs, political attitudes or standards of good taste.[398]

499. Outcome: Justice Titus, the federal district court judge in Maryland, held that Cassidy was not guilty because the legislative provision violated the First Amendment and was unconstitutional 'as applied to' his twitter comments. The Court granted the Motion to Dismiss. Whether the provision itself was unconstitutional was not addressed as it was unnecessary having Cassidy succeeded on the other arguments.

500. Public Sentiment: In general, the decision is considered to be one that protects speech. Professor Eugene Volokh was vocal in affirming the constitutional safeguards of freedom of speech under the First Amendment.[399] He noted that both frequent and occasional speech fall within the scope of protection. In particular, he was concerned with the broader ramifications of the case, indicating the prosecutorial trend from one-to-one communication to one-to-

[398] 814 F. Supp. 2d 574, 579 (D. Md. 2011), p 11.
[399] Eugene Volokh, Volokh Conspiracy, "Federal Government Prosecuting Man for Writing Many Insulting Tweets and Blog Posts About Religious Leader" (27 August 2011), accessible at http://www.volokh.com/2011/08/27/federal-government-prosecuting-man-for-writing-many-insulting-tweets-and-blog-posts-about-religious-leader/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%253A+volokh%252Fmainfeed+%2528The+Volokh+Conspiracy%2529&utm_content=Google+Reader

public communication.[400] Whilst the traditional concern of harassment and stalking is one-to-one communication such as telephone or mail threat, he emphatically stated that communication about certain persons to the public at large should be less vulnerable to prosecution and more valuable for protection. The commentary of a religious leader, however outrageous, is a one-to-public communication because it has a public concern relating to whether a religious leader is qualified in his position. It is made on a public platform and reaches certain willing listeners who may or may not share the same concerns.

501. The law in question, with which Cassidy was charged, had been amended in 2005 to prohibit "a course of conduct that causes substantial emotional distress" and to include the use of "any interactive computer service" in such conduct. The judge's ruling was criticized as too narrow and as leaving a "chillingly overbroad criminal statute" in force.[401] While the Maryland Court dismissed the charge, it ruled that the law was unconstitutional only as applied to the facts, where there was: (a) postings of anonymous criticism; (b) of a public figure; (c) on matters of public concern; (d) in a public forum; and (e) that the putative victim was free to avoid. The Electronic Frontier Foundation (EFF), a digital civil liberties group, criticized both the case and the law as unconstitutional and entered amicus curiae brief to the court against the government.[402]

502. In 2012, the Senate amended the statute by expanding it to cover conduct that "attempts to cause, or would be reasonably expected to cause" substantial emotional distress. The EFF said that the existing law was already "dangerously vague and overbroad" and the amendment would "make an unconstitutional law even more unconstitutional."[403] Others

[400] Eugene Volokh, "One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and 'Cyber-Stalking' " (2012) *Northwestern University Law Review* (forthcoming), accessible at http://www2.law.ucla.edu/volokh/crimharass.pdf

[401] Daniel Segal and John Stinson, "Indicting 'Invective' in the Internet Age: US v. Cassidy", *Bloomberg BNA The United States Law Week – Case Alerts and Legal News* (13 March 2012), http://www.hangley.com/ufiles/segal_stinson-indicting_invective_in_the_internet_age.pdf

[402] 'Judge: Prosecution of Online Critic Under Anti-Stalking Law Unconstitutional' (*Electronic Frontier Foundation*, 15 December 2011), http://www.eff.org/press/releases/judge-prosecution-online-critic-under-anti-stalking-law-unconstitutional

[403] Marcia Hoffman, 'Senate Bill would make Unconstitutional Anti-stalking Law even more unconstitutional' (*Electronic Frontier Foundation,* 24 April 2012), https://www.eff.org/deeplinks/2012/04/senate-bill-would-make-unconstitutional-anti-stalking-law-even-more

share this opinion, saying that sanctioning behaviour in this way would lead to violations to the First Amendment and thus to further litigation.[404]

503. The full provision, including the recent amendment in Stalking- Section 2261A of title 18, United States Code, which was signed into law through The Violence Against Women Reauthorization Act of 2013, reads as follows:

> Whoever--
> `(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--
>
> > `(A) places that person in reasonable fear of the death of, or serious bodily injury to--
> >
> > > `(i) that person;
> > > `(ii) an immediate family member (as defined in section 115) of that person; or
> > > `(iii) a spouse or intimate partner of that person; or
> >
> > `(B) **causes, attempts to cause, or would be reasonably expected to cause** substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or
>
> `(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service **or electronic communication service or electronic communication system** of interstate commerce, or any

[404] *Ibid.*

other facility of interstate or foreign commerce to engage in a course of conduct that--

> `(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or
>
> `(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.'.

(*Emphasis added to show the relevant amendments*)

504. While the judge in *Cassidy* made it clear that posting a twitter message about a person constitutes communication on a public platform rather than a one-to-one communication to that person, the amendment does not clarify that the offending conduct through electronic communication should be directed at a particular person. Therefore, it may be possible that a tweet, Facebook status update, or blog post that substantially distresses someone else could amount to stalking behaviour under the amendment. In this regard, the American Civil Liberties Union has commented that "… if an individual is tweeting or blogging with the intent to "intimidate" or "harass" another person, and the speech is of the type—like that in *Cassidy*—that would be "reasonably expected" to cause that emotional distress, the blogger or tweeter has committed a serious federal crime, *even if* the target never sees the tweets or blogs."[405]

505. While the federal stalking laws are known for being under-enforced, it has been commented that "by opening the door to the criminalization of ugly messages that are never

[405] Gabbe Rottman, "New Expansion of Stalking Laws Poses First Amendment Concerns", *American Civil Liberties Union*, 12 March 2013, accessible at http://www.aclu.org/blog/free-speech/new-expansion-stalking-law-poses-first-amendment-concerns

even read by the intended recipient, Congress has exacerbated the problem, and it's a matter of time before we see another case similar to *Cassidy*."[406]

4.5.2. Staley v. Jones[407]

506. While the factual background of this case does not involve news-gathering activities, this case illustrates the scope of the exemption "constitutionally protected activity" and "conduct that serves no legitimate purpose" under the Michigan anti-stalking statute. The court cited examples of First Amendment rights; such as the right of reporters to investigate issues of public importance, to analyze whether the statute may infringe First Amendment rights. Because the case reached the federal level, it could have implication on how other states interpret similar provisions.

507. Case Background: After their break-up, Jerry Lee Staley persistently intervened in the life of his ex-girlfriend Joellyn Weber. His actions included breaking into Weber's house late at night, making 15 phone calls to her at home and at work, intimidating her and her family with death threats and later threatening to burn down her house.

508. Staley was charged with and convicted of stalking and aggravated stalking under the stalking laws of Michigan, Mich. Comp. Laws 750.411(h) (Stalking) and 750.411(i) (Aggravated Stalking). Under those laws, stalking is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[408] "Harassment" is defined as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress."[409] Expressly excluded from the definition of "harassment" is "constitutionally protected activity or conduct that serves a legitimate purpose."[410]

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[406] *Ibid.*
[407] 239 F.3d 769 (6th Cir. 2001); 108 F. Supp. 2d 777 (W.D. Mich. 2000) (2001, 6th Circuit Court of Appeal; 2000, Federal District Court, Michigan).
[408] Mich. Comp. Laws Ann. § 750.411i(e).
[409] Mich. Comp. Laws Ann. § 750.411i(d).
[410] The full text of the Michigan anti-stalking statute is accessible at http://www.victimsofcrime.org/our-programs/stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state/michigan#h

509. Claiming that the Michigan stalking statute was unconstitutional, Staley unsuccessfully appealed his conviction to the Michigan Court of Appeal.[411] The Michigan Supreme Court also denied leave to appeal.[412]

510. Having exhausted his state remedies, Staley entered into federal habeas corpus proceedings in the District Court and was granted a writ of habeas corpus. [413] At the review hearing, the District Court held that the anti-stalking statute violated the First Amendment because it was overbroad. It held that although the statute criminalized conduct and not speech, it infringed upon a substantial amount of conduct which was at the core of the First Amendment. Because in a previous case[414] only labor picketing and other organized protests were explicitly excluded from the definition of harassment, the statute was at odds with the First Amendment.

511. The District Court cited three examples of First Amendment rights. First, "the rights of the press to investigate issues of public importance." The court remarked that if a reporter was persistent in his efforts to question a juror, which caused the juror emotional distress, and if the juror had a reasonable feeling of harassment or fear, the reporter could be prosecuted under the statute. Second, the District Court observed that "commercial speech is placed in jeopardy as well." The court provided the example of a telemarketer or door-to-door salesman, who could be subject to prosecution for repeatedly soliciting someone. Third, the court noted that "the rights of ordinary citizens to redress political or legal grievances is implicated by the statute." The court cited as examples the repeated calling of a congressman or the filing of numerous documents with a court clerk.

512. In conclusion, the District Court said that the cited examples illustrated that the interpretation of the phrases "constitutionally protected activity" and "conduct that serves a

[411] *State v. Staley*, No. 178555 (Mich.Ct.App. Aug. 20, 1996) (unpublished per curiam).
[412] *People v. Staley*, 454 Mich. 919, 564 N.W.2d 898 (Mich.1997).
[413] *Staley v. Jones*, 108 F.Supp.2d 777 (W.D.Mich.2000).
[414] *People v. White*, 212 Mich.App. 298, 536 N.W.2d 876 (Mich.Ct.App.1995) also involved a near-tragic romantic relationship. In this case the Michigan Court of Appeals stated in relevant part that "[b]oth § 411h(1)(c) and § 411i(1)(d) state that '[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose,' and such protected activity or conduct has been defined as labor picketing or other organized protests." For this proposition, the court referred to *Pallas v. Florida, 636 So.2d 1358*, 1360 (Fla App, 1994), involving an ex-husband and -wife relationship. In *Pallas*, the relevant part of Florida anti-stalking statute read: "Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests," § 784.048(3), Fla. Stat. (Supp. 1992).

legitimate purpose" is so limited that it allowed application of the statute to core First Amendment conduct. "This is not to say that the statute necessarily makes protected conduct illegal or that individuals engaging in this conduct are certain to be prosecuted or convicted. Instead, the vagueness of the statute chills the exercise of First Amendment freedoms because it potentially subjects those who exercise these rights to criminal prosecution. The state of Michigan may certainly criminalize stalking, but it may not do so at the expense of the First Amendment."

513. The District Court decision attracted media attention, in particular because of the implications to the media in the cited examples. [415]

514. The Respondent Jones, the Warden of the prison where Staley was serving his sentence, appealed the District Court's grant of writ of habeas corpus to the 6th Circuit Court of Appeal.[416] The following paragraphs discus the review of the case de novo by the appellate court.

515. Case Development: While the facts of the case clearly revealed that Staley's conduct was "so abhorrent and harassing that it clearly falls within the zone of conduct that a stalking statute would constitutionally make criminal," the District Court nonetheless ruled that the Michigan stalking statute was overbroad because it could hypothetically be applied in an unconstitutional manner. This was the first observation by the appellate court.

516. The Court then observed:

> The overbreadth doctrine … is prospective. Its purpose is to prevent the chilling of future protected expression. …"persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression". Its value would therefore not be diminished on habeas. … "Facial challenges to overly broad statutes are allowed not primarily for the

[415] See for example, Reporters Committee for Freedom of the Press '"Judge finds state anti-stalking unconstitutional." accessible at http://www.rcfp.org/browse-media-law-resources/news/judge-finds-state-anti-stalking-law-unconstitutional

[416] A federal court can grant a writ of habeas corpus to state prisoners if they are held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The 6th Circuit Court of Appeal reviews a District Court's decision in a habeas proceeding de novo. Habeas relief is available only if the federal court finds that the state court's decision was unreasonable, not simply erroneous or incorrect.

> benefit of the litigant, but for the benefit of society-to prevent the statute from chilling the First Amendment rights of other parties not before the court." … For this reason, any sense of injustice created by the windfall to a guilty defendant is vastly outweighed by the benefit to society in protecting the right to free expression.

517. However, in analysing the reasoning of the District Court, The Appeal Court agreed with the Respondent that the case the District Court relied on for finding the statute overbroad only referred to an illustration of "constitutionally protected activity"; i.e. labor picketing and other organized protests, as evidenced from the wording of the relevant legislation ("Constitutionally protected activity is not included within the meaning of 'course of conduct.' Such constitutionally protected activity *includes* picketing or other organized protest)." Thus "constitutionally protected activity" can include other activities even if not expressly stated in the legislation.

518. The Court indicated that the District Court had posed several examples of speech or expressive conduct that could conceivably be restricted under the statute but that simply citing several examples did make the statute overbroad. The Court quoted with approval the following passage from *Broadrick v. Oklahoma*:[417]

> This Court has repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.

519. *Broadrick* had also stated that whatever overbreadth existed could be cured on a case-by-case basis. As the Michigan Court of Appeals recognized, the thrust of the statute was proscribing unprotected conduct. Furthermore, any effect on protected speech was marginal

[417] 413 U.S. at 615-16, 93 S.Ct. 2908.

when weighed against the plainly legitimate sweep of the statute.[418] Thus, it was not unreasonable for the state court to reject Staley's overbreadth challenge.

520. On the vagueness challenge on the grounds that "conduct that serves a legitimate purpose" was not defined, the Court held that the Michigan stalking statute was certainly not vague as applied to Staley, as his conduct fell squarely within the heartland of conduct the statute was designed to prohibit. Staley had argued that he acted with a legitimate purpose -to communicate with his wife and preserve his marriage.

521. Outcome: The 6th Circuit Court of Appeal reversed the opinion of the District Court, holding that the statute was not vague or overbroad.

4.5.3. Other instances of stalking

522. Police chief filing suit over stalking by reporter (Ohio): After withdrawing his invasion of privacy lawsuit against the Akron Beacon Journal, Akron Police Chief Ed Irvine re-filed a complaint in 1999 alleging that the newspaper's staff harassed him and stalked his wife (Geneva). The complaint included allegations of telephone harassment by the newspaper's telemarketing system. The allegation against a reporter and a photographer was that they stalked Geneva by trying to reach and taking photographs when she was in Louisiana staying with relatives and undergoing cancer surgery. They also tried to access hospital records in an effort to obtain information about her alleged claims of domestic violence. The Irvines sought a total of $8 million in compensatory and punitive damages.[419]

[418] The Court cited cases in which the Supreme Court had struck down laws on overbreadth grounds. E.g.. *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (invalidating on First Amendment facial grounds an ordinance making it unlawful to "interrupt" police officers in performance of their duties); *Airport Comm'rs v. Jews for Jesus*, Inc., 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987) (invalidating resolution banning "First Amendment activities" in the airport's central terminal area); Lewis, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (invalidating on basis of First Amendment facial challenge ordinance prohibiting "[a]ny person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to" a policeman while performing his duties); *Gooding,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (invalidating on First Amendment grounds a statute making it a misdemeanor for any person, without provocation, to use to or of another, and in his presence, "opprobrious words or abusive language, tending to cause a breach of the peace").

[419] "Akron police chief again files suit over 'stalking' by Beacon Journal reporters", Reporters Committee for Freedom of the Press, 8 October 1999, http://www.rcfp.org/browse-media-law-resources/news/akron-police-chief-again-files-suit-over-stalking-beacon-journal-rep

523. The case did reach the courts, up to the appellate level.[420] The judgment reveals that the Irvines did in the end pursue the invasion of privacy lawsuit. In relation to the harassment by telemarketing system, it was pursued under the federal Telephone Consumer Protection Act. The Irvines succeeded on both claims.

524. Freelance journalist charged with harassment, aggravated harassment, and stalking[421] (New York):[422] This happened in 2001 to freelance journalist Kern after charges were laid against him based on a complaint filed by Charlie Flynn, Chairperson of the Erie County Independence Party, a Commissioner of the Buffalo Municipal Housing Authority, and former Residency Officer for the City of Buffalo.

525. The complaint alleged that: 1) Kern confronted Flynn twice during or right after public meetings; 2) Kern once stood outside Flynn's house, while Flynn's children were playing in the driveway; 3) Kern called Flynn at home and left messages on his answering machine three times, and left phone messages for Flynn at his office three other times; 4) Kern sent Flynn thirteen faxes at his office; and 5) during the personal encounters and phone messages Kern called Flynn a disgrace to the community and a liar, questioned Flynn's integrity, and told Flynn that he, Kern, was watching him.

526. Kern filed a complaint in the Courts seeking a preliminary and permanent injunction prohibiting the Erie County District Attorney's office from prosecuting him based on Flynn's complaint. In his complaint, Kern alleged that he had been subjected to a series of bad faith prosecutions brought by the Erie County District Attorney (D.A.)'s Office in order to "harass, oppress and punish [Kern] because of his vigorous and zealous advocacy under the First Amendment to the United States Constitution and Article One, Section Eight of the New York State Constitution." In addition to the pending prosecution, Kern alleged that he had been the subject of ten other criminal prosecutions, all stemming from his watchdog actions.

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[420] *IRVINE et al., Appellees and Cross-Appellants, v. AKRON BEACON JOURNAL et al., Appellants and Cross-Appellees*147 Ohio App.3d 428 (2002) available at http://scholar.google.com.hk/scholar_case?case=6949031986333061672&hl=en&as_sdt=2&as_vis=1&oi=scholarr&sa=X&ei=zB2_UbK8FMagkQXqyIHACw&ved=0CCkQgAMoADAA

[421] *Kern v. Clark, Drmacich and Zavah,* 331 F.3d 9 (2003) available at http://www.leagle.com/decision-result/?xmldoc/2003340331F3d9_1339.xml/docbase/CSLWAR2-1986-2006

[422] The anti-stalking laws of New York do not provide for "constitutionally protected activity" exemption. The only exemptions are that harassment does not apply to activities regulated by National Labor Relations Act, Railway Labor Act, or Federal Employment Labor Management Act. See http://www.victimsofcrime.org/our-programs/stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state/new-york

527. Kern maintained that he was working on a story and at the time was writing extensively on housing issues and city employees violating the law that required them to live in Buffalo by residing outside the city.

528. The appellate court remanded the case to the lower court for a hearing to resolve the disputed issue of whether the prosecution was brought in bad faith. The case revolves more around the bad faith complaint rather than the harassment charges.

529. Kern's attorney commented that "This case has a chilling effect on Mr. Kern and other journalists because they don't know if the D.A. will prosecute me for attending a meeting," …Who will it be tomorrow? This is a strong message that the penal law should not be used as an instrument of oppression."[423]

530. Reporter arrested on suspicion of stalking story subject[424] (Colorado):[425] A reporter from Denver-based alternative weekly newspaper Westword, David Holthouse wrote an article "Stalking the Bogeyman: Coming to grips with the killer inside me"[426] in 2004, about being raped as a child.

531. He was arrested on suspicion of stalking his alleged attacker. He wrote in the article that he had once planned to kill the man who allegedly raped him: "This time last year, I had a gun, and a silencer, and a plan." He said he changed his mind after talking to his parents. Instead, Holthouse wrote, he confronted his alleged attacker in a face-to-face meeting in Denver when the man apologized and told Holthouse he was his only victim, according to the article, which did not identify the man.

532. Holthouse told The Associated Press (AP) that he feared retaliation against his parents because his mother sent letters to neighbors of the alleged rapist warning them of the man's past. Holthouse asked a friend, to watch the man on one day. He did but was arrested in the

[423] "Appeals court revives journalist's suit over harassment charges," Reporters Committee for Freedom of the Press, 5 June 2003, available at http://www.rcfp.org/browse-media-law-resources/news/appeals-court-revives-journalists-suit-over-harassment-charges
[424] "Reporter arrested on suspicion of stalking story subject," Reporters Committee for Freedom of the Press, 3 June 2004, available at http://www.rcfp.org/browse-media-law-resources/news/reporter-arrested-suspicion-stalking-story-subject
[425] The anti-stalking laws of Colorado do not provide for "constitutionally protected activity" exemption. See http://www.victimsofcrime.org/our-programs/stalking-resource-center/stalking-laws/criminal-stalking-laws-by-state/colorado
[426] The article is available online at http://www.westword.com/2004-05-13/news/stalking-the-bogeyman/

following day on suspicion of stalking, and Holthouse was arrested on the felony stalking charge when he attempted to post bail for his friend. However, Holthouse told the AP he believed he was arrested because of the article.

533. Holthouse said that "Any charges against me are essentially charges of thought crimes." A district attorney told The Denver Post that Holthouse was arrested for "investigation of harassment by stalking," not for what was written in the article.

534. The Police Department did not release the police report or give further details about the case. Many people thanked Holthouse for revealing the story and sympathized with him.

535. There is no record of the case reaching the courts.

536. TV reporter issued with restraining order for alleged unwarranted questions [427](Florida): A circuit court judge in Tampa refused to rescind his earlier restraining order against a reporter, Steve Andrews, who allegedly asked "unwarranted" questions of a man, Ross, with multiple drunk-driving arrests and instances where crucial evidence had not been accepted by the court.

537. It was commented that "It's a devastatingly bad decision to prohibit a reporter from asking questions", and that the "injunctions [428] are designed to protect spouses in abuse situations."

538. Ross had complained that Andrews and a cameraman followed him out of the courthouse, where Ross and his lawyer refused to answer questions. The cameraman also videotaped Ross driving with a suspended license. Ross said "that Andrews "harassed me and my lawyer repetitively with unwarranted questions," and accused the reporter of "displaying me and treating me as a terrible individual" in news reports.

539. Andrews called the injunction "ridiculous" and an affront to the First Amendment. There is no record of the outcome of this case.

[427] ""Unwarranted questions" result in restraining order for reporter," Reporters Committee for Freedom of the Press, 12 December 2102, available at http://www.rcfp.org/browse-media-law-resources/news/unwarranted-questions-result-restraining-order-reporter
[428] Florida does not have a civil stalking statute.

540. The last three alleged instances of stalking occurred in jurisdictions where no defence exists that specifically protect speech / the media.

PART 5

5. High Profile or Random Cases of Stalking Involving Demonstration/Protest Activities

541. This part addresses high profile or random cases of stalking involving demonstration/protest activities. It should be noted that trial cases are unlikely to be reported, in particular when they are tried summarily.

542. A feature that has been identified by looking at several cases in the different jurisdictions is that the more precise the language of the anti-stalking legislation is, the less likely the number of challenges is. In some instances legislation has been amended due to those challenges. Likewise, if the laws are not designed to regulate conduct but instead speech or content, then constitutional challenges based on violations to the freedoms of expression, protest/demonstration/assembly are more likely. Another feature is that the more precise the defences or exemptions are that protect the right to peaceful protests, the less likely it is that such activities be targeted; and the more likely is that a provision that may seem to target speech is balanced with a specific defence.

543. The jurisdiction with most cases where protests activities have been targeted by the anti-stalking legislation is the UK. The UK PHA expressly includes speech in the definition of conduct, being the only jurisdiction to do so.

544. The US anti-stalking legislation does not sanction speech but conduct, as sanctioning speech would infringe upon the First Amendment right of free speech.[429] For example, the California Civil Code states that "This section shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly."[430] The Nevada Rev. Stat. contains similar provisions, as we have examined earlier. The Nevada Rev. Stat. also contains the provision that "A person who commits the crime of stalking with the use of an Internet or network site, electronic mail, text messaging or any

[429] In *State v. Elder,* 382 S0. 2d 687 (Fla. 1980), the Florida Supreme Court referring to the statute which forbade "the making of an anonymous telephone call with the intent to annoy, abuse, threaten, or harass the recipient of the call... ." 382 So.2d at 689, said: "That this conduct may be effected in part by verbal means does not necessarily invalidate the statute on freedom of speech grounds. At most, the use of words as the method with which to harass the recipient of the call involves conduct mixed with speech, to which the controlling constitutional considerations differ somewhat from those applied to pure speech."
[430] See also Part 1.11 above.

other similar means of communication to publish, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim shall be punished for a category C felony…" While speech is not explicitly sanctioned, the manner in which the speech is directed through technological communication may substantially increase the risk of harm or violence.

545. While the Queensland statute's list of prohibited conduct includes "contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology", the focus is on the conduct and not the content of communication. Victoria's list of prohibited conduct includes "publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material- relating to the victim or any other person; or purporting to relate to, or to originate from, the victim or any other person." Under this provision, the focus is on the act of publishing and not the content.

546. The New Zealand's specified acts under the HA do not include the act of communicating, publishing or any conduct that involves expressly speech.

547. Section 264's list of prohibited conduct in the Canadian Criminal Code includes "repeatedly communicating with, either directly or indirectly, the other person or anyone known to them." Again, the focus is on the conduct of communicating, rather than speech. The same applies to the similar provision in the Manitoba Domestic Violence and Stalking Act 1999.

548. Finally, the South African PHA's list of harassment conduct contains the provision "engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues." This provision does not seem to target speech because it does not matter whether conversation ensues or not; the principal objective being the act of engaging in communication, not the content of such communication, if it eventually occurs.

549. In conclusion, drawing the line between conduct and speech can be a difficult task. For example, statutes that include the act of communication cannot be said to be totally content-neutral. Caplan proposes a solution to this problem in as much as it relates to civil harassment litigation in the US. He proposes that instead of the petitioner's emotional state, which is often a reaction to the content of the respondent's speech, allegations about content

should be recast as allegations about unwanted or un-consented contact, given that the purpose of legislating on harassment is to protect safety and privacy, rather than to suppress particular content.[431] In this way, the government can regulate on a content neutral basis without infringing freedom of speech:

> Ending unconsented contact (regardless of the content that may be conveyed during the contact) is a permissible exercise of the government's power to regulate, on a content neutral basis, the noncommunicative aspects of expressive activity.[432]

5.1. UK

5.1.1. Diane Selvanayagam v. United Kingdom[433] (Protest designed to draw attention to practices carried out at a farm)

550. This case covers criminal and civil harassment and has several stages, up to the admissibility stage of the European Court of Human Rights (ECHR).[434] The examination of this case is divided into the following sections: Case background, development and outcome, criminal case, civil case, ECHR decision, and public sentiments.

551. Case background, development and outcome: The first three persons arrested and charged under the UK PHA 1997 were not stalkers but peaceful protesters. They were arrested in July 1997 and prosecuted in March 1998 under section 2 of the PHA in a Magistrates' Court. Their cases, as the majority of cases dealt with at the Magistrates' level, were not reported. The facts are summarized from the ECHR decision.

552. Besides the criminal prosecution, a High Court interim injunction was obtained under section 3 of the PHA with a threat of a civil claim against one of the alleged protesters, Ms Diane Selvanayagam (Diane S.). The injunction was granted without the applicant having notice of the application, in her absence and prior to the issue of civil proceedings.

[431] Caplan, 839.
[432] Caplan, 838.
[433] [2002] ECHR 857.
[434] The Third Section of the ECHR deliberated on admissibility of the application (in Chambers only). This is discussed below.

553. The three of them were acquitted after a nine-day trial in the Magistrates' court. The Director of Public Prosecutions however successfully appealed to the Divisional Court.[435] Diane S. sought the following question to be certified by the House of Lords (HL) as a question of general and public importance:

> Whether conduct which is in breach of an injunction imposed in civil proceedings is capable of being reasonable under section 1(3)(c) of the Protection from Harassment Act 1997.

554. Diane S was advised by counsel that her appeal would likely fail at the leave stage. Therefore she did not pursue the appeal to the HL.

555. As a result of the judgment of the Divisional Court, Diane S. was convicted by the magistrate. She was sentenced to an absolute discharge and an indefinite restraining order under section 5 of the Act.

556. On 29 October 1999, she applied to the Crown Court for leave to appeal, out of time, against the magistrate's decision to convict and sentence her. This application was rejected by the Crown Court on 13 January 2000.

557. On 12 April 2000, Diane S., acting in person, applied to the Divisional Court for permission to seek judicial review of the Crown Court's decision. Permission was granted on 25 October 2000. At the full hearing on 26 February 2001, the Crown Court's decision was quashed.[436]

558. The criminal case: Diane S. had been "involved in peaceful protests designed to draw attention to practices carried out at Corneyhaugh Mink Farm in Northumberland."[437] She, together with Moseley and Woodling who were also protesting at the same place but were not named in the injunction, was arrested and charged with harassment under section 2 of the PHA.

559. The charge in the Magistrates' court read:

[435] *R v. Director of Public Prosecutions, ex parte Moseley and others*, 9 June 1999, case no. CO/664/99 ("*ex parte Moseley*").
[436] *R v. Newcastle Crown Court, ex parte Selvanayagam*, 26 February 2001, case no. CO/1330/2000.
[437] [2002] ECHR 857, "A. The Circumstances of the Case."

> Diane Selvanayagam, jointly with others between 20th July 1997 and 17th March 1998 at Corneyhaugh Mink Farm, Kirkley Hall, Northumberland pursued a course of conduct which amounted to harassment of Peter John Harrison, contrary to section 2 of the Protection from Harassment Act 1997.

560. According to the magistrate, as reported in *Diane Selvanayagam v. United Kingdom,* the defendants' actions "continued" despite the presence of the injunction. Presumably, this means they continued to protest in the area that had already been prohibited under the injunction. No further judicial information regarding their actions is available. It was briefly stated in an article, that the defendants had an "incident" which occurred on Christmas Day and upset the farmers' children, and had one noisy all-night vigil in which flaming torches were present. [438]

561. The magistrate considered that Moseley and Woodling had general notice of the injunction, though not of the exact terms, and this was enough for them to be bound by the injunction.

562. After eight days of trial and cross-examination, the magistrate came to the conclusion that the defendants' actions were nonetheless reasonable. He found that the protests were peaceful, and that the defendants had urged other protestors not to resort to violence. He also felt that the purpose of the protest, which was to express opposition to the practice of mink farming, had strong public support and the government had expressed an intention to ban mink farming. He considered that although the protests were in breach of the injunction, this was only one factor in considering whether the conduct was reasonable for the purposes of the defence under PHA's section 1(3) (c). He held that the court should undertake a balancing exercise between the effect of the protests on the farmers, and the nature and purpose of the protests. As a result, he acquitted the defendants.

563. In considering whether to regard the applicant's behaviour as reasonable, the magistrate balanced the "highly valued and protected" right to protest against the effect of the protests on the occupants of the farm. He continued:

[438] Emily Finch, "Legitimate Protest or Campaign of Harassment – Protestors, Harassment and Reasonableness: The Decision in DPP v Moseley" (1999) Web Journal of Current Legal Issues, available at http://webjcli.ncl.ac.uk/1999/issue5/finch5.html ("Finch").

> ...there has been in the evidence no suggestion of violence and not more than the smallest hint of possible damage and abusive language.
>
> Even in the case of the last two I am far from certain about the value of the evidence. What I have heard and been impressed by is that all of them [the Defendants], and Miss Selvanayagam in particular, have gone out of their way to avoid such behaviour and have indeed counselled others against it.
>
> What all this amounts to is that I am satisfied that the purpose of the protest and the way in which these three pursued it was reasonable and I therefore dismiss all the charges against them.

564. The Prosecution appealed to the High Court against the acquittal, on the argument that conduct that was in breach of the injunction could never be reasonable. The argument, which had failed before the Magistrate's Court, succeeded before the High Court. In other words, the High Court rejected the balancing exercise.

565. The civil case: Diane S. "attended, mainly outside and occasionally within the boundaries of Cornyhaugh mink farm for the purpose of protesting peacefully against mink farming" over a period of 8 months. According to Finch's article on the case,[439] the farm was also home to the farmer and his family, including elderly parents and young children.

566. After several months of protest, the farmer applied for a High Court injunction under section 3 of the PHA, which prohibited Diane S. from entering the farm and the neighboring land. The injunction also bound anyone who was "in concert" with her, as well as anyone who had been given notice of the terms of the injunction. The injunction could be challenged within 24 hours.

567. The Injunction order provided:

> (1) This Order prohibits you from doing the acts set out in this Order. You should read it carefully. You are advised to consult your solicitor as soon as possible. You have a right to ask the Court to vary or discharge this Order.

[439] *Ibid.*

(2) If you disobey this Order you may be found guilty of Contempt of Court and you may be sent to prison or fined and if fined your assets may be seized."

568. It continued further as follows:

VARIATION OR DISCHARGE OF THIS ORDER

The Defendant may apply to the Court at any time to vary or discharge this Order but if he wishes to do so he must first inform the Plaintiffs' Solicitors in writing at least 24 hours beforehand.

569. Diane S. served a timely defence and a notice of application to have the injunction varied or discharged. However, the court did not list the matter and there was no hearing taken place prior to her arrest for the criminal offence of harassment. The High Court did not keep a copy of the application to vary or discharge the injunction.

570. The Divisional Court held that Diane S.'s behaviour could not be deemed to be reasonable under section 1(3)(c) of the Act because her course of conduct had continued notwithstanding that it was in breach of a High Court injunction. She had acted with knowledge that no application to vary or discharge that injunction had been heard. Thus the punishment was not for the alleged protests per se but for acting against a court order which had not been varied or discharged.

571. The ECHR decision: On 21 January 2000, Diane S. had lodged an application to the European Court of Human Rights in relation to the civil injunction. The ECHR assessment highlights the problem of the blurring between civil and criminal liability under the PHA. This has been discussed in Part 1 above.

572. In relation to the restraining order, the problem for Diane S. was that she did not apply for a variation or discharge in the domestic courts; as such the ECHR could not interfere. Therefore, her application was inadmissible and did not go further than the Third Section of the ECHR, which deliberated on admissibility of her application in Chambers only.

573. Public sentiments: As the first series of prosecutions under the PHA 1997 and especially as it involved peaceful protesters, it made way into academic interest. One academic commentator found this case encouraging as it recognized the harassing nature of

certain protests (especially by animal rights protesters in UK).[440] Others saw it as an example of the use of PHA 1997 to curb public protest.[441] It was also reported and criticized by Liberty (a leading civil liberties group in UK).[442]

5.1.2. Other cases under the PHA: involving mainly civil injunctions

574. Civil injunctions sought against protesters under the PHA extend 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 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 will be 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.[443] Courts have easily responded to these questions in the affirmative, as seen below. 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.

575. Protesters subject to civil injunctions under the PHA include environmental protesters against a power plant for dumping ashes into lakes (*RWE Npower v. Carrol & Ors*), anti-war protestors, particularly against an arms manufacturer (*Campaign to Smash EDO*), and environmental protestors against the construction of a third runway in the Heathrow Airport (*Heathrow Airport v. Garman*). In the latter two incidents, the injunction on the ground of harassment either failed or was dropped by the claimant, but the injunction in the first case was only challenged to a certain extent. It is fair to say that the use of injunctions on legitimate protests has become a major concern in UK.

576. Several cases where the PHA has been used to silence protesters involve the so-called "animal rights extremists", most notably SHAC (whose protests aimed at Huntingdon Life

[440] *Ibid.*
[441] SR Dabydeen, "Erosion of the Power to Protest in the UK" in SR Dabydeen (ed), *Civil Liberties in England and Wales* (iUniverse 2004).
[442] 'Told you so!', *Schnews*, Issue 159, 20 March 1998, accessible at http://www.schnews.org.uk/archive/news159.htm#Heading2
[443] For commentary on the use of injunctions against protest activities, often made under PHA 1997, see Jilaine Seymour, "Injunctions enjoining non-parties: distinction without difference" (2007) 66(3) *Cambridge Law Journal* 605.
See also Helen Fenwick, *Civil Liberties and Human Rights* (Cavendish Publishing Limited, 3rd edn, 2002), for example, pp 515-516.

Sciences and their business partners) and SPEAK (whose protest aimed at Oxford University). Their conduct has been often described as a "campaign of harassment" or even "a form of terrorism". Prosecutions and injunctions taken out against animal rights extremists may be legitimate and generally supported by the public. However, this should be understood against the UK context where animal rights extremism is considered a serious problem and is already targeted by other legislation such as the Serious Organised Crime and Police Act (Protection of activities of certain organisations).

5.1.3. RWE Npower plc & Ors v. Carrol & Ors[444] (involving both protests and news-gathering)

577. This is arguably the most vivid example of the PHA 1997 being readily used to clamp down on legitimate and peaceful protests, particularly with the assistance of a rule of civil procedure that allows injunctions to be applied without notice to defendants. The injunctions also imposed a ban on press photography.

578. In relation to "without notice" injunctions, Practice Direction to Part 25 of the Civil Procedure Rules requires anyone making an application for an injunction without notice to explain in the evidence supporting the application the reason why notice was not given.[445] The without notice application can be made in relation to issues that require secrecy (this would include so called super-injunction[446] which prevents any public scrutiny as there is no report of the existence of the proceedings[447]), but when the application without notice is not related to issues of secrecy, informal notification of the proceedings proposed should "ordinarily" be given to the other party.[448] Obviously, the latter notification is not binding on the receiving party.[449]

579. Case background: The power company Npower had planning permission to undergo construction to fill the Radley Lakes with ashes from the nearby coal-fired power plant. Dr Peter Harbour, a retired physician, founded the organization "Save Radley Lakes" to protest against this development together with the townspeople nearby.

[444] [2007] EWHC 947 (QB).
[445] Practice Direction to Part 25 Civil Procedure Rules, para. 3.4.
[446] This is discussed in Part 4 above.
[447] The problems related to super-injunctions were highlighted by the Joint Committee on Privacy and Injunctions – Oral and Written Evidence (2011). See for example, Section 1. How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice.
[448] Practice Direction to Part 25 Civil Procedure Rules, para. 4.3.
[449] Without notice injunctions are also discussed in Part 7.1.

580. Editorial Photographers UK (EPUK) had consistently covered the story of the Radley Lakes. Channel 4 reported on the story as well.[450]

581. Case development: On 14 February 2007, Npower obtained an injunction pursuant to section 3 of PHA 1997 from Mr Justice Calvert-Smith upon an emergency "without notice" application to the High Court. The injunction restrained the defendants from harassing Npower's employees or contractors and from trespassing the area around Radley Lakes owned by Npower. The full injunction was published by EPUK, and it was effective against all protestors including "anyone who has been given notice of the terms of the injunction".[451]

582. EPUK[452] and Channel 4 later revealed the witness statements used to persuade the judge to grant the first injunction. The most serious allegation was that a protester tried to drive a car at Npower's employee, but no one was hurt. It was also alleged that the protestors took photographs of the claimant's employees, and that one of the protestor said that she was going to put the photographs on the Internet, which may then be used to identify and harass them (although this has not taken place). The court also relied on a former Chief Superintendent's speculation of what environmental protestors might do. These witnesses could not be cross-examined as this application was made without notice to the defendants.

583. On 15 February 2007, the injunction was served to a photojournalist named Adrian Arbib.[453] This caused huge public outcry and directed national attention to this case.

584. On 27 April 2007, Mr Justice Teare of the Queen's Bench Division of the High Court heard the claimants' application to continue the injunction. The defendants were not qualified for legal aid, and the counsel representing them indicated that the defendants have been unable to advance an effective and full response to the application.

585. The judge heard evidence that the first five defendants occupied a house (Sandles House) in the claimant's property in order to obstruct the claimant's construction, and after

[450] "Injunction to stop power protest", *Channel 4 News*, 20 March 2007, http://www.youtube.com/watch?v=mdOFRaDXd2g
[451] The full injunction can be read in "The npower injunction in full", *EPUK*, 20 February 2007, http://www.epuk.org/News/475/the-npower-injunction-in-full
[452] "The npower statements that persuaded a court to ban photography at Radley Lakes", *EPUK*, 22 February 2007, http://www.epuk.org/News/480/radley-lake-witness-statements
[453] "Npower places injunction on EPUK member", *EPUK*, 16 February 2007, http://www.epuk.org/News/472/npower-injunction-on-epuk-member

eviction, set up a protest camp nearby. It was alleged that they intended to re-occupy the house and called for equipment to resist further eviction. They were also "professional" protesters with experience of other environmental campaigns. It was not alleged that Dr Peter Harbour, the sixth defendant, had anything to do with these.

586. Some of the protestors, including Dr Harbour, told the media that the fight would go on.

587. The judge continued to rely on witness statements that was used in the application for the first injunction that accused Dr Harbour of driving a car at the claimant's employee and taking photographs of them which the claimants fear would be published to enable other protesters to identify and harass them (though the publication has never taken place).

588. Based on the above evidence, the judge believed that the claimants had reasonable ground to fear that unless restrained some protestors will continue their trespass and harassment, and ordered the injunction.

589. This decision was reached notwithstanding the defendants, especially Dr Harbour, had since the first injunction only organized two large-scale lawful and peaceful protests, one of which was attended by the Mayor of Abingdon. The Town Council of Abingdon also supported their actions.

590. Outcome: The injunction was revised to apply only to the named defendants and "all other persons acting in concert with the Defendants to deter, obstruct or prevent the First Claimant's intended use of Sandles House and Radley Lakes by harassment, trespass and any other unlawful means". The term in the first injunction against "anyone who has been given notice", which applied to the photojournalist, was removed. However, Dr Peter Habour, and anyone acting in concert with him, was still restrained.

591. Public sentiment: The case was mentioned in a Parliamentary report by the UK House of Lords and House of Commons Human Rights Joint Committee.[454] The focus of criticism was on the rule of civil procedure that allows claimants to apply for injunctions

[454] "Demonstrating respect for human rights? A human rights approach to policing protests", March 2009, paras 96-100, accessible at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4707.htm#a25

without notice to the defendants. In the same report, the case itself attracted extensive criticism by way of written evidence submitted to the Human Rights Joint Committee:

a. Memorandum submitted by Mr. Adrian Arbib,[455]
b. Memorandum submitted by Dr Peter Harbour,[456]
c. Memorandum submitted by Liberty.[457]

592. During the same Parliamentary debates at the Committee's inquiry, the use of other legislation intended for non-protest purposes was also raised:

> We were concerned to hear that the Protection from Harassment Act 1997, which was brought in primarily to deal with stalkers, has been used to obtain injunctions to prevent protest activities that seemed to us to be perfectly legitimate. We heard of the injunction obtained by npower against Dr. Peter Harbour over the Radley lakes issue, where npower wanted to use the lakes to dump ash from power stations, not surprisingly attracting community disapproval. He could not afford to challenge the injunction taken out against him and the protesters. An injunction was also taken out against a photo-journalist for merely taking pictures of what was going on in that case. That was successfully challenged in court, and presumably the case was financed by the journalist's publication.[458]

593. The case was further criticized by:

- Article 19, an international NGO concerning free expression, in its submission to the United Nations Human Rights Committee made in 2007.[459]
- Editorial Photographers UK.[460]
- George Monbiot, in several articles.[461]

[455] http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we13.htm
[456] http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we33.htm
[457] http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we41.htm#n111, para 28.
[458] HC Deb, 4 February 2010, c151WH.
[459] http://www.article19.org/pdfs/publications/uk-unhrc-submission.pdf
[460] http://www.epuk.org/Opinion/574/how-npower-lost-its-credibility?pg=2
[461] Including: George Monbiot, "Otter-spotting and birdwatching: the dark heart of the eco-terrorist peril", *The Guardian*, 23 December 2008, http://www.guardian.co.uk/commentisfree/2008/dec/23/activists-conservation-police,

- Duncan Lamont.[462]
- Edward Countryman, husband of Evonne Powell-Von Heussen, the woman who campaigned for the anti-stalking legislation in 1997.[463]
- Oxford University Professor Phil Vinter said that "the use of blanket injunctions effectively incorporating everyone was a worrying development."[464]
- Chris Cheesman.[465]

5.1.4. EDO MBM/Edo Technology Ltd (Edo) & Anor v. Campaign To Smash Edo & Others [466] (Anti-war protests)

594. Case Background: This was a case concerning anti-war protestors against arms manufacturer EDO. The protestors' complaints aimed at EDO assisting UK in committing war crimes in Iraq and Palestine.

595. Some protestors were convicted under criminal offences of obstruction and aggravated trespass. According to the judge, "that campaign has included, at the least, seriously arguable instances of harassment. I single out, by way of example, targeting of directors' homes or neighbourhoods, photography of employees and their cars, other intimidation experienced by employees in their cars when driving from the EDO premises and criminal damage."[467]

596. EDO sought an injunction against all protestors pursuant to section 3 of PHA 1997.

George Monbiot, "A glut of barristers at Westminster has led to a crackdown on dissent", *The Guardian*, 6 Mar 2007, http://www.guardian.co.uk/commentisfree/2007/mar/06/comment.politics

[462] Duncan Lamont, "The harassment of press freedom", *The Guardian*, 5 March 2007, http://www.guardian.co.uk/media/2007/mar/05/mondaymediasection11

[463] Edward Countryman, "Response: Those behind the harassment law did not want it to be used to stifle protest" *The Guardian* 7 January 2009, http://www.guardian.co.uk/commentisfree/2009/jan/07/harassment-law.

[464] Phil Vinter, "Injunction is step too far", *Oxford Times*, 16 Feb 2007, www.oxfordtimes.co.uk/news/1197765.injunction_is_step_too_far

[465] Chris Cheesman, "Photo injunction sparks media rights fear", *Amateur Photographer*, 21 Feb 2007, http://www.amateurphotographer.co.uk/photo-news/537985/photo-injunction-sparks-media-rights-fears.

[466] *EDO MBM Technology Ltd v. Campaign To Smash EDO & Ors* [2005] EWHC 837 (QB), *Edo Technology Ltd ("Edo") & Anor v. Campaign To Smash Edo & Ors* [2005] EWHC 2490 (QB), and *Edo Technology Ltd ("Edo") & Anor v. Campaign To Smash Edo & Ors* [2006] EWHC 598 (QB).

[467] [2006] EWHC 598 (QB), at para 68.

597. Case Development: On 29 April 2005, EDO obtained a controversial interim injunction that greatly restricted the nature of the protest outside EDO's factory at Brighton.[468]

598. However, at trial, while the High Court considered that the protestors could not rely on the defence of crime prevention under s 1(3)(a), they might be allowed to show that they were acting reasonably under s 1(3)(c). The success of this defence, according to the High Court, would "depend very strongly on precisely what acts are proven to have been committed by any particular defendant". Thus the High Court proceeded to hear on the defendants' evidence of war crimes committed by UK.[469]

599. In February 2006, an out of court settlement was reached between EDO and several defendants. EDO agreed, on the condition of certain undertakings by the defendant, to lift the interim injunction.[470]

600. On 23 March 2006, a judgment was handed down holding that EDO committed an abuse of process in unduly delaying the proceedings and holding onto the interim injunction. The interim injunction was officially lifted, the claim for permanent injunction was struck out, and EDO suffered heavy legal costs.[471]

601. Outcome: No injunction was granted as the case was settled and the application was struck out due to claimant's undue delay of proceedings.

602. Public Sentiment: The case received some media criticism, notably from The Guardian.[472] It was also criticized by an NGO, Campaign Against Criminalising Communities, in its written submission to the parliamentary Joint Committee on Human Rights.[473]

5.1.5. "Stop Huntingdon Animal Cruelty" (SHAC) cases

603. Case Background: SHAC is known for having "demonstrated violently and with a degree of terrorism" and conducting campaigns of harassment, against individuals and

[468] *EDO MBM Technology Ltd v. Campaign To Smash EDO & Ors* [2005] EWHC 837 (QB).
[469] *Edo Technology Ltd ("Edo") & Anor v. Campaign To Smash Edo & Ors* [2005] EWHC 2490 (QB).
[470] Campaign to Smash EDO, "Bomb builders drop injunction", 10 Feb 2006, http://www.smashedo.org.uk/pressreleases/06-02-10.htm
[471] *Edo Technology Ltd ("Edo") & Anor v. Campaign To Smash Edo & Ors* [2006] EWHC 598 (QB).
[472] Paul Lewis and Rob Evans, "High court injunction – the weapon of choice to slap down protests", *The Guardian*, 27 October 2009, http://www.guardian.co.uk/uk/2009/oct/27/high-court-injunctions-protests
[473] http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we21.htm

companies dealing with Huntingdon Life Sciences (HLS). It advised its activists on tactics for protests outside targets' homes, including throwing rape alarms in roof guttering at night, setting off fireworks, and ordering taxis and pizzas.[474] In 2001, HLS managing director in the UK was beaten outside his home by three masked men — animal rights activist David Blenkinsop was sentenced to three years in prison for the attack — and HLS marketing director Andrew Gay was attacked on his doorstep with a chemical spray to his eyes that left him temporarily blinded.[475] A number of active members of SHAC have acquired "a large number of convictions".[476]

604. The express purpose of SHAC is to close down the business of HLS, whose business include the use of laboratory animals for the purpose of research and testing of pharmaceutical and other products. SHAC also target commercial organisations that do business with HLS, e.g. its shareholders, insurance brokers, auditors, and their bankers.

605. HLS successfully sought interim and final injunctions against SHAC.[477]

606. Business partners of HLS also sought injunctions against SHAC, including Daiichi UK,[478] Smithkline Beecham,[479] Novartis Pharmaceuticals,[480] Bayer Cropscience,[481] AGC Chemicals Europe,[482] Astellas Pharma,[483] and Harlan Laboratories.[484]

607. The main case of *Huntingdon Life Sciences* is considered a precedent in handing down a permanent injunction against an organization of protesters under PHA 1997. The final

[474] HC Deb Col 241WH-243WH, 19 Mar 2003.
[475] Southern Poverty Law Group, "From push to shove", *Intelligence Report*, Fall 2002, http://www.splcenter.org/intel/intelreport/article.jsp?aid=42
[476] *Huntingdon Life Sciences Plc & Anor v. Stop Hungtingdon Animal Cruelty (SHAC)* [2003] EWHC 1139 (QB).
[477] *Huntingdon Life Sciences Plc & Anor v. Stop Hungtingdon Animal Cruelty (SHAC)* [2003] EWHC 1139 (QB), [2003] EWHC 1967 (QB), [2004] EWHC 1231 (QB), [2005] EWHC 2233 (QB), [2007] EWHC 522 (QB).
[478] *Daiichi UK Ltd & Ors v. Stop Huntingdon Animal Cruelty & Ors* [2003] EWHC 2337 (QB).
[479] *Smithkline Beecham Plc & Ors v. Avery & Ors (Representing Stop Huntingdon Cruelty ("Shac")* [2009] EWHC 1488 (QB).
[480] *Novartis Pharmaceuticals UK Ltd & Ors v. Stop Huntingdon Animal Cruelty ('SHAC') & Ors* [2009] EWHC 2716 (QB).
[481] *Bayer Cropscience Ltd & Anor v. Stop Huntingdon Cruelty ("SHAC") & Ors* [2009] EWHC 3289 (QB).
[482] *AGC Chemicals Europe Ltd v. Stop Huntington Animal Cruelty (SHAC)* [2010] EWHC 3674 (QB).
[483] *Astellas Pharma Ltd & Ors v. Stop Huntingdon Animal Cruelty (SHAC) & Ors* [2011] EWCA Civ 752.
[484] *Harlan Laboratories UK Ltd & Anor v. Stop Huntingdon Animal Cruelty ("SHAC") & Anor* [2012] EWHC 3408 (QB).

injunction handed down in 2007 [485] was modeled on since then. The following case development focuses on this case.

608. Case Development: On 16 April 2003, HLS obtained the first injunction against SHAC and its protesters and a few other animal rights organizations. It was alleged that in addition to that physical attacks, regular harassment and threats, harassment has become more frequent, including "about 26 visits to the homes of employees during which acid as thrown over cars and front doors, personal alarms were thrown into gardens and windows were broken". It was also alleged that SHAC published a list of customers of HLS which ended with words "now you know who they are and where they are, its pay back time".

609. The judge considered that PHA 1997 was apt to cover protests, as the defendants' conduct and the effect of the conduct was very much like stalking, even though motives may differ. In other words, the fact that the defendants were protesting does not matter in the determination of whether their conduct amounts to harassment. An interim injunction was thus granted.

610. On 20 June 2003, the High Court heard an application from the defendants to strike out the HLS's injunction application, but this was denied as the Court felt that HLS had reasonable prospects of success. The judgment for this hearing was extensively referred to in the judgment where the final permanent injunction was granted.

611. The judge, in particular, dealt with the injunction and right to freedom of expression and assembly under the European Convention on Human Rights. Evidence showing that the protesters had previously broken the law, or had been convicted, or had encouraged others to breach the law in the course of the protests, and that such unlawful tactics continued to be used, weighed heavily on the balance to uphold the interim injunction. Nevertheless, the judge was mindful that the balance between protest and harassment involves intensive factual inquiry and questions of degrees.

612. The defendants had never defended themselves on the ground of "reasonable conduct" or "prevention of crime". They only denied having committed acts of harassment.

[485] [2007] EWHC 522 (QB).

613. Outcome: On 15 March 2007, permanent injunction was granted against the SHAC and its associates. This was the first permanent injunction granted under PHA 1997 against an organization of protesters, and the terms of the injunction were modeled on in later cases.

614. As to range of "Protesters" bound by the injunction, the judge upheld a wide definition, as opposed to only SHAC members. He was of the view that the injunction was to give HLS control over protests in an "exclusion zone". He deliberately pointed out that the injunction would bind even peaceful protesters if they enter the exclusion zone.

615. The injunction would allow for weekly protests with prior notice to the police, and greatly restricted the use of megaphones.

616. The judge however, declined to restrict the protesters from making media responses.

617. Public Sentiment: Rather than focusing on the public sentiment around the injunctions, it is more practical to look at the sentiment around SHAC itself. Overall, there is little criticism towards injunctions against so-called "animal right extremists", which is often closely associated with SHAC only.

5.1.6. Heathrow Airport cases[486] *(environmental protests)*

618. Case Background: This case concerned environmental protests against the construction of a third runway in Heathrow Airport. The British Airport Authority, which operates the Heathrow Airport, sought an injunction pursuant to section 3 of PHA 1997 against the protesters.

619. Case Development: The claimants originally sought an injunction against all members of an umbrella organization known as Airport Watch, which would include over millions of members of Green Peace, Friends of the Earth, the Royal Society for the Protection of Birds, the National Trust, etc. It was branded by protestors as "the mother of all injunctions".

620. The original injunction sought would restrain the defendants from "coming or remaining at" the airport. However, in spite of public outcry, the intended injunction was revised to include a much more limited range of protestors, and only to restrain them from

[486] Main case: *Heathrow Airport Ltd & Ors v. Garman & Ors* [2007] EWHC 1957 (QB).

pursuing a prescribed course of conduct that amounts of harassment of certain protected persons.[487]

621. The conduct relied on by the claimants were two occasions when British Airport Authority's Heathrow offices were blockaded and an occasion when loud music was played outside the home of the chief executive of BAA.

622. Outcome: The injunction based on the PHA 1997 was refused. "It is plain that considerable care must be taken in applying the 1997 Act to situations of public protest and, by its application, seeking to restrict freedom of expression, which is an integral part of our democratic process. There will however be cases where there is obviously reason to believe that protest and expression will involve the harassment of individuals, and in such cases the courts have in the past been prepared to invoke the 1997 Act to prevent such behaviour. I am not satisfied that this is appropriate here for these reasons."[488]

623. The claimants only succeeded in seeking the injunction on the ground of trespass and nuisance against the members of one organization known as Plane Stupid and anyone else acting in concert with them for the purpose of disrupting the airport.

624. Public Sentiment: Due to the draconian injunction that BAA initially tried to seek, the case received very wide media coverage and criticisms, including by the BBC,[489] The Guardian,[490] Financial Times,[491] and as far as New York Times.[492] Liberty and even the Mayor of London also criticized the injunction sought.[493]

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[487] [2007] EWHC 1957, paras 17-19.
[488] [2007] EWHC 1957, para 99.
[489] "BAA seeks Heathrow green demo ban", *BBC*, 27 July 2007, http://news.bbc.co.uk/2/hi/uk_news/6918565.stm
[490] John Vidal and Dan Milmo, "Catch-all Heathrow protest injunction could bar millions", *The Guardian*, 27 July 2007, http://www.guardian.co.uk/environment/2007/jul/27/climatechange; Alison Benjamin, "Bullying BAA seeks Heathrow protest injunction", *The Guardian*, 27 July 2007, http://www.guardian.co.uk/environment/2007/aug/01/travelandtransport.transportintheuk
[491] Kevin Done and Nikki Tait, "BAA attacked for Heathrow injunction bid", *Financial Times*, 28 July 2007, http://www.ft.com/cms/s/0/c6b431b4-3c70-11dc-b067-0000779fd2ac.html#axzz2LqgbR5ta
[492] James Kanter, "Environmentalists vs. Heathrow Airport", *New York Times*, 30 July 2007, http://green.blogs.nytimes.com/2007/07/30/environmentalists-vs-heathrow-airport/
[493] "BAA seeks Heathrow green demo ban", *BBC*, 27 July 2007, http://news.bbc.co.uk/2/hi/uk_news/6918565.stm. Liberty further criticized the injunction in its written memorandum submitted to the House of Lords and House of Commons Joint Committee on Human Rights, http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47we41.htm#n111

5.1.7. SPEAK cases[494] *(University of Oxford seeking injunctions against animal rights activists)*

625. Case Background: These cases concerned the University of Oxford obtaining injunctions against animal rights activists, who were protesting against the university's use of animals in laboratories. The University of Oxford sought an injunction against animal rights protesters pursuant to section 3 of PHA 1997.

626. A police witness statement in ***Chancellor, Masters and Scholars of the University of Oxford and others v. Broughton and others,***[495] revealed that the activists targeted the homes of some of the complainants (no details are given), that some of the complainants received postal packages with the appearance of 'parcel bombs', and that some of the complainants received letters threatening to send to their neighbours fictitious lists of convictions of sexual offences, unless the contract with the University was terminated within one week.[496]

627. Outcome: An injunction was obtained to create an exclusion zone around the new biomedical facility and to restrict the nature of protests. The injunction provided for weekly protests outside the exclusion zone, and, if agreed by the police, monthly protests inside the exclusion zone. The injunction was applicable to anyone acting in pursuit of the campaign to prevent or obstruct the building of the new biomedical facility.[497]

628. Public Sentiment: Because of the involvement of the prestigious university, the case received some considerable media coverage, including in The Telegraph[498] and the BBC.[499]

5.1.8. Save Newchurch Guinea Pigs[500]

629. Case Background: This case concerned animal rights activists protesting against a farm that bred guinea pigs for experiments. The actions of the protestors included desecration of the tomb of the farm-owner's mother and stealing away the corpse, though the Save

[494] Main cases: *University of Oxford & Ors v. Broughton & Ors* [2004] EWHC 2543 (QB), [2006] EWHC 1233 (QB), [2006] EWCA Civ 1305, [2008] EWHC 75 (QB).
[495] [2004] EWHC 2543 (QB).
[496] [2004] EWHC 2543 (QB), para 28.
[497] The judge considered equally necessary to include the prohibition on photographing the protected persons, as photography is the easiest way of identifying potential targets.
[498] Rosie Murray-West, "Oxford wins new animal rights protest injunction", *Telegraph*, 27 May 2006, accessed at http://www.telegraph.co.uk/news/uknews/1519544/Oxford-wins-new-animal-rights-protest-injunction.html
[499] "Oxford lab injunction tightened", *BBC*, 26 May 2006, accessed at http://news.bbc.co.uk/2/hi/uk_news/5018718.stm
[500] Main case: *Hall & Ors v. Save Newchurch Guinea Pigs (Campaign) & Ors* [2005] EWHC 372 (QB).

Newchurch Guinea Pigs campaign disavowed affiliations with those actions. The campaign was described as "a form of terrorism" by the judge.

630. Outcome: The injunction was ordered against the protesters.

631. Public Sentiment: The BBC reported the case with the tone of the report sounding sympathetic toward the farm owners.[501]

5.1.9. Injunctions and alternative remedies

632. The reasons why alleged stalking victims seem to prefer applying for injunctions under the PHA over making complaints to the police have been examined in Part 4 above.[502] In addition, injunctions can be as wide as to exclude all opportunity to be heard. The particular injunction sought against trying to drive a car in the Npower case was in such wide ranging-terms that it was capable of effectively creating an "exclusion zone" to nearly all protestors. Moreover, injunctions can be applied on an ex-parte emergency basis while the respondent would not have a right to reply before an interim injunction is handed down. This route has in fact been used in most protest cases, including the Npower cases and the Smash EDO Campaign cases. In the Npower cases, the witness statements were revealed by EPUK, and they turned out to be very much contested. Protestors would then have to return to court, often at their own cost, to argue for the lifting of the injunction.

633. 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. This has been said to be the first of several "behavior acts" which "blur the distinction between civil and criminal offences",[503] in the sense that a company can apply for an injunction under civil standards of proof and with ex parte emergency hearings, which would entail criminal implications for those who breach the injunction. The injunctions sought under PHA 1997 are thus more convenient, which is also assisted by the broadness of the statute, as conduct can be nearly anything.

[501] "Timeline: Farm under siege", *BBC*, 4 May 2006, http://news.bbc.co.uk/2/hi/uk_news/england/staffordshire/4176446.stm
[502] In particular see Part 4.1.7. See also Part 5.1.4.
[503] http://www.monbiot.com/2007/03/06/a-plague-of-lawyers/

634. Turning to other remedies, the police has the alternative of relying on the harassment offences under the Public Order Act 1986 (POA)'s sections 4A[504] and 5[505] when dealing with protests. During parliamentary discussions on "harassment to deter lawful activities" introduced in the PHA, an MP mentioned that "where public order is threatened by a large group of demonstrators the police are more likely to use other powers, such as those under the Public Order Act 1986, to deal with disorder."[506]

[504] "4A. **Intentional harassment, alarm or distress**.
(1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—
(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
thereby causing that or another person harassment, alarm or distress.
(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.
(3) It is a defence for the accused to prove—
(a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
(b) that his conduct was reasonable.
(4) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.
(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both."

[505] "5. **Harassment, alarm or distress**.
(1) A person is guilty of an offence if he—
(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.
(3) It is a defence for the accused to prove—
(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
(c) that his conduct was reasonable.
(4) A constable may arrest a person without warrant if—
(a) he engages in offensive conduct which [a] constable warns him to stop, and
(b) he engages in further offensive conduct immediately or shortly after the warning.
(5) In subsection (4) "offensive conduct" means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in paragraph (a) and the further conduct need not be of the same nature.
(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale."

[506] Joint Committee on Human Rights, Eight Report, 2. Serious Organised Crime and Police Bill (2005), para 2.52, accessible at http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/60/6005.htm#n75

635. The PAO creates three separate public order offences dealing with speech and behaviour: sections 4,[507] 4A and 5. The words "likely to be caused harassment, alarm or distress" in POA's section 5 are especially similar to those 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.

636. Section 5 of the POA has been very controversial. For example, responding to the Government Consultation on Police Powers to promote and maintain Public Order, civil rights group Liberty proposed to repeal that section altogether.[508] The Government was however only persuaded to remove the reference to "insulting" in section 5 amid public concerns.[509]

637. With regard to prosecution policies and police guidelines on protests, the Crown Prosecution Service's (CPS) prosecution policy on Public Protests[510] includes a non-exhaustive list of offences that may be committed arising out of protests (Annex A).[511] While POA (section 5) is in the list, the PHA is not included.

638. Her Majesty's Inspectorate of Constabulary (HMIC), the oversight body for police in the UK, issued a report "Adapting to Protest"[512] in 2009. In the section of "Legal Framework for Policing Protests", again, POA (section 5) is on the list, but the PHA is not.

639. The CPS prosecution policy on Stalking and Harassment[513] specifically mentions that harassment under the PHA can occur in political protests. It refers to the prosecution policy

[507] Section 4 criminalises words or behaviour intended to cause another to fear immediate unlawful violence or to provoke another to immediately use unlawful violence.
[508] http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-response-to-the-home-office-consultation-on-police-powers-to-promo.pdf
[509] Note that the House of Lords has voted in favour of an amendment in the Crime and Courts Bill to change the words "threatening, abusive or insulting" to "threatening or abusive" in both s.5(1)(a) and s.5(1)(b). See HL Deb, 12 December 2012, c1119-c1131. The government has said that it will not challenge the amendment in the House of Commons either: See 'Insulting to be dropped from section 5 of Public Order Act' (The Guardian, 14 January 2013), http://www.guardian.co.uk/world/2013/jan/14/ insulting-section-5-public-order-act. This is again confirmed in a consultation by the UK Home Office that was completed in 2013 (https://www.gov.uk/government/uploads/system/uploads/attachment_ data/file/157871/consultation-responses-summary.pdf) The amendment came amid the Reform Section 5 campaign spearheaded by comedian Rowan Atkinson, human rights campaigner Peter Tatchell and former shadow home secretary David Davis.
[510] Legal Guidance – Public Protests, http://www.cps.gov.uk/legal/p_to_r/public_protests/
[511] http://www.cps.gov.uk/legal/assets/uploads/files/public_protests_annex_a_offences.doc
[512] http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf
[513] http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/

for public protests for further guidance. Curiously, the prosecution policy for public protests does not include the PHA as a potential offence.

640. The Association for Chief Police Officers (ACPO) issued a practice advice for investigating stalking and harassment,[514] and specifically included guidance at section 1.4.12 about potential harassment complaints during public protests. It also included POA's sections 4A and 5 as offences that are associated with harassment under the PHA.

641. Summing up, it is curiously the case that if a prosecutor or the police start with guidance relating to protests, it would be unlikely for them to invoke harassment offences under the PHA. It would rather be likely that he would invoke POA's section 5. However, if they start with guidance relating to stalking and harassment, it would be likely for them to find harassment offences applicable to protest situations. There is a possibility, in any case, that absent POA's section 5, more protestors might have been prosecuted under the PHA.

642. In fact, POA's section 5 is a very commonly invoked offence. According to parliamentary debates, 24,248 persons were proceeded against in magistrates' courts under section 5 in 2010.[515] However, it could not be identified how many of them occurred in private places and how many in public places, as section 5 applies to both.

5.1.10. Instances of stalking with police intervention

643. The following instances of stalking are also cited in the table in Part 5.1.12 below.

644. Activist possibly charged under Christopher Brown's injunction under PHA.[516]Christopher Brown is a farmer who bred cats for vivisection and whose was targeted by animal rights activists. He was granted an injunction against animal rights protestors under the PHA. SchNEWS, in a report about the use of PHA against protestors, mentioned that one woman had been charged for "demonstrating outside the home of Hillgrove Farm owner Christopher Brown". It was not explicitly mentioned whether the charge was under the PHA or not. No further information can be found to verify whether the woman was charged for breach of the injunction under PHA or for other offences.

[514] http://www.acpo.police.uk/documents/crime/2009/200908CRISAH01.pdf
[515] HC Deb, 13 July 2011, c330W.
[516] 'Disclaimer…' *SchNEWS* Issue 126 (18 July 1997), available at http://www.schnews.org.uk/archive/news126.htm

645. Protestors outside Cornyhaugh Mink Farm charged under PHA.[517] According to a SchNEWS report on 20 March 1998, Tindle and Crocker were involved in the protests against Cornyhaugh Mink Farm, i.e. the same protests that Diane Selvanayagam was involved in. According to the judgment for Selvanayagam's case, the protests were peaceful and "mainly outside, occasionally inside, the boundaries of the farm". A month after attending a vigil outside the farm, Tindle and Crocker were arrested and charged for "continual harassment" of the farmer. It is not clear whether they were charged under the PHA, either under section 2 for the offence of harassment or for breach of the injunction under section 3. They were taken to court on 25 February 1998, found guilty and sentenced to an absolute discharge with costs, as well as to a restraining order that prohibits them from going near the farm.

646. SchNEWS reported that another two protestors were arrested in the same protests on 18 March 1998. They were charged under the PHA and "given 7:30pm – 7am curfew". There is no further clarification on whether "curfew" refers to restraining orders or otherwise.

647. *DPP v. Dziurzynski.*[518] Dziurzynski was an animal-rights protestor and had been protesting in the vicinity of a company named B&K Universal Group Ltd on many occasions. He was charged for the harassment of the "employees of B&K Universal" under PHA's section 2. The Prosecution alleged that, between 22 June and 20 July 2000, Dziurzynski had on two separate occasions been outside the premises of B&K, used a camera that pointed in the direction of the employees of B&K entering the premises, and made abusive remarks at them. The employees had a wide range of reactions, from smiling back to feeling threatened. However, none of the prosecution witnesses had been present on both occasions.

648. On 19 December 2000, he was acquitted at the District Court. The District Judge made no conclusion as to whether the conduct amounted to harassment, but instead decided that the charge was defective itself. He held that the description of "the employees of B&K Universal" was too vague and did not constitute a "close knit definable group" for the purposes of harassment. This also caused the charge to contain an unknown number of offences, i.e. the charge was bad for duplicity, which was confirmed by the Court of Appeal.

[517] Told you so!' *SchNEWS* Issue 159 (20 March 1998), available at http://www.schnews.org.uk/archive/news159.htm
[518] *Director of Public Prosecutions v. Dziurzynski* [2002] EWHC 1380 (Admin) http://www.bailii.org/ew/cases/EWHC/Admin/1380.html

649. Arrest and charge of Paul Lesniowski for filming the SmashEDO protests. This case has been discussed in Part 4.1.10 above.

650. *R v. Buxton*.[519] The case did not give rise to a prosecution under PHA but concerned a restraining order that was given under the PHA following the defendants' conviction for another crime (obstruction of railway). The Court of Appeal overturned the restraining order, ruling that it can only be granted where there is evidence pointing towards a real fear of harassment.

5.1.11. Table of cases

651. A table showing cases found from accessible sources is produced below, which includes some additional cases to the ones reported in this Part. The same comments in Part 4.1.11 apply to this part.

Table 5.1: Table showing the cases arising out of protests / demonstrations under the UK PHA

Case	Civil	Crim	Remarks
British Field Sports Society's injunction and Christopher Brown's injunction against animal rights activists [520]	✓		The BFSS injunction created an exclusion zone around BFSS's headquarters in which protest is barred. The other injunction bars activists from interfering with a farmer who breeds cats for vivisection and his family. Liberty expressed concern. [521]

[519] *R v. Buxton* [2010] EWCA Crim 2923, http://www.bailii.org/ew/cases/EWCA/Crim/2010/2923.html
[520] 'Disclaimer…' *SchNEWS* Issue 126 (18 July 1997), available at http://www.schnews.org.uk/archive/news126.htm
[521] 'Told you so!' *SchNEWS* Issue 159 (20 March 1998), available at http://www.schnews.org.uk/archive/news159.htm

Case	Civil	Crim	Remarks
Stop Huntingdon Animal Cruelty (SHAC) cases [522] [523] [524] [525] [526] [527] [528] [529] [530] [531]	✓		See Part 5.1.5 above.
Activist jailed for harassing Huntingdon Life Sciences staff [532]		✓	Charlotte Lewis, an animal rights activist, sent death threats to the staff of Huntingdon Life Sciences. She pleaded guilty to 4 counts of harassment and was jailed for 6 months.
Injunction against and prosecution of Diane Selvanayagam for protesting outside Cornyhaugh Mink Farm [533] [534]	✓	✓	See Part 5.1.1 above.
Animal rights protestors outside Cornyhaugh Mink Farm [535]		✓	Two were found guilty and two were arrested under PHA. See Part 5.1.10 above.

[522] *Huntingdon Life Sciences v. Curtin and Ors,* Court of Appeal (Civil Division), 15 October 1997. Full text available at http://www.freebeagles.org/caselaw/CL_hs_Curtin_full.html
[523] *Huntingdon Life Sciences v. Curtin and Ors*, High Court (Queen's Bench Division), 28 November 1997. Full text available at http://www.freebeagles.org/caselaw/CL_hs_Curtin%20(2)_full.html
[524] *Daiichi UK Ltd & Ors v. Stop Huntington Animal Cruelty & Ors* [2003] EWHC 2337 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2003/2337.html
[525] *Huntingdon Life Sciences Group Plc & Anor v. Stop Huntingdon Animal Cruelty* (SHAC) [2007] EWHC 522 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2007/522.html
[526] *Smithkline Beecham Plc & Ors v. Avery & Ors (Representing Stop Huntingdon Cruelty* ("Shac") [2009] EWHC 1488 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2009/1488.html
[527] *Novartis Pharmaceuticals UK Ltd & Ors v. Stop Huntingdon Animal Cruelty* ('SHAC') & Ors [2009] EWHC 2716 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2009/2716.html
[528] *Bayer Cropscience Ltd & Anor v. Stop Huntingdon Cruelty ("SHAC") & Ors* [2009] EWHC 3289 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2009/3289.html
[529] *AGC Chemicals Europe Ltd v. Stop Huntington Animal Cruelty (SHAC)* [2010] EWHC 3674 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2010/3674.html
[530] *Astellas Pharma Ltd & Ors v. Stop Huntingdon Animal Cruelty (SHAC) & Ors* [2011] EWCA Civ 752. http://www.bailii.org/ew/cases/EWHC/QB/2009/2716.html
[531] *Harlan Laboratories UK Ltd & Anor v. Stop Huntingdon Animal Cruelty ("SHAC") & Anor* [2012] EWHC 3408 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2012/3408.html
[532] 'Animal activist jailed over threatening letters' *BBC* (31 January 2001), http://news.bbc.co.uk/2/hi/uk_news/1147068.stm
[533] *Diane Selvanayagam v. the United Kingdom - 57981/00* [2002] ECHR 857 http://www.bailii.org/eu/cases/ECHR/2002/857.html
[534] *R v. DPP, ex parte Moseley and Ors, High Court* (Queen's Bench Division), 9 June 1999. Full text available at http://www.freebeagles.org/caselaw/CL_hs_Moseley_full.html
[535] 'Told you so!' *SchNEWS* Issue 159 (20 March 1998), available at http://www.schnews.org.uk/archive/news159.htm

Case	Civil	Crim	Remarks
Director of Public Prosecutions v. Dziurzynski [536]		✓	Protestor charged under PHA's section 2. Acquitted as the charge was defective. See Part 5.1.10 above.
Oxford University's injunctions against SPEAK [537] [538] [539]	✓		See Part 5.1.7 above.
EDO's injunction against anti-war activist group Campaign to Smash EDO [540]	✓		See Part 5.1.4 above.
Paul Lesniowski arrested and charged for breach of EDO injunction [541]		✓	See Part 4.1.10 / 5.1.10 above.
Save Newchurch Guinea Pigs [542]	✓		See Part 5.1.8 above.
Npower's injunction on protestors[543]	✓		See Part 5.1.3 above.
Heathrow Airport's injunction on environmental protestors.[544]	✓		See Part 5.1.6 above.

[536] *Director of Public Prosecutions v. Dziurzynski* [2002] EWHC 1380 (Admin) http://www.bailii.org/ew/cases/EWHC/Admin/1380.html
[537] *University of Oxford & Ors v. Broughton & Ors* [2004] EWHC 2543 (QB) http://www.bailii.org/ew/cases/EWHC/QB/2004/2453.html
[538] *University of Oxford & Ors v. Broughton & Ors* [2006] EWCA Civ 1305. http://www.bailii.org/ew/cases/EWCA/Civ/2006/1305.html
[539] *University of Oxford and Ors v. Broughton and Ors* [2008] EWHC 75 (QB). http://www.bailii.org/ew/cases/EWHC/QB/2008/75.html
[540] *EDO MBM Technology Ltd v. Campaign To Smash EDO & Ors* [2005] EWHC 837 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2005/837.html ; [2005] EWHC 2490 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2005/2490.html ; [2006] EWHC 598 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2006/598.html
[541] EDO Injunction Prisoners Support, 'Free Paul Lesniowski' *Indymedia* (London, 16 June 2005), available at http://www.indymedia.org.uk/en/2005/06/314311.html.
[542] *Hall & Ors v. Save Newchurch Guinea Pigs (Campaign) & Ors* [2005] EWHC 372 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2005/372.html
[543] *RWE Npower plc & Ors v. Carrol & Ors* [2007] EWHC 947 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2007/947.html
[544] *Heathrow Airport Ltd & Ors v. Garman & Ors* [2007] EWHC 1957 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2007/1957.html

Case	Civil	Crim	Remarks
Harrods' injunction against protestors	✓		Harrods was granted a temporary injunction under PHA that created an exclusion zone of 5 yards around its store, with no more than 3 protestors at each of the 12 entrances.[545] The court has recently decided to further tighten the restrictions on protestors, which may include expanding the exclusion zone and limiting the use of loudhailers.[546]

5.2. Australia

5.2.1. Nadarajamoorthy v. Moreton[547] (Protest against immoral and corrupt conduct of religious leader)

652. Case Background: The defendant had been found guilty of two counts of stalking under section 21A (2) of the Crimes Act 1958 by a Victorian Magistrates' Court.

653. The first count was stalking by loitering which would fall within section 21A (2) (c) (entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person). This count was concerned with a protest at a local Temple against the immoral and corrupt conduct of the religious leader, which allegedly ran against the tenets of the Hindu religion. It involved handing out pamphlets and the erection of a banner. The second count arose from a tailgating of vehicles; i.e. following.

654. The defendant appealed to the Trial Division of the Victoria Supreme Court.

655. Case Development: In the appeal, the defendant argued that stalking by loitering must involve an illegal purpose. The appeal judge disagreed but found in favour of the defendant on other grounds. He pointed out that:

> It is the confluence of these actions in a course of conduct directed to a person with a specific intent and a specific result which constitutes the criminality.

[545] 'Week-long protest staged at Harrods in bid to ban fur' *Daily Mail* (18 December 2006), http://www.dailymail.co.uk/news/article-423404/Week-long-protest-staged-Harrods-bid-ban-fur.html
[546] *Harrods Ltd & Ors v. McNally & Ors* [2013] EWHC 1479 (QB), http://www.bailii.org/ew/cases/EWHC/QB/2013/1479.html
[547] [2003] VSC 283 (2003, Victoria Supreme Court). Moreton was a Detective Senior Constable.

> The purpose of the section is to extend the law and render illegal actions which did not constitute offences at the time it was enacted. There is no basis for reading into the word "loitering" as it appears in this section any notion of necessarily unlawful purpose. However, it does seem that the word must mean more than simply "be and remain at". It conveys a concept of idleness, lack of purpose or indolence. In the context of the statutory provision under consideration, s 21A(2)(c), loitering must mean being and remaining at or near the places specified for at least one or more of the purposes specified in s 21A(2), namely causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person.[548]

656. The protest was directed at a wider audience than the alleged victim and, more importantly, the acts of the defendant did not constitute loitering as it involved acts such as handing out pamphlets. None of the acts were carried out with the purpose of causing harm or apprehension under section 21A (2). In relation to the second count, a ruling against conviction was made on the basis that it was not a course of conduct that constitutes the crime of stalking.

657. Outcome: The appeal was allowed and the convictions overturned.

5.2.2. R v. Abbott [549] (Protest to draw public attention to child custody and access issues)

658. Case Background: John Abbott was a leader of a divorced fathers' group, the Black Shirts. He organised demonstrations outside the home of Suzanne McKinnon, the wife of one of the Black Shirts' members, E. Goldberg, in order to draw public attention to the issues of child custody and access. Suzanne McKinnon had a son with Goldberg but after the couple separated, the Family Court denied Goldberg access to his son.

659. Unrepresented at the trial, Abbot was found guilty of one count of stalking and acquitted of another similar count by the County Court in Melbourne. He remained

[548] [2003] VSC 283, para 32.
[549] [2006] VSCA 100.

unrepresented at his leave to appeal stage to the Court of Appeal of the Supreme Court of Victoria.

660. Abbott had given evidence at trial and said that the purpose of the demonstration was to appeal to the public at large, and was not directed to any particular person. It was a peaceful demonstration on a political issue. The Crown case had been based upon paragraphs (b), (c), (e) and (g) of section 21A(2), Victoria Crimes Act 1958.

661. Case Development: On appeal, his main argument was that no reasonable jury could have found that he was guilty of stalking because he organised a political demonstration and a political demonstration could not be caught by section 21A. Moreover, he intended to make a political point instead of affecting the aggrieved woman in any way.

662. The appeal judge noted that Abbot's acts included the distribution of pamphlets containing the victim's information to her neighbours, congregating near the victim's home and a phone call to the victim; and that even if he had wider political objectives, his acts in relation to the victim Suzanne McKinnon showed he had committed the offence of stalking. In other words, in relation to the victim, he had not shown that his acts were "for the purpose of engaging in political activities." The appeal judge said that Abbot:

> …telephoned the victim, he attended and remained near the victim's residence, and could be said to have done so for the purpose of arousing apprehensional fear in her for her safety, and he left a pamphlet which could be regarded as offensive to her. Those acts were arranged by the applicant and were performed by him and others dressed in a sinister fashion and acting menacingly.
>
> …
>
> Perhaps the principal issue was the applicant's intention. He said in his evidence that his actions were not intended to have any effect upon Suzanne McKinnon. She was no more than an example he was using to make a political point. Again, I do not think that a reasonable jury was bound to accept the applicant's version as a reasonable hypothesis. The jury could reasonably have inferred beyond a reasonable doubt that the applicant had the intention

> necessary to constitute the offence. In any event the Crown was not required to prove that the applicant intended to harm or arouse apprehension, but only that the applicant appreciated that his conduct was likely to have that effect.[550]

663. Thus, the fact that the applicant had wider political objectives did not preclude the conclusion that his conduct offended against section 21A of the Act. In light of his menacing acts, a conviction could reasonably be inferred by the jury. In the circumstances, it was sufficient for Abbott to appreciate that his conduct was likely to arouse apprehension of harm in the victim.

664. Outcome: The Court of Appeal refused to grant leave to appeal. This case suggests that the applicant was trying to use the "political activities" defence for his own personal (and perhaps Goldberg's) agenda, and not for Black Shirts' wider aims.

5.2.3. Monis v. The Queen[551]

665. Case background: The equivalent to freedom of speech in Australia is the implied freedom of political communication,[552] which was at the heart of this case. Although not a case involving stalking or harassment, it is included in this Part as an example of the meaning of offensive conduct, which is to be distinguished from harassment or stalking. It is also an illustration of written protests and how the highest appellate court might decide on a similar case involving stalking. This case makes it clear that offensive post is not protected speech.

666. The offence involved the use of a postal or similar service in a way that "reasonable persons would regard as being in all the circumstances, menacing, harassing or offensive" (section 471.12(b) of the *Criminal Code* (Cth)) but the appellants were charged with the 471.12 (b)'s "offensive" limb.

667. One of the communications referred to in the judgment involved the appellant Man Haron Monis who was said, in 2007, 2008 and 2009, to have written letters to parents and relatives of soldiers killed on active service in Afghanistan calling the son "a murderer of civilians" comparing the son to "a pig and to a dirty animal", and describing "Hitler as not

[550] [2006] VSCA 100, paras 22 -23.
[551] [2013] HCA 4 (27 February 2013).
[552] The implied freedom of communication was first postulated in *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1, and in *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLE 106.

inferior to the son in moral merit." The communication expressed sympathy to his parents but not to the son.

668. Whether "offensive" use of postal or similar service has a stalking offence counterpart: The Court said that the impugned provision, so far as it relates to "offensive" use of a postal or similar service can be distinguished from the offence of stalking under South Australian and Tasmanian law which cover sending offensive material to a person but in a manner which would reasonably be expected to cause the recipient apprehension or fear.[553] While the offensive use limb of section 471.12 has a fault element on intent, it has no equivalent limitation of reasonable expectation of apprehension or fear.

669. Case development: We examine the constitutional freedom of political communication. French CJ remarked that:

> The Australian Constitution limits the power of parliaments to impose burdens on freedom of communication on government and political matters. No Australian parliament can validly enact a law which effectively burdens freedom of communication about those matters unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government in Australia.[554]

670. The Chief Justice held that the questions to be asked when a law is said to have infringed the implied freedom of communication are

> 1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
>
> 2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s

[553] *Criminal Law Consolidation Act* 1935 (SA), s 19AA(1)(a)(iv), (iva) and (ivb); see also *Criminal Code* (Tas), s 192(1)(f) and (g) and (3).
[554] [2013] HCA 4, para 2.

> 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people?
>
> …
>
> in deciding whether the freedom has been infringed, the central question is what the impugned law does…[555]

671. In allowing the appeal, the Chief Justice held that the scope of the criminal liability created by section 471.12 in its application to offensive uses of postal or similar services must be taken to effectively burden freedom of communication about government or political matters in its operation or effect. With regard to the second question, the CJ held that the purpose of the prohibition imposed by section 471.12 was as broad as its application and therefore invalid. The communications complained of on their face involved matters of government or political concern.

672. Outcome and public sentiment: Two judges agreed with CJ French in allowing the appeal while the other three did not. This evenly split ruling means that the original lower court ruling stands. However, as it has been commented, the ruling leaves "open the question of how far our law will go to protect Australia's equivalent of free speech."[556]

673. It has also been observed that "The High Court missed an opportunity to decide clearly what the law should be regarding free speech,"[557] and that there is a danger of the goals for freedom of speech to be pegged to responsible and representative governmental aims.[558]

5.3. New Zealand

[555] [2013] HCA 4, paras 61-62.
[556] "High Court divided on freedom of speech", *ABC Radio National*, Law Report, 5 March 2013, ("ABC Radio") audio accessible at http://www.abc.net.au/radionational/programs/lawreport/rundle-street-preachers/4548266
[557] "Free Speech in Australia Still Has Limits", 6 March 2013, accessible at http://bretttechlawyer.wordpress.com/2013/03/06/free-speech-in-australia-still-has-limits/
[558] *Ibid.*

5.3.1. Beadle v. Allen[559] (Protest/complaint against medical services)

674. Case background: This was an appeal against a decision in the District Court granting a restraining order pursuant to section 16 of the Harassment Act 1997 against the appellant Carol Beadle on the application of the respondent Dr Allen, a medical practitioner.

675. Ms Beadle had consulted Dr Allen on three occasions. Following the third consultation, Ms Beadle was upset at the advice given by Dr Allen. She complained by sending documents to Dr Allen via facsimile regarding his "misdiagnosis" of her condition; information on the syndrome she claimed to have been suffering from (regarding which she had been an advocate and had been involved in lobbying both the Accident Compensation Corporation and the Ministry of Health), and on advocacy services. Other recipients of such facsimiles included colleagues of the respondent. The correspondence also included allegations of a sexual nature. The Doctor applied and was granted a restraining order. He had also initiated a separate action for defamation

676. Case development: One of the appeal grounds was that Ms Beadle's right to freedom of expression was threatened by the restraining order and that Dr Allen's concern was in fact for his reputation for which a remedy in defamation existed. It was suggested that the Courts were reluctant to grant injunctions in defamation cases because they had the effect of curtailing freedom of expression. Thus Dr Allen had but to rely on the HA although what those documents caused him only amounted to "concern and upset" and therefore were insufficient to justify a restraining order under the Act.

677. The respondent argued that both sections 4 (meaning of specified act) and 16 of Act were satisfied.

678. The case of *C v. G*[560] was considered and distinguished. In that case, angry glances and intimidating manner did not fit any of the specified acts in section 4(a) to (e) of the Act but would on the face of it fit the more general type of acts set out in s 4(1)(f), namely acting in any other way (i) that causes that person (person A) to fear for his or her safety; and (ii) that would cause a reasonable person in person A's particular circumstances to fear for his or

[559] [2000] NZFLR 639.
[560] [1998] DCR 805.

her safety. In the context of s 4(1)(f) it was not enough that the person was angered, annoyed or upset.

679. As to section 16 (which is subject to section 17, lawful purpose), whether or not a restraining order should issue depended on the Court's assessment of the *degree of distress* caused or threatened by the behaviour in all the circumstances of the case. This, said Judge Potter, was the criteria under the Act for the exercise of the Court's discretion to a restraining order once a specified act had been established. There was no requirement in section 16 that the applicant feared for his or her personal safety. That requirement was only relevant to establishing a specified act under s 4(1)(f).

680. Outcome: The appeal was dismissed and the restraining order granted slightly modified. The Court held that Dr Allen's allegations fell within the definition of a specified act in section 4(1)(d) (making contact with that person (whether by telephone, correspondence, or in any other way)) and (e) (giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person) and were therefore not subject to the more rigorous test in s 4(1)(f), applicable to "other" behaviour.

681. In considering a restraining order, the Court should address whether: there is a pattern of behaviour addressed against the applicant; the behaviour included a specified act; the specified act against the applicant occurred on at least two separate occasions within a period of 12 months (delay in filing is a factor); the Court was satisfied that the applicant was caused distress or was threatened to be caused distress; the degree of distress was sufficient; the degree of distress justified the making of a restraining order; and the degree of restraint which is reasonably justifiable to protect the applicant from harassment but to curtail as little as possible the right to freedom of expression to which the appellant is entitled.

682. In considering what was a justifiable limitation on the appellant's freedom of expression, it was necessary to balance competing rights and freedoms, and harassment fell within the terms of section 14 (freedom of expression) of the New Zealand Bill of Rights Act 1990. The public interest and overall needs of the community required a limitation on freedom of expression as the "degree of distress" justified the making of a restraining order, and the order was necessary to protect that victim from further harassment.

683. In considering whether the degree of distress was sufficient, the court only agreed with the findings of the District Court Judge on the existence of a pattern of behaviour within the meaning of section 3, which continued for a lengthy period of time and certainly within the 12 months preceding the filing of the application. This was sufficient to meet the requirements of section 4(1)(d) and (e) of the Harassment Act. The court held that there was ample evidence upon which the District Court Judge was entitled to form the view that in the circumstances of this case the respondent was caused a degree of distress which justified him in exercising his discretion to grant a restraining order under section16. Thus the courts followed a literal interpretation of the relevant provisions.

684. The Court suggested, without deciding, that lawful purpose included 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.

685. Public sentiments over the case: The literal interpretation of section 4 has caused concern as it would mean that harassment, for example, by posting two letters within a 12-month period, need not cause the other person to fear for his/her personal safety:

> The only apparent qualification to this requirement is that the specified acts must be "directed against" the other person. These terms are in themselves extremely vague. Furthermore they have not been defined in the Act. Exactly what is required by these terms appears to be a matter for the courts to decide, leaving significant discretion to each individual court. Perhaps some examples of the type of behaviour the Act might be concerned with would illuminate the matter.[561]

[561] Jane Mountfort, "The Civil Provisions of the Harassment Act 1997: A Worrying Area of Legislation?" (2001) 32 *Victoria University of Wellington Law Review* 999, 1002 ("Mountfort"), accessible at http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/VUWLRev/2001/49.html?stem=0&synonyms=0&query=stalking

686. As to section 16's interpretation and whether the HA did or did not risk infringing on individual freedoms such as the freedom of expression, it has been argued that this "depends entirely on each individual judge's interpretation of the word "distress"":[562]

> The degree to which the Act impacts upon freedom of expression is also dependent on this interpretation. We can therefore respectfully call into question Potter J's assumption that section 16 provides a safeguard on fundamental freedoms.
>
> It appears more than arguable that the purpose of section 16 was to ensure that restraining orders are only granted when an order is necessary to prevent the applicant from further harassment, rather than to prescribe the overall level of conduct required. The behaviour must be causing or threatening to cause distress, but it is assumed that harassment has already been found.[563]

5.3.2. B v. Reardon[564] (Protest/complaint against medical practitioner)

687. Case background: The applicant was a registered medical practitioner and the only doctor in the area authorised by Income Support to assess sickness beneficiaries and provide them with the necessary certificate. The respondent visited the applicant, who was not his usual doctor, for a sickness benefit assessment. The applicant needed a report from the respondent's usual doctor to complete the assessment. After the report was obtained, the applicant assessed the respondent as fit for work and refused to refer him to an osteopath under Accident Compensation.

688. The respondent then complained to the Health and Disability Commissioner, who referred the complaint to the Medical Council where it was dismissed. The respondent advertised in the local paper asking people who had grievances with doctors to contact him. While various doctors were complained of, the respondent concentrated his efforts on complaints relating to the applicant.

[562] Mountfort, 1004.
[563] Mountfort, 1004-1005.
[564] [2000] DCR 575.

689. The respondent wrote letters threatening the applicant and posters appeared criticising his standard of care. The applicant received a letter with threatening overtones, which included proposed mediation guidelines.

690. The issue was whether letters, posters and media campaign could have constituted harassment for the purpose of the Harassment Act or whether they could be protected by the defence of truth of honest opinion in sections 8 and 9 of the Defamation Act 1992.

691. Case development: The applicant was upset about the public campaign the respondent was waging against him. He claimed it was causing his family and colleagues distress, and had caused him to resign from the medical centre where he was employed. It was submitted that specified actions of the respondent amounted to harassment as defined in sections 3 and 4 of the Act.

692. Outcome: In granting the application for a restraining order with conditions, the District Court Judge held that the statements made were intimidatory and fell within section 4 of the Harassment Act. The correspondence was a specified act within section 4(1) (d), and the nature of the correspondence was offensive material which would be brought to the attention of the applicant pursuant to section 4(1)(e). Furthermore, it could cause fear for a person's safety which includes a person's mental wellbeing under section 4(1)(f)(i) and section 2. He said that "Such a conclusion would apply notwithstanding the fact that the threatened publication is true. It is the threat to publish the statement which is the "defined act" and which could be harassment justifying a restraining order and not the publication of the statement."[565]

693. In considering whether there was a lawful purpose and whether freedom of expression was infringed, the Judge relied on *Beadle v. Allen*, in particular on the passage where Judge Potter had suggested that lawful purpose would include "lobbying for change, providing information and making complaints. Such behaviour is 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."

[565] [2000] DCR 575, at 585.

694. He concluded that the requirements of section 16 were met and that distress had occurred, and the harassment was likely to continue if an order was not made.

695. Although the defences of truth and honest opinion under the Defamation Act 1992 did not fall within a specified act in section 4 of the Harassment Act, the Judge held that in most cases such defences must apply to proceedings under the Harassment Act. In other words, non-defamatory advertising inviting patients who had complaints against doctors to contact the respondent, and advertising made where truth and honest opinion can be relied on, should not be regarded as harassment under the Harassment Act.

5.3.3. E v. O[566] *(Protest against resolution of complaints)*

696. Case background: This was an application by a number of applicants against Mr. O, the respondent for a restraining order under the Harassment Act 1997. The applicants were all persons who at the time held, or had previously held, positions associated with the Auckland District Health Board (the Board) and/or its predecessor.

697. Mr. O had been an out-patient treated at Auckland Hospital throughout the mid-1990s. He was unhappy with the standard of treatment he received and made various complaints to the Auckland District Health Board, the Ombudsman, and the Health and Disability Commission. Mr. O was not satisfied with the conclusions of these various bodies and embarked on a letter writing and emailing campaign. The Respondent sent letters and emails directly to the Applicants, as well as their families, business associates, employees, other members of the Board, and employees of the Board. Freedom of speech was an issue in the case.

698. Case development: Mr. O defended the application on the grounds that: (a) the material was not offensive; and (b) he was permitted to distribute the material by virtue of section 17 of the Act as the specified acts were done for the lawful purpose of protesting against the treatment he received. In the course of his submissions, Mr. O relied on the principle of freedom of speech at common law and under the New Zealand Bill of Rights Act 1990. Mr. O referred to the judgment of Potter J in *Beadle v. Allen* and the statements made in English cases referred to by the Judge where the importance of freedom of expression free from intrusion in the public interest was acknowledged.

[566] [2004] DCR 281.

699. Outcome: Application for a restraining order for two years was granted.

700. Concerning the first defence (i.e. that the acts were not offensive), the court endorsed *H v. S* [2000] DCR 90 where it referred "offensive material" to be construed as "encircling such as 'aggressiveness, hurtfulness, that which annoys or insults'". The court thus held that on the evidence, it was clearly established that there was a pattern of behaviour, which included a specified act, directed against the applicants. The specified acts included making contact with each applicant by correspondence and, in the case of one applicant, by telephone. It also involved the giving of offensive material to each applicant and to persons associated with the applicants. The Respondent undertook a campaign that was hurtful to each of the applicants and that was intended to annoy and insult them.

701. Concerning the second defence (i.e. lawful purpose under section 17 of the Harassment Act and the principle of freedom of speech), the court acknowledged the importance of the principle of freedom of expression and accepted that it could sometimes lead to "vigorous, colourful, and even disrespectful language". Further, there was a public interest in the open discussion of issues of general concern and the law expected the ordinary person to bear adverse comment with fortitude, particularly when dealing with persons holding prominent positions in a public utility. However, by using offensive language and distributing the material as often and widely as he did, Mr. O had moved from mere expression of opinion to harassment. The purpose of the Act was to restrict freedom of expression to the extent necessary to provide protection for the victims of harassment.

702. Taking into account all the circumstances, the court determined that the degree of distress experienced by the applicants justified making restraining orders and any intrusion on freedom of expression was justified.

703. In determining the degree of restraint reasonably justifiable to protect the applicants, but at the same time to curtail as little of the right to freedom of expression to which the Respondent was entitled, the Court concluded that two years was an appropriate period.

5.3.4. Allistair Patrick Brooker v. Police[567] *(Protest against a police constable)*

704. Case background: This was an appeal by Mr. Allistair Patrick Brooker from the judgment of the Court of Appeal dismissing his appeal by leave from conviction by the District Court for disorderly conduct under section 4(1)(a) of the Summary Offence Act 1981. Although the case concerned the meaning of "behaves in a disorderly manner" in section 4(1)(a) of the Summary Offences Act 1981, the Harassment Act 1997 was also discussed in the judgment.

705. In this case, Mr. Brooker believed that a police constable had acted unfairly towards him and that he had been the victim of an abuse of police power and that the constable's purpose had been to harass him. It was the basis upon which Mr. Brooker decided to make a public protest outside the constable's home. One morning Mr. Brooker went to that constable's house, knowing that she had been on duty overnight. He rang and knocked until she opened the door and told him to go away. He then retreated to the grass verge of the road where he sang songs in a normal singing voice and played his guitar while displaying a placard referring to police conduct. The constable called the police and an inspector and others arrived. After talking to the complainant, the police told the Applicant he would be arrested for intimidation if he did not desist. He did not desist and was arrested. There was no evidence of complaint from any other resident.

706. Case development: Mr. Brooker was first charged with loitering with intent to intimidate under section 21(1)(d) of the Summary Offences Act. At trial, the District Court Judge amended the charge to one of disorderly behaviour under s.4(1)(a) of the Summary Offences Act 1981, as there was no evidence of intent to intimidate and he was convicted of behaving in a disorderly manner in a public place under s.4(1)(a) of the Summary Offences Act 1981.

707. Mr. Brooker appealed on the ground that his behaviour could not be regarded as "disorderly" under s. 4(1)(a) when read in conformity with s.14 of the New Zealand Bill of Rights Act 1990, which guaranteed the right to freedom of expression.

708. The Supreme Court analyzed the reasoning of the Court of Appeal and was of the view that it was not easy to follow. The Supreme Court held that the Court of Appeal had

[567] [2007] 3 NZLR 91.

wrongly applied the test in *Melser v. Police* [1967] NZLR 437 for disorderly behavior. The court held that disorderly behaviour under s.4(1)(a) of the Summary Offences Act is behaviour disruptive of public order; simply causing annoyance to someone else, even serious annoyance, is insufficient if public order is not affected.

709. The court then went on to consider the wider context and held that the same conclusion can be justified by wider contextual considerations. Elias J (Chief Justice of New Zealand) placed significant emphasis on the legislative intent of different Acts. Her Ladyship considered the Harassment Act 1997 and she agreed with Gault and Keith J that the Act "recognizes that behavior which may seem trivial in isolation may amount to harassment when seen in context. It provides protection through criminal offences and civil remedies, including restraining orders. Acts capable of constituting harassment include loitering near or watching a person's place of residence or making contact in any way with a person. To constitute harassment, the specified conduct must occur on at least two separate occasions within a period of 12 months."

710. Blanchard J, on the other hand, explicitly rejected the applicability of the Harassment Act 1997 to the present case since harassment under the Harassment Act 1997 requires a "pattern of behavior" directed against another person within a period of 12 months.

711. Thus even the highest appellate court is divided on the matter of what should constitute harassment under the HA.

712. Outcome: The appeal of Mr Brooker was allowed on a 3-2 majority.

713. Regarding the meaning of "disorderly behavior" under section 4(1)(a) of the Summary Offences Act, the majority court, Thomas J dissenting, held that section 4(1)(a) of the Summary Offences Act, read consistently with section 14 of the New Zealand Bill of Rights Act, was intended to protect public order. For behaviour to be "disorderly", it had to be disruptive of public order in the particular circumstances of time and place. The fact that the conduct was in a residential area might be relevant in applying the standard to the facts but could not be determinative. The fact that the conduct involved a genuine exercise of the right to freedom of expression was also relevant. Private annoyance, even serious annoyance, was not sufficient.

714. Regarding whether the behavior of Mr. Brooker had been disorderly for the purpose of section 4(1)(a) of the Summary Offences Act, the court, with McGrath and Thomas JJ dissenting, ruled that on evidence, taking into account the purpose of protest, the level of noise, the duration of the incident and the time of day, Mr. Brooker's conduct could not be said to have been disorderly.

715. The Supreme Court of New Zealand noted that New Zealand was committed to the ICCPR. The ICCPR allows for restrictions on the freedom of expression if they are reasonable, and if the Court were to follow the ICCPR here, the appellant's appeal could have been denied. However, the Court ruled in favor of the appellant by favoring the NZ Bill of Rights, which does not allow for such restrictions on the right to freedom of expression.

5.4. Canada

716. Cases have been discussed under the broader topic of freedom of expression and assembly in Part 4 above. In addition, it should be noted that a specific exclusion of labour-related activities in section 264 of the Criminal Code was deemed unnecessary by the Parliamentary Committee that debated the criminal harassment bill. The reasoning provided was that labour-related activities would clearly be excluded by the lawful authority defence due the enactment of provincial statutes that allow and regulate strikes and picketing.[568]

717. In relation to the exemption found in the intimidation offence under section 423(2), namely "attending at or near or approaching to such house or other place as aforesaid in order merely to obtain or communicate information shall not be deemed as watching or besetting within the meaning of this section", judicial comment in *Ontario (Attorney-General) v. Dieleman*[569] indicates that there have been few cases since the 1940s which considered subsection 423(1)(f), the prohibited act of watching and besetting, to which the exemption for the purpose of obtaining or communicating information applies, and that the offence of intimidation has "fallen out of use largely because of the *Aristocratic Restaurants* case."[570] However, similar exemptions exist in other provisions of the Criminal Code.

[568] See Part 6.4 below.
[569] 1994 CanLII 7509 (ON SC).
[570] 1994 CanLII 7509 (ON SC), at 508.

718. The following four cases indicate that the exemption "for the purpose of obtaining or communicating information" has assisted protestors / demonstrators when they did no more than communicating a message in a peaceful manner.

5.4.1. Williams v. Aristocratic Restaurants[571]

719. Case Background: This case was decided by the Supreme Court of Canada under what was then a "watching and besetting" offence under section 501 of the Criminal Code, now one of the prohibited acts in section 423(1); namely act (f) of the current Criminal Code. The offence of "watching and besseting" had substantially a similar exemption to the current subsection 423(2),[572] namely "*attending at or near or approaching to such house or other place as aforesaid in order merely to obtain or communicate information* shall not be deemed as watching or besetting within the meaning of this section".

720. A trade union picketed the restaurants by having two men walk back and forth on the sidewalk in front of them, each bearing a placard to the effect that the employer did not have an agreement with the union. The two men spoke to prospective patrons of the restaurant saying that "this is a picket line". The employer's application for an injunction to enjoin this picketing and for damages was dismissed by the trial judge but was maintained by a majority in the Court of Appeal for British Columbia.

721. Case Development: The Supreme Court judges rejected the contention by the employer that the mere presence of picketers could amount to intimidation and fall outside of the communications protection. In a frequently quoted passage, Rand J reasoned as follows:

> This may mean that the conduct envisaged by the proviso excludes compulsion as the object in view. If it does, then with every respect … I am unable to follow it; … If the meaning is that the compulsion cannot be brought about by persuasion, I confess I am equally unable to follow the reasoning. *For what conceivable use or purpose would information be furnished if not to win support by the persuasive force of the matter exhibited?* The persuasion is not ordinarily or necessarily sought of the person to be compelled; economic

[571] [1951] SCR 762.
[572] The current section 423 (2) reads: "A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section."

> pressure is to affect him; but that pressure, quite legitimate by those who exert it, may easily be set in motion by persuasion exercised upon either workmen or the public is a frequent experience of labour controversy. If "attending at or near or approaching to such house" for the purpose mentioned is not to be taken as a form of watching or besetting, then likewise it is outside of the penalized conduct and could not be excepted from it.[573]

722. The same passage was quoted in support of the Court's reasoning in the case of *R v. Dooling*[574] that dealt with a similar defence in section 430(7) of the Criminal Code, the offence of mischief.

723. Outcome: The appeal was allowed and the trial judge's judgment restored; i.e. the picketing did not constitute a criminal offence. It was also said obiter, that "peaceful picketing designed to communicate information in order to persuade by rational argument is per se lawful".

5.4.2. R v. Dooling[575]

724. Case Background: This case involves the question of when and in what manner a person has the right to express himself in the course of picketing during a lawful strike and not thereby commit the offence of mischief under section 430 of the Criminal Code. Section 430 of the Criminal Code deals with the offence of mischief[576] and section 430 (7) provides that "no 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." Thus similar to section 423(2).

725. It should be noted that picketing is lawful and protected by the Labour Relations Act in Newfoundland, the jurisdiction of this case. Union members who are on a lawful strike are

[573] [1951] SCR 762, at 783.
[574] 1994 CanLII 10215 (NL CA).
[575] *Ibid.*
[576] "430. (1) Every one commits mischief who wilfully
(a) destroys or damages property;
(b) renders property dangerous, useless, inoperative or ineffective;
(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.
…
(7) No 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."

explicitly allowed under that law to peacefully persuade anyone not to enter the employer's place of business, operations or employment, deal in and handle the products of the employer, and do business with the employer.

726. The case involved the owner of a drugstore who was in a labour dispute with the United Food and Commercial Workers Union. Employees of the store were on a lawful strike but the owner was attempting to continue to operate.

727. The union members commenced picketing activities and displayed signs outside the drugstore. They generally stood next to the door, as opposed to right in front of it, and did not impeded people coming in or going out. Customers of the drugstore were not physically prevented in any way from entering the store and did in fact enter the store to transact business and leave without incident. The picketers were cooperative and not abusive.

728. The store owner asked the picketers to leave, and upon obtaining a refusal, called the police. The police came and also asked the picketers to leave but they refused. The police arrested some union members, including the defendant, Dooling.

729. Case Development: Dooling was convicted before the Provincial Court on the charge of mischief contrary to section 430(1)(d). The trial judge at the Provincial Court decided that section 430(7) did not apply. He held that if Dooling's actions were solely to communicate information, he would not need to go into the cramped on a summer evening using such large signs. As such, his actions were "designed and calculated to intimidate some who may walk up and walk away", and were "calculated effort to interfere with the lawful use and enjoyment of the premises" of the drug store. Dooling appealed to the Newfoundland Supreme Court.

730. Green J held that whether section 430 (7) could be regarded as either an exception or as an aid in interpreting the mischief offence, the end result would be the same; namely:

> …acts which might otherwise be technically regarded as resulting in an obstruction, interruption or interference will not be so regarded for the purpose of the offence of mischief if the nature of the act is such that it amounts to mere presence ("attendance") at a place, and is incidental to a purpose of communicating information. It relates not only to the mental element of the

> offence, but also to its external circumstances inasmuch as certain obstructions, interruptions or interferences so regarded in common parlance, will not be considered to be such for the purpose of s. 430(1).[577]

731. Provided that the only thing done is communication of information (and not for example some physical act), the exception in section 430(7) remains available even it is an intended result to interfere with the employer's business in the course of a lawful labour dispute and bring economic pressure to the employer. The results of the communication are irrelevant. Thus this is a similar interpretation to section 423(2) exception as applied by the Supreme Court in the case of *Aristocratic Restaurants*, discussed above.

732. Outcome: The defendant was held to be protected by section 430(7) and his conviction set aside.

5.4.3. R v. Osborne[578]

733. Case Background: On a federal election day, the accused stood on top of the metal chain link caging that covered an overhead pedestrian-way over a busy highway. The accused was warmly dressed and wearing a safety harness that had a fall rope secured to the metal caging, and he carried a sign that read on one side "What's a Big Lie" and on the other said "1 Answer = 1 Vote".

734. The police noted that cars slowed down in front of the overhead highway to look at the sign, and expressed concerns for the safety of the travelling public and the risk of a major accident caused by the distraction either by the sign or by the accused falling down. The accused refused to remove himself and the police shut down the highway and rerouted the traffic. The accused maintained that he was trying to express displeasure with a family court ruling and a demand to meet the Provincial Attorney-General. Finally, due to worsening weather, the accused came down and he was arrested and was charged with the offence of mischief.

735. Case Development: The case was heard before the Provincial Court of New Brunswick. The Court ruled that the conduct amounted to mischief and went on to consider the defence in section 430(7). It was of the view that that section had no application in the

[577] 1994 CanLII 10215 (NL CA), para 34.
[578] 2007 NBPC 3 (CanLII).

case as the accused was not simply present to communicate information via his sign, but mounted the pedestrian-way and secured himself to a dangerous perch. This was more than mere presence and was not "reasonably necessary to communicate information" (referring to *R v. Dooling*).

736. The Court also considered whether the conduct was protected by freedom of expression, and considered the notion of "civil disobedience". The Court held that freedom of expression and civil disobedience had limits and could not, say, endanger anyone, damage property, significantly restrict essential services and processes within society. The Court was of the opinion that the accused's physical activity did not convey a message but was only meant to grab attention, and endangered the public. Thus the defence on the basis of freedom of expression also failed.

737. Outcome: the defendant's conviction was upheld.

5.4.4. R v. Tremblay[579]

738. Case Background: The case arose out of a dispute between two neighbours, which had origins in some flood damage that occurred in the complainant's property. The complainants attributed the damage to a drain that Tremblay installed in his house. The dispute escalated and the complainants initiated a civil lawsuit against Tremblay. The complainants tried to sell their property and arranged for an open house to be conducted. Right before the open house, Tremblay put his old and rusted van alongside the property line he shared with the complainants, with large words in fluorescent orange paint saying, "I AM NOT RESPONSIBLE FOR YOUR BASEMENT FLOODS" on the side of the van facing the complainants' property. The complainants cancelled the open house and through their Counsel requested Tremblay to remove the van, to which Tremblay complied. Later the complainants sold their house and moved out.

739. For this conduct, Tremblay was charged with the offence of mischief, as well as two companion counts of watching and besetting and two counts of criminal harassment.

740. Case Development: Tremblay was found guilty on summary conviction in the Ontario Court of Justice for the offence of mischief, but was acquitted on all the other companion

[579] 2010 ONCA 469 (CanLII).

charges. The judge rejected that section 430(7) applied, holding that he could not understand how the defendant's conduct "had anything to do with communicating information in order to persuade by rational argument".

741. Tremblay appealed to the Ontario Superior Court. The Summary Conviction Appeal Judge (SCAJ) dismissed the appeal on the ground that Tremblay's conduct was not intended *only* for the purpose of communicating information but also to send a message that the complainants were dishonest people, to negatively affect their ability to display and sell their home, to draw attention to prospective purchasers of the flooding problem, and to attempt to have the complainants withdraw their lawsuit.

742. Counsel for Tremblay argued that the trial judge erred by qualifying the defence in section 430(7) with the requirement "to persuade by rational argument". The SCAJ commented that the purpose of having section 430(7) was clearly to protect public debate and free speech:

> Envisaged in this right is the need to ensure that persons such as pollsters, election enumerators, political candidates, sales persons, peaceful picketers, solicitors of funds, political advocacy groups, and the news media (to mention just a few) will not be prosecuted in circumstances where their attendance near or approaching a dwelling-house or place is for the purpose only of obtaining or communicating information.[580]

743. As such, the SCAJ agreed that the trial judge had erred in qualifying the defence in section 430(7) with the requirement "to persuade by rational argument". However, this did not affect the ultimate conviction.

744. Tremblay further appealed to the Ontario Court of Appeal,[581] which agreed that communication that is not made to persuade by rational argument is also protected by section 430(7). The Court further thought that the SCAJ made two errors of law, and allowed the appeal, as well as setting aside the conviction.

[580] 2009 CanLII 25984 (ON SC), para 25.
[581] 2010 ONCA 469 (CanLII).

745. First, the Court thought that the SCAJ erroneously conflated an act for the purpose only of communication of information with the consequences of that act, and therefore mistakenly concluded that section 430(7) did not apply. The key of the defence is that the accused's conduct is only incidental to the purpose of communicating information. Whether the consequences of that communication may be to persuade others to interfering with others' property does not matter. In holding so, the Court agreed with *R v. Dooling* that communication is always intended to accomplish some other purpose as a result of that communication.

746. Secondly, the Court thought that the fact that the defendant in *R v. Dooling* had a statutory right to picket or protest was not a material distinction. If peaceful picketing in order to persuade an employer to enter into a favourable employment contract by interfering with the employer's business is allowed, there is no reason why peaceful protesting in order to persuade a neighbour to drop a lawsuit by interfering with their efforts to sell their home cannot be allowed.

747. The Court approved the SCAJ's observations about the purpose of section 430(7) to protect public debate and free speech, and to protect picketers, news media, etc.

748. However, the Court also commented that the communication must be peaceful and non-violet to afford protection under section 430(7). In line with *R v. Dooling*, it must not simply be "a mask or subterfuge for conduct that is not solely communicative and that has some entirely different purpose".

749. The following three examples were considered as crossing the line: three anti-nuclear protesters fastened themselves to the anchor chain of a United States aircraft carrier and intended to display a radiation symbol, of which that court held to be a conduct "well beyond trespass" and "serious interference with the moorings of a large vessel" (*R v. Tan*); the accused told the court officials that he had a bomb, showed a device resembling a bomb, and caused the courthouse to be evacuated (*R v. Conforti*); and an aboriginal protester blocking a private parcel of land that was subject to a land claim dispute in order to protest construction of a road (*R v. Drainville*).

750. The Court contrasted Tremblay's case with the above three cases and stated that Tremblay's actions did not constitute trespass or harassment, did not endanger anyone, and

posed no potential risk of damage. It was held that Tremblay's conduct did not constitute any more than communication of his message. The fact that the potential purchasers made their own decisions based upon Tremblay's message, and that the complainant's ability to sell their house was negatively affected, did not remove Tremblay from the protection of section 430(7).

751. Outcome: Tremblay was covered by the defence in section 430(7) and his conviction was set aside.

5.5. US

5.5.1. Hanzo v. DeParrie[582] *(anti-abortion protests)*

752. Case Background: The defendant, DeParrie, led the Advocates of Life Ministries in an anti-abortion campaign in which they picketed the homes of abortion providers. The defendant was also the editor of Life Advocate magazine. At various times, Life Advocate magazine editorialized that the use of "godly force" is "morally justified" in defense of "innocent life." In addition, on two occasions, the defendant signed declarations or manifestos of support for anti-abortionist activists who killed abortion providers.

753. The complainant, Hanzo, was the executive director of an abortion clinic. The conduct and communications which gave rise to the stalking complaint included:

- A copy of Life Advocate magazine was left on the complainant's doorstep and was distributed throughout her neighborhood. That issue included articles on a variety of anti-abortion activities and legal developments, There is no direct evidence that the defendant either personally delivered, or caused someone else to deliver, the publication. Although the publication included references to abortion providers as "child killers," and an excerpt from an essay by a woman imprisoned for aiding and abetting the destruction of a clinic, it did not include any explicit advocacy of violence against abortion providers.
- The claimant received, at her home, a postcard picturing a fetus on a cross, bearing the legend "Father, forgive them, for they know not what they do." On the postcard was a handwritten note, "Please stop killing kids," signed, "a

[582] 953 P.2d 1130 (Ct. App. 1998) (1998, Court of Appeal of Oregon).

neighbor." The claimant described the postcard as "a well-known Advocates for Life postcard"; there was, however, no direct evidence that the defendant personally mailed the postcard or caused it to be mailed.

- The defendant led a group of approximately nine anti-abortion protestors who picketed on public streets and sidewalks in front of the claimant's home and distributed written materials in petitioner's neighborhood. Before initiating those activities, the defendant gave the written notice of the anticipated picket to the police. Before picketing, the defendant passed out handbills that bore the claimant's picture, as well as her name, home address, and work telephone number. The handbill was captioned, "YOUR NEIGHBOR IS AN ABORTIONIST."
- During the ensuing picketing, the defendant and the others stood on the public street and sidewalk in front of the claimant's home displaying anti-abortion slogans, none of which advocated violence against abortion providers. The picketing activity was peaceful and involved no direct interaction between the defendant and the complainant or the other participants. There was no evidence of trespass to the claimant's property or, shouting or chanting.
- Advocates For Life mailed a flyer to the medical director of Hanzo's clinic. That flyer, which was captioned "THESE ABORTIONISTS HAVE BEEN EXPOSED!", included the pictures, names, addresses, and telephone numbers of five abortion providers, including petitioner, with check marks indicating that their residences had been picketed on certain dates.
- The defendant called Hanzo at her home, but was asked by Hanzo never to call her at her home again. The defendant did not call again.
- Finally, the defendant and a group of between ten and fifteen others again engaged in pamphleting in Hanzo's neighborhood and picketing of her residence. This time there was direct interaction and confrontation between the defendant and the claimant. During the exchange, which lasted several minutes, the claimant took photographs of the protestors. The demeanor of both groups was somewhat confrontational; it was by no means a matter of one group engaging in aggressive conduct, while the other group cowered. The only person who appeared afraid was one of the protestors, a woman who

> left the group and walked out into the street toward the uniformed police officer, who was observing the protest from the other side of the street. The claimant followed that woman, who appeared intimidated when petitioner approached and took her photograph.

754. Case Development: The complainant successfully obtained a stalking protective order (SPO) against the defendant from the trial judge but based only on the two demonstrations, not on the other alleged contacts. The major ground for the grant of an SPO was that it was objectively reasonable for the complainant to feel alarmed or coerced and that she was in fact alarmed or coerced given the intensity of the contacts and their potentially violent and confrontational nature.

755. The defendant appealed, mounting a constitutional challenge against ORS 30.866(1), the provision authorizing the grant of an SPO, because the 'contacts' in the present case were premised on constitutionally protected expression. In deciding the case, the Court of Appeal was primarily concerned with one question: whether 'the issuance of a permanent SPO on the basis of the "contacts" alleged and proved here offends the free expression protections of both the Oregon Constitution and the United States Constitution.'

756. Oregon's ORS § 30.866 provides for an action for issuance or violation of a stalking protective order. Subsection (1) states:

> (1) A person may bring a civil action in a circuit court for a courts stalking protective order or for damages, or both, against a person if:
>
> > (a) The person intentionally, knowingly or recklessly engages in repeated and unwanted contact with the other person or a member of that persons immediate family or household thereby alarming or coercing the other person;
> >
> > (b) It is objectively reasonable for a person in the victims situation to have been alarmed or coerced by the contact; and
> >
> > (c) The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victims immediate family or household.

757. The appellate court noted that all of the alleged "contacts" in this case involved expression.

758. In examining the relevant statute, i.e. ORS 30.866(1), the court noted that subsection (b) and (c) required that the complainant's alarm or coercion be both subjectively experienced and objectively reasonable. It also noted that the statute implicated the coercive use of governmental authority to restrain conduct involving expression.

759. Outcome: The court held in the affirmative and reversed the SPO. It held that the provision of the anti-stalking statue was overbroad as applied to the present case:

> Where predicate contacts involve expression, order may issue only where expression or other associated conduct so unambiguously, unequivocally and specifically communicates determination to cause harm that objectively reasonable persons in recipient situation would fear for personal safety or safety of household members.[583]

760. None of the alleged contacts of the defendant involved such conduct. In particular, such conduct was not found in the demonstration which was peaceful, did not involve any trespass or other unlawful activity and was pre-notified to the police.

761. Importantly, neither the signs nor the pamphlets of the defendant advocated violence against the abortion providers. The court also took into account the fact that the complainant initiated the only interpersonal contact between her and defendant in an attempt to pursue the protesters when they moved away from her house.

5.5.2. Snyder v. Phelps[584] (protest against homosexuality)

762. This is a civil case involving the picketing of a religious organisation against the tolerance of homosexuality in the United States. With the actions of the defendant varying from stalking and disturbance of peace, it was a diversity action for a tort of intentional infliction of emotional distress according to the statues of Maryland. It is relevant for considering how far free speech should go in the context of picketing/protest groups.

[583] *Hanzo v. DeParrie*'s case summary, accessible at http://www.oregonlaws.org/ors/30.866
[584] 562 U. S. (2011) (2011, Supreme Court of the United States).

763. Case Background: The Westboro Baptist Church (WBC) is a religious group whose mission is to publicise their message of God's hatred for homosexuality in the United States. A group of WBC members picketed a military funeral to make a point that homosexuality has brought down America including the death of soldiers. With slogans such as "Thank God for 9/11", "God Hates Fags" and "You're Going to Hell" and "Thank God for Dead Soldiers", the picketing was 'outrageous' but it was not directed at the deceased or his family. However, it notified police officers in advance and drew a significant reaction from the community. The protests were carried out in accordance with laws that provided protests may be staged from a certain distance.

764. Case Development: The defendant was the pastor of WBC and was charged with, amongst others, intentional infliction of emotional harm and intrusion upon seclusion.

765. The case went all the way to the Supreme Court. The majority of the court, led by Chief Justice Roberts, stressed on content and context.

766. On content, CJ Roberts said that the content of WBC highlighted issues of 'public import', namely politically and moral conduct ranging from homosexuality in the military, scandals of Catholic clergy, fate of the United States.

767. The context, on the other hand, did not affect the content. Even though a few signs seemed to target at the deceased only, the signs of the WBC came under the constitutional shield of the First Amendment so long as the views were honestly held and the overall or dominant theme of the protest addressed public issues. This remains the case regardless of the offensiveness of the speech itself, so long as the protest was conducted in a peaceful manner and did not infringe the regulation.

768. In dissent, Justice Alito emphatically stated in the opening line that "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case." Instead of focusing on the overall tone of the demonstration, Justice Alito highlighted that fact that unprotected speech, such as the signs directing at the deceased, is still actionable even if it is mingled with permissible speech. He also disagreed with the majority that the overall tone of the protest was unrelated to private individuals and that the motive of increasing publicity of public issues is relevant for granting constitutional protection to speech causing emotional injury to private individuals.

769. Outcome: The Supreme Court held by 8-1 that the conviction could not stand and the speech of the defendant, however outrageous, fell under the constitutional safeguards of freedom of expression.

770. Public Sentiment: The judgment attracted critical commentary from the media and the academia. It was noted that the broad-brush approach adopted by the majority is problematic because 'dominant theme' is ill-defined and it could give the license to carry few signs of personal attack whilst having the rest of them addressing public issues.[585]

771. On the other hand, Professor Neil Richards[586] observed that the ruling is a 'victory for orthodox free speech theory' and highlighted the court's 'fidelity to the existing First Amendment precedents'. Moreover, the ruling sent a message that for free speech to be protected, it has to be regulated in spatial or temporal manner, as is the present case where the protesters were placed in a protest zone behind protective barriers.

[585] Sean Gregory, "Why the Supreme Court Ruled For Westbro," *TIME Magazine*, 3 March 2011, accessible at http://www.time.com/time/nation/article/0,8599,2056613,00.html
[586] Neal Richards, "A few preliminary thoughts on Snyder v. Phelps" 2 March 2011, accessible http://www.concurringopinions.com/archives/2011/03/a-few-preliminary-thoughts-on-snyder-v-phelps.html

PART 6

6. 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

772. This part addresses 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. It will be seen that 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.

6.1. UK

773. The Protection from Harassment Act 1997 was originally introduced in response to the perceived inadequacies of the existing law in protecting victims of stalking.[587] By 2012, it was felt by government that the PHA was not adequately dealing with the problem, in particular with female stalking victims. The Government then added two specific offences of stalking.[588]

774. On 9 July 1996 the Government published a consultation paper on stalking and gave two months for comments. A Research Paper published by the House of Commons Library acknowledges some of the concerns raised by the media and other concern groups.[589]

775. One concern by the Law Society related to the widely drafted Clause 1 (the prohibition on harassment) of the Protection from Harassment Bill, which was criticized as

[587] See Emily Finch, "Stalking the perfect stalking law: an evaluation of the efficacy of the Protection from Harassment Act 1997," (2002) *Criminal Law Review* 703; Stalking, harassment and intimidation and the Protection from Harassment Bill Research Paper 96/115, 13 December 1996 ("Research Paper 96/115").
[588] This is discussed below in Part 6.1.3.
[589] Research Paper 96/115.

capable of covering the activities of journalists and of other groups. There was just one single category that included journalists:

> **…**for example, the activities of political activists, market researchers, telephone sales companies, evangelical religious organisations and journalists as well as activities such as begging, racial or sexual harassment, harassment by neighbours or harassment in the workplace could be covered by the Bill.[590]

776. The newspaper *The Times* expressed concerns that journalists who investigate stories in the public interest could be caught by the proposed Bill. In an editorial, *The Times* said: It is to be hoped that reporters will not have to be taken to court and acquitted before the police accept that there is no ground for arrest."[591]

777. The Bill was criticised for not providing the right balance and being introduced at the wrong time (near elections) and therefore inducing a hasty discussion on several complex issues that deserved more careful analysis.[592] Furthermore, the then director of Liberty, an organization protecting civil liberties and promoting human rights, was quoted as saying that:

> There has been growing concern about the erosion of parliamentary sovereignty by executive supremacy, and attempts to rush through this legislation without any opportunity for proper scrutiny or debate will only fuel existing public fears about the democratic deficit. This Bill, which is supposed to protect victims, will make a victim of democracy.[593]

778. As it has been commented and will be shown below, "the parliamentary debates clearly envisaged that the news-gathering activities of journalists could potentially come within the terms of the 1997 Act."[594]

779. The Protection from Harassment Bill was published on 6 December 1996 and completed its Second Reading and the committee stages in the House of Commons in only two days (17 and 18 December 1996). The Second Reading in the House of Lords was on 24

[590] Research Paper 96/115, p 36.
[591] Research Paper 96/115, p 16.
[592] Research Paper 96/115, pp 15-16. One of such comments originated from an editorial in the Guardian, cited in the Paper.
[593] Research Paper 96/115, p 45.
[594] Anthony Hudson, "Privacy: a right by any other name" (2003) *European Human Right Law Review* 73, 81.

January 1997 and "although technically the third reading took place on 19 March 1997, it was never formally reconsidered by the House of Commons because of the calling of the general election."[595]

780. When the Bill was presented to Parliament on 17 December 1996, the Home Secretary acknowledged the concern of the wide scope of the Bill on the activities of journalists, salesmen, religious activists, debt collectors, private investigators and political canvassers. He was though of the view that the defence of acting reasonably in the particular circumstances could safeguard those legitimate activities.[596] However, it should be noted that this defence was envisaged for the lower- level offence only.

781. Pressing on the concern of whether the Bill "would adequately protect a professionally qualified person in going about his or her professional duties",[597] it was pointed out that the "Bill contains some imprecise references to reasonableness or the pursuit of crime."[598]

782. The Bill was also criticized as showing "signs of clumsy and over-hasty drafting."[599]

783. Expressing the concerns of their constituents, some MPs complained that the Bill might not deal adequately with issues of freedom of the press, expression, demonstration/protests.

784. It was submitted that the activities of journalists would be subjected to the subjective reasonableness of the particular magistrate or judge and that "clever lawyers might seek to extend the scope of the Bill so that it involves matters such as trade disputes, …, and the role of investigative journalists."[600] Furthermore:

> What is reasonable to one judge in the pursuance of a specific case might not be reasonable in respect of journalism. We are not talking only about

595 Neil Addison and Timothy Lawson-Cruttenden, Blackstones' Guide to the Protection from Harassment Act 1997 (Chapter 1), accessible at http://www.neiladdison.pwp.blueyonder.co.uk/book/ch1.htm.
See also http://www.publications.parliament.uk/pa/cm199798/cmsid/c1-5.htm#c1
The Act received Royal Assent on 21 March 1997.
596 HC Deb, session 1996-1997, December 17, 1996, col.784.
597 HC Deb, session 1996-1997, December 17, 1996, col.798.
598 *Ibid.*
599 HC Deb, session 1996-1997, December 18, 1996, col.988.
600 *Ibid*, col. 806, 807.

> invasions of the privacy of distinguished ex-members of the royal family or pop stars but about serious journalists carrying out serious research. The defence that is allowed depends on the subjective judgment of the individual judge who is directing the jury in a specific case. That causes me great concern.[601]

785. Indicating that legislation that is rushed through the House tends to be bad legislation, and that the Bill was vague, an MP asked the Home Secretary about the workings of the exemption if someone was behaving reasonably. He included many examples, such as that of journalists, free-lancers, people who just wish to present ideas that are contrary to other groups' etc.:

> Many people are involved in harassing other people and do it perfectly legitimately. The Leader of the Opposition tries to harass the Prime Minister, and I am sure that no one would complain about that. Most Members of Parliament try to harass Ministers, and it is our job to do so. Most hon. Members will admit to harassing a fair number of civil servants and officials in their constituencies to get justice for their constituents.
>
> …
>
> What about a constituent who tries to put right an injustice for himself? Does he has the same defence? This seems to be one of the problems. If someone can say that he is a debt collector and operating as such, his behaviour will be acceptable when he harasses people to pay their debts. But what happens if an individual tries to get people to settle their debts?
>
> Recently, a constituent had some work done by a local builder whose standard of work was appalling. He went to the small claims court and was awarded money, but then the builder said that he was not Joe Bloggs the builder but John Jones the builder. Everyone knows the trick: builders move easily from one business to the next, leaving their debts behind them. My constituent followed that individual around for a week and every person that the builder

[601] *Ibid.*

> talked to was handed a note by my constituent explaining his claim for money. Eventually, he got his money. I think that that was harassment, but justified harassment. I am concerned that my constituent, acting as an individual to try to get that money, could not claim that he was a professional debt collector.
>
> What about the Child Support Agency? That Government body has the right to sue people for money, but what about an individual who feels that the CSA is not doing enough and wants to provide extra evidence to it? Would that be legitimate?
>
> What about journalists? Moreover, when is a journalist a journalist, and when is he not? If he or she has full-time paid employment, there will be little doubt, but if he or she is freelance there are difficulties. A particular problem for a journalist is that, with hindsight, all sorts of things can be seen to be unreasonable but at the time it may have seemed to the journalist that they were reasonable.
>
> What about writers? We often read articles in newspapers saying that a certain biography was authorised and they usually say what a nice person the subject was, but how legitimately can someone trying to produce an unauthorised biography go about collecting information under this legislation, and when does it become harassment?
>
> I could give many more examples, but the Government must deal with the question of the defence of someone pursuing a legitimate occupation.[602]

786. In relation to protesting and demonstrating, another MP asked for "a clear statement from the Home Secretary that the Bill will not be used against protesters. This country has always believed in freedom of speech and freedom to demonstrate. There seems to be a narrow line between protesting and demonstrating, and harassment."[603]

787. During the discussion of proposed amendments to the Bill, the Government responded by noting that the suggestion for more specific defences was unnecessary on the grounds that

[602] *Ibid.*, col. 810.
[603] *Ibid.*, col. 811.

the Government's general defence of 'reasonable in the particular circumstances' was sufficient. One of the proposed amendments was to insert a further defence after clause 1(3)(c) that would read:

> or (d) that it was pursued for the purpose of investigating a tort, suspected civil wrong or other matter, where a bona fide investigation is required in the interests of justice.[604]

788. The above proposed defence would have covered "a range of legitimate investigations"[605] such as:

> investigating industrial accidents, matrimonial inquiries, the taking of statements, interviewing for witness statements, tracing missing persons and process serving… providing evidence for a local authority on anti-social neighbours, the vetting of potential and existing staff, and debt recovery. I hope to convince the Minister of the necessity of a stronger defence than that provided by the clause. The defence of an action in subsection (3)(a)— that it was pursued for the purpose of preventing or detecting crime"—might appear fine, but the argument of what is reasonable is problematic.[606]

789. The response by the Government in relation to the above proposed amendment was articulated in the following way:

> The amendment does not wreck the Bill but it is unnecessary. If the action of a party to a dispute is reasonable, it will be covered by the general defence provided in clause 1(3)(c): that in the particular circumstances the pursuit of the course of conduct was reasonable. That would apply to whole categories of people, such as journalists, politicians, doorstep sellers and people who canvass on religious matters… It comes down to whether someone's activity is reasonable.
>
> …

[604] HC Deb, session 1996-1997, December 17, 1996, col. 829.
[605] *Ibid*.
[606] *Ibid*, col. 830.

> The similar general defence of acting reasonably in the case of the lower-level offence of causing harassment has been provided in recognition of activities such as journalism and political proselytising, which may cause harassment but are legitimate and should be protected. That consideration does not apply to the higher-level offence of causing fear of violence. It is clearly not reasonable to put someone in fear of violence through doorstep selling or religious or political proselytising. We should keep that defence for exceptional circumstances, and those circumstances are clearly set out in the Bill. For the reasons that I have given, I hope that hon. Members will withdraw their amendments.[607]

790. The amendment was withdrawn after the Government's assurances[608] and hence was not further debated, nor had been a previous opportunity for consulting civic groups on this amendment.

791. On the issue as to when someone's activity would be reasonable, the Government could not give examples of whether one activity would be reasonable and another not; "it would depend on the actions of the person concerned and the effect that they had on the victim."[609]

792. Furthermore, the legitimate interests of journalists were doubted by the Government when a proposal that would protect private investigators' interests, as well as journalists', was rejected in the following terms:

We all see what those who tabled the amendment are trying to protect. We all know that people who could come into that category might well have a legitimate interest, although some of us would find it rather hard to believe that certain journalists have a legitimate interest, given the pursuing that they do.

> Because of the form in which those who tabled the amendment are seeking to insert it in the Bill, however, it would have a wrecking effect--although, in

[607] *Ibid.*, col. 830, 831.
[608] *Ibid.*, col. 832.
[609] *Ibid.*, col. 833.

> procedural terms, it is not a wrecking amendment. I hope that the Committee will resist it, and that the Labour party will not seek to press it.[610]

793. At the Committee stage, the Government pointed out that the general defence of conduct pursued in the particular circumstances was sufficient to protect journalists' activities but that such defence was to be used in exceptional circumstances:

> The similar general defence of acting reasonably in the case of the lower-level offence of causing harassment has been provided in recognition of activities such as journalism and political proselytising, which may cause harassment but are legitimate and should be protected. That consideration does not apply to the higher-level offence of causing fear of violence. It is clearly not reasonable to put someone in fear of violence through doorstep selling or religious or political proselytising. We should keep that defence for exceptional circumstances, and those circumstances are clearly set out in the Bill. For the reasons that I have given, I hope that hon. Members will withdraw their amendments.[611]

794. The amendment was withdrawn. One Member was satisfied for the time being with the reassurances above expressed:

> I accept from the way in which the Minister gently rejected my amendments, given the vigour with which he has rejected others, that he understood my points. I listened carefully to his remarks about what constitutes reasonable conduct. I hope that his reassurances are right. I suspect that questions about what is reasonable conduct will be raised again in another place. In view of his comments, and of the time, I beg to ask leave to withdraw the amendment.[612]

[610] *Ibid.*, col. 849. The amendment concerned the orders a court may make: "'In considering whether to order an interdict or interim interdict in proceedings under this section, a court shall have primary regard to whether such an order is necessary for the protection of what the court considers are the pursuer's legitimate interests".'"
[611] HC Deb 17 December 1996 vol 287 cc820-35, col 834.
[612] *Ibid.*

6.1.1. Collective harassment

795. A new form of harassment, known as collective harassment, was added in the interpretation section 7 of the PHA, as section 7(3A), by the Criminal Justice and Police Act 2001 c. 16, section 44(1).[613] Clause 13 of the Criminal Justice and Police Bill read:

> (1) In section 7 of the Protection from Harassment Act 1997 (interpretation of sections 1 to 5), there shall be inserted the following subsection--
>
> (3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another—
>
> > (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is);
> >
> > and
> >
> > (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.[614]

796. The Minister of State, Home Office moved it to be read a Second time and a brief debate ensued after which the Bill was read the Third time and passed by the House of commons, on the same day, 14 March 2001.

797. Although it was already a form of harassment for a group of people to arrange for one person to engage in a course of conduct that harasses another, there was no explicit form of harassment for a group of people to arrange for each member to do just one act of harassment, which would amount to what one MP called "a campaign of harassment."[615]

798. While the new type of harassment was introduced because of the problems relating to protests against animal experimentation and sought to protect employees of research

[613] See Explanatory Notes 137-139 at http://www.legislation.gov.uk/ukpga/2001/16/notes/division/3/1/3/8/11. The Criminal Justice and Police Act 2001 received Royal Assent on 11 May 2001; effective August 1, 2001.
[614] This is also the current section 7(3A) (a) and (b) of the PHA.
[615] HC Deb, session 2000-2001, 14 March 2001, col.1046.

companies,[616] a few MPs opined that the way the draft law was presented could imply extension to other areas.[617]

799. In defending the proposals, the Government said that they were "sufficiently tight not to be dangerous in achieving the balance between civil liberties and the protection of potential victims."[618]

800. An MP raised the example of the protest against the President of China when he visited the UK. Indicating that it was a relevant political example to draw an inference that the right to protest is at risk of being curtailed, the MP said:

> The President of China might have been caused alarm or distress because he did not like people protesting against his actions. Our debate is about the extent to which people are affected.
>
> The Bill asks the court and the relevant police officer to judge whether an action is likely to cause alarm or distress. There is a danger of our [*sic.*] becoming over- authoritarian if we argue that any action that is likely to cause any alarm or distress, no matter how slight or for how short a period, is sufficient to constitute an offence.[619]
>
> …
>
> I am simply anxious to get the balance right. We must proceed carefully with the new measure to ensure that we protect victims--we all support that--but that in doing so we do not prevent people from protesting. We might have a society that prohibits protest if we legislate on the basis that someone might be caused alarm or distress by it. If we do that, we will make great inroads into the right to protest. We must strike the right balance. Without the higher qualification that we propose, the balance swings against the civil rights of the

[616] *Ibid*, col. 1048.
[617] *Ibid*, col. 1046.References related to antisocial behaviour associated with prostitution and kerb crawling. The implications for political protests were also raised, as later discussed.
[618] *Ibid,* col 1053.
[619] *Ibid*, col. 1054.

> protester and overly and unnecessarily towards the protection of a victim, who does not need matters to go that far.[620]

801. However, a supporter of the Bill indicated that "political protest would be deemed reasonable. All that the Bill does is to prevent people from staging a demonstration, which might be reasonable under some circumstances…"[621]

802. While the wording of the legislation in section 7(3A) is not limited to any specific type of person and thus collective harassment can be used against any person, there have been no reported cases where protesters have been criminally charged with conduct amounting to collective harassment; nevertheless, protesters, other than animal rights extremists have been the target of injunctions, as discussed in Part 5 above.

803. As a matter of fact, the Crown Prosecution Service, in its guidance on "Stalking and Harassment" states the kinds of groups which can be the target of collective harassment:

> Closely connected groups may also be subjected to 'collective' harassment. The primary intention of this type of harassment is not generally directed at an individual but rather at members of a group. This could include: members of the same family; residents of a particular neighbourhood; groups of a specific identity including ethnicity or sexuality, for example, the racial harassment of the users of a specific ethnic community centre; harassment of a group of disabled people; harassment of gay clubs; or of those engaged in a specific trade or profession.[622]

804. Collective harassment as a form of harassment only explicitly exists under the UK PHA. The stalking offences in the other jurisdictions overviewed do not appear to have similar effect.

805. Available in the other jurisdictions, such as Queensland and Victoria, are the laws of complicity. For instance, relevant provisions in the Federal Criminal Code Act 1995,[623] the

[620] *Ibid*, col. 1055.
[621] *Ibid*.
[622] CPS, "Stalking and Harassment" accessible at http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/.
[623] Section 11.2(1).

Queensland Criminal Code Act 1899[624] and in Victoria Crimes Act 1958[625] provide that a person who has aided, abetted, counseled or procured another person to commit stalking is liable for stalking.

6.1.2. Harassment to deter lawful activities

806. In 2005, a new offence of harassment to deter lawful activities was added to the PHA as section 1(1A) by the Serious Organised Crime and Police Act 2005 c. 15 section 125 (2) (a).[626] This amendment meant that conduct on one single occasion was criminal when pursued in relation of two or more people with the intention of persuading (not necessarily the person against whom the conduct is pursued) not to do something a person is entitled or required to do, or to do something that he is not under any obligation to do. One of the terms used to describe this type of situation is "economic sabotage"[627]

807. Furthermore, power to issue injunctions to protect people targeted under section 1(1A) was also added as section 3A in the PHA, by the Serious Organised Crime and Police Act 2005 c. 15 section 125 (5).[628]

808. During parliamentary debates, a supporter of the Bill called the attention of the Government with regard to the right of protesters. However, there was no debate on the new offence: [629]

> …the power to remove protesters or to put onerous conditions on them, particularly as we are taking that power to deal with the problem outside Parliament now, gives me deep cause for concern. As someone said, hard cases make bad law. That is absolutely true, and we must be careful not to over-respond to the situation in front of Parliament. We must do nothing to stop fair and decent protesting in this country.[630]

[624] Section 7.
[625] Sections 323 and 324
[626] See Explanatory Notes 302-306 at http://www.legislation.gov.uk/ukpga/2005/15/notes/division/6/1/14/1. The Serious Organised Crime and Police Act 2005 received Royal Assent on 7 April 2005. Section 7(3) was substituted by the same Act 2005, s. 125 (7) (a). Effective July 1, 2005.
[627] HC Deb, 7 December 2004, col 1056.
[628] Also effective July 1, 2005.
[629] See Part 7: criticism on how this offence was swiftly introduced without debate.
[630] HC Deb, 7 December 2004, col 1096.

809. With regard to the compatibility of the new section with the rights to freedom of expression and peaceful assembly, the Government "accepted that the measure would go beyond the context of protests against bioscience companies by animal-rights extremists, and expressed its consciousness of 'the need to ensure that legitimate protest is not restricted in any way.'"[631] Nevertheless, the Government did not agree that the proposed offence was too widely formulated but it accepted that "the offence might be committed by people engaged in a protest outside a MP's constituency office, for example, which on one occasion harassed the MP and on another occasion harassed the MP's secretary. However, it considered that where public order is threatened by a large group of demonstrators the police are more likely to use other powers, such as those under the Public Order Act 1986, to deal with disorder."[632]

810. Harassment to deter lawful activities only explicitly exists under the UK PHA. However, the anti-stalking provisions in the Queensland's Criminal Code Act 1899 have certain resemblance. The definition of "detriment" in section 359A includes "(c) prevention or hindrance from doing an act a person is lawfully entitled to do"; and "(d) compulsion to do an act a person is lawfully entitled to abstain from doing." Examples of (c) and (d) are cited in the statute as follows:

> *Examples of paragraph (c)—*
> A person no longer walks outside the person's place of residence or employment.
> A person significantly changes the route or form of transport the person would ordinarily use to travel to work or other places.
>
> *Example of paragraph (d)—*
> A person sells a property the person would not otherwise sell

811. The offence of intimidation in section 423.(1) of the Canadian Criminal Code has also certain resemblance to "harassment to deter lawful activities" in the UK PHA. Section 423.(1) criminalizes certain acts if the person "wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a

[631] Joint Committee on Human Rights, Eight Report, 2. Serious Organised Crime and Police Bill (2005), para 2.52, accessible at http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/60/6005.htm#n75
[632] *Ibid.*

lawful right to do, or to do anything that he or she has a lawful right to abstain from doing," engages in certain acts.

812. 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 to the UK provision, no similar effect is detected. Even if the provisions in the Queensland and Canadian statutes have such effect, no case indicates that they have been used in the context of protests or news activities.

6.1.3. Stalking offences

813. In 2012, two new offences of stalking were added by the Protection of Freedoms Act 2012 c. 9, section 111(1).[633] They are in force since 25 November 2012.

814. The original Bill on the Protection of Freedoms did not contain provisions relating to stalking. It was only during the House of Lords' Second Reading that the idea of introducing such offence was discussed.[634] During the Lords' Third Reading, the Government amended the bill to add a stalking offence (Government Amendment 6) and further amendments were discussed.[635] For the first time, examples of stalking behaviour would be introduced that would help police officers and prosecutors to "be able better to recognise and respond to cases of stalking."[636]

815. The Lords amendments were discussed in the Commons in March 2012.[637] Reference was made to the Criminal Justice and Licensing (Scotland) Act, introduced in 2010, which created a single offence of stalking with a list of prohibited conduct. This served as guidance in England and Wales.

816. However, following the PHA pattern, two levels of stalking were introduced: the less serious in section 2A and the more serious in section 4A.

817. Section 2A (6) and section 4A (9), which provide that sections 2A and 4A are without prejudice to the generality of sections 2 and 4, respectively, reflect the government views that

[633] See Explanatory Notes 446-452 at http://www.legislation.gov.uk/ukpga/2012/9/notes/division/5/1/7/3. The Protection of Freedoms Act 2012 received Royal Assent on 1 May 2012; effective November 25, 2012.
[634] HL Deb, 8 November 2011, col 172.
[635] HL Deb, 12 March 2012, col 19.
[636] *Ibid*, col 20.
[637] See Protection of Freedoms Bill, Commons Reasons and Amendments, Revised 21 March 2012.

stalking would be treated distinctly from other forms of harassment. Sections 2A (5) and 4A (7) state that alternative charges and verdicts of sections 2A and 4A are sections 2 and 4, respectively.

818. The reason behind introducing sections 2A and 4A was lack of sufficient protection for predominantly female stalking victims.[638] We explain the background of the 2012 amendment.

819. Harassment in the PHA, before the 2012 amendment, was broader than stalking. For example, when compared with section 39 of the Criminal Justice and Licensing (Scotland) Act 2010, "the Scottish legislation defines the offence as one of "stalking" rather than the broader offence of harassment."[639]

820. Stalking under the PHA was not recognised as a crime in its own right and was not legally defined. Thus when one person fixated upon another and stalked her in an obsessive, persistent and terrifying manner, the perpetrator was often not charged.[640]

821. As mentioned in Part 2 above, a campaign run by the organisation Protection Against Stalking (PAS) and the National Association of Probation Officers (NAPO) pointed out to the insufficiency of protection for victims of stalking, and the findings of a unique survey for victims of stalking put together by PAS supported the campaign insights.[641]

822. The campaign by PAS and NAPO and other organizations was the driving force leading to an "Independent Parliamentary Inquiry" led by the chair of the Justice Unions' Parliamentary Group, which published a report in February 2012. As part of a package of reforms, the Independent Parliamentary Inquiry noted that the intention of introducing the original PHA had been "to deal with the overt problem of stalking."[642] However, the PHA actually covered a broader bahaviour other than stalking itself. [643]

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[638] Independent Parliamentary Inquiry into Stalking Law Reform Main Findings and Recommendations, February 2012, Chapter 7 ("Independent Parliamentary Inquiry").
[639] See Pat Strickland, *Stalking*, Home Affairs Section – Library, House of Commons, 14 September 2012, p 4 ("Stalking 2012").
[640] Stalking and Harassment: A Victims Voice, 10 November 2011, p 2 ("Stalking survey").
[641] Stalking Survey, p 1.
[642] Independent Parliamentary Inquiry.
[643] *Ibid*.

823. The panel of the Inquiry (The Panel) included parliamentarians from the Commons and the Lords. With regard to the review of the PHA, they recommended that there should be a specific offence of stalking introduced into the PHA replacing section 4 ("Putting people in fear of violence", the most serious type of harassment under the PHA). The Panel also recommended that the offence of harassment under section 2 of the PHA ("Offence of harassment", the less serious type of harassment under the PHA) should be triable in both the magistrates and crown court to signal the serious nature of the offending behaviour.

824. In other words, the proposed amendment the Panel called for was to have one harassment offence and one stalking offence under the PHA. The stalking offence was to be similar to that introduced in Scotland in 2010, with a list of prohibited bahaviours. The consultation launched by the government closed on 5 February 2012 and a summary of responses was published in July 2012.[644]

825. The majority of respondents to the consultation, 56%, considered that the current legislation was inadequate for dealing with stalking perpetrators, and 51% felt that stalking needed to be defined in law through a specific offence.[645] The most frequent suggestion was for a stalking offence to be based on the Criminal Justice and Licensing (Scotland) Act 2010.[646]

826. Some responses criticised the fact that the PHA "has been used for disputes between neighbours and protests as well as for stalking cases, and that they felt these issues should be dealt with under different provisions."[647]

827. The summary of responses does not reveal concerns over news activities being affected by the proposed stalking provisions, nor do parliamentary debates show such concerns.

828. The government's response was to leave sections 2 and 4 of the PHA untouched and introduce in parallel to them, two new offences of stalking, ensuring that stalking would be treated distinctly from other forms of harassment.[648]

[644] Home Office, Review of the Protection from Harassment Act 1997: Improving protection for victims of stalking, - Summary of Consultation Responses and Conclusions, July 2012 ("Consultation 2012").
[645] Consultation 2012, p 14.
[646] *Ibid.*
[647] Consultation 2012, p 15.

829. In parallel to sections 2 and 4 of the PHA, the simple stalking offence in section 2A ("Offence of slaking") allows a defence under section 1(3), including 1(3)(c) "that in the particular circumstances the pursuit of the course of conduct was reasonable", which is also allowed in section 2. However, this defence (section 1(3)(c)) is not available in sections 4 and 4A ("Stalking involving fear of violence or serious alarm or distress").[649] As it has been pointed out earlier, it was thought that the more serious types of conduct should not be protected by the general defence of reasonable conduct.

830. Training of criminal justice professionals (including the police, prosecution and the judiciary) was a key element in the effective implementation of the stalking offences, which would be monitored by PAS and NAPO.[650]

831. In conclusion, the extent of concerns by the media, civic groups and the rest of the public (which MPs voiced according to their constituencies) over the freedom of the press, freedom of demonstration/protest and freedom of expression was serious enough to have attracted responses by the Government in the way we have discussed in Part 6.1 above. How the Government responded was mostly by way of assurances instead of amendments. Lobbying for amendments is rare in the UK as there is no legislation on lobbying. One feature that was present during most legislative debates was the way the Government rushed through those debates. As we have seen, the PHA 1997 was practically passed in a two-day debate.

832. 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 only responded that the right balance between civil liberties and the protection of potential victims had been struck.

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[648] A summary of parliamentary debates is available in Stalking 2012, section 7.
[649] This is clear from the PHA itself. Further guidance is given by the Crown Prosecution Service: The Guidance for Prosecutors – Stalking and Harassment ("Guidance for Prosecutors") , accessible at http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a02b.
[650] Judicial opinion on the stalking offences is not yet available; however, it was recently reported that a man pleaded guilty to a charge of stalking his former girlfriend of 7 years. He was jailed for 51 weeks under section 2A of the PHA. See Paul Hooper, "Hythe Stalker Michael Key jailed for campaign of harassment against ex-lover Kally Lewis", Kent Online, 12 March 2013, accessible at http://www.kentonline.co.uk/kentish_express/news/2013/march/13/stalker_jailed.aspx

833. 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.

834. With regard to the stalking offences, 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, and the offences targeted the lack of sufficient protection under the PHA in that regard.

6.1.4. Scotland

835. The current section 39 (Offence of Stalking) of the Criminal Justice and Licensing Act includes a list of prohibited conduct.

836. When the Criminal Justice and Licensing (Scotland) Bill was being debated before the Scottish Parliament,[651] one of the amendments introduced (Amendment 378[652] debated

[651] A detailed record describing how the Criminal Justice and Licensing (Scotland) Bill was passed is available from the Scottish Parliament's website at http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/

[652] Amendment 378, available at http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/CriminalJusticeandLicensing/NewoffencesrelatingtostalkingAmendment.pdf, stated:

"Threatening, alarming or distressing behaviour

(1) A person ("A") commits an offence if-

(a) A behaves in such a manner that a reasonable person would be likely to-

(i) fear for the safety of any person on account of the behaviour, or

(ii) be alarmed or distressed by the behaviour, and

(b) the condition in subsection (2) is satisfied.

(2) That condition is that A-

(a) intends by the behaviour to cause fear, alarm or distress, or

(b) is reckless as to whether the behaviour would cause fear, alarm or distress.

(3) It does not matter-

(a) whether A's behaviour is directed at anyone in particular,

(b) if it is directed at a particular person, whether that person is aware of the behaviour, or

(c) whether A's behaviour-

(i) actually causes anyone fear, alarm or distress, or

(ii) takes place in public or private.

(4) Subsection (1) applies to-

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done,

(b) behaviour consisting of-

(i) a single act, or

(ii) a course of conduct.

(5) The reference in subsection (1)(a)(i) to fear for a person's safety is to fear that the person's life could be endangered or that the person's physical or psychological well-being could be harmed.

(6) A person guilty of an offence under subsection (1) is liable-

together with Amendment 399) led to criticism on the ground that it would broaden the scope of the stalking provisions by threatening freedom of speech.[653] In effect, Amendment 378 was a new draft stalking offence.

837. In considering whether Amendment 378 was compatible with the Human Rights Act 1998, leading Scottish QC Herbert Kerrigan and Solicitor-Advocate Timothy Lawson-Cruttenden analysed seven scenarios, such as where people opposing certain ideas voiced their dissatisfaction through speech, protest or demonstrations and use offensive messages with the effect of causing distress or alarm. Such scenarios, including labor disputes and protests against bankers, felt within the scope of the amendment. The amendment was incompatible with the 1998 Act.[654] The reasons are summarised as follows:

1. the lack of any prescribed behaviour,

2. prohibition of undefined behaviour by reference to the standards of a reasonable person i.e. behaviour conducted '*…in such a manner that a reasonable person would…*' consider it constituted an offence contrary to the terms of the amendment,

3. unclear as to how it was possible to prescribe undefined behaviour, and how the applicable criminal burden of proof which, in order to secure a conviction, requires near certainty that an offence has been committed, would apply.

838. Ms. Rhoda Grant proposed further Amendments 399, 400 and 401.[655] The Government proposed an offence comprising of "threatening, alarming or distressing behaviour", while Ms. Grant suggested a non-exhaustive list of conducts which constituted stalking. The Justice Committee invited organisations, bodies and individuals to submit their

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both."

[653] "Freedom of speech could be threatened by Scottish law," *The Christian Institute*, 14 April 2010, accessible at http://www.christian.org.uk/news/freedom-of-speech-could-be-threatened-by-scottish-law/
[654] See Legal Opinion "In the matter of the Criminal Justice and licensing (Scotland) Bill" 26 March 2010, at http://www.christian.org.uk/issues/2010/freespeech_scot/opinion_26mar10.pdf.
[655] *Ibid.*

views. Those who had made written submission[656] were mainly support groups for victims of stalking, [657] women's organisations, [658] local organisations, [659] professional bodies [660] and scholars. [661] A Christian charity, [662] a police organisation [663] and a detective inspector specialising in stalking cases[664] also submitted their views. No media organisation made a submission to the Scottish Parliament to express its views on the new stalking offence.

839. Support groups for victims of stalking such as Victim Support Scotland[665] and Action Scotland Against Stalking[666] generally supported the introduction of the new stalking offence. Some respondents considered that the Scottish Government's proposal was too broad and vague; they preferred Ms. Grant's proposal of defining and categorising stalking behaviours.[667] Amongst these respondents, the Christian Institute expressed the strongest views against the Scottish Government's proposal. It was worried that this proposal would curtail free speech. In its submission, it wrote:

> At its most extreme, the draft offence criminalises private behaviour which is *not intended* to cause fear, alarm or distress, and *causes no one* fear, alarm or distress. A huge range of conduct is caught by the offence. Our concern is not at the upper end: stalking and domestic violence must, of course, be criminalised. However, at the lower end, we are very concerned that the offence will restrict free speech.

[656] The list of written submissions received at Stage 2 of the Scottish Parliamentary proceedings is available from the Scottish Parliament's website at http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/Stage2submissions.htm. Please note that this list of written submissions contains views on the new stalking offence as well as other amendments to the Criminal Justice and Licensing (Scotland) Bill.
[657] For example, Victim Support Scotland and Action Scotland Against Stalking
[658] For example, Scottish Women's Aid, Hemat Gryffe Womens Aid, Glasgow Community and Safety Services, and Perth and Kinross Violence Against Women Partnership
[659] For example, Scottish Justices Association
[660] For example, Glasgow Bar Association and Law Society of Scotland
[661] For example, Dr. Anne Macdonald, Professor R A Duff, Professor L Farmer, Professor S E Marshall, Professor V Tadros, Dr. M Renzo and Mr. James Chalmers
[662] Christian Institute
[663] Association of Chief Police Officers in Scotland (this organisation has merged with Scotland's other police organisation and forces to form Police Scotland on 1 April 2013)
[664] Mr. Hamish Brown MBE
[665] The written submission from Victim Support Scotland is available at http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/CJL.S2.32%20Victim%20Support%20Scotland.pdf
[666] The written submission from Action Scotland Against Stalking is available at http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/CJL.S2.11ActionScotlandAgainstStalking.pdf
[667] For example, Christian Institute, Mr. Hamish Brown MBE and Action Scotland Against Stalking

The following scenarios could all be argued to fall within the ambit of the offence:

- A cartoonist produces images of Mohammed. Muslims say they are distressed by such a representation of their central religious figure.
- A boy holds up a sign outside a building owned by the Church of Scientology which reads: "Scientology is not a religion, it is a dangerous cult."
- A Glasgow art gallery has an exhibition featuring the Bible, inviting those who feel excluded from it to 'write themselves back in'. Obscene and offensive messages are scrawled over the Bible. Christians are distressed.
- A well known advocate of atheism speaks at a public debate at St Andrew's University, in which he likens Christian belief in Christ to belief in fairies. He also makes parallels between raising children as Christians with forms of child abuse. A number of Christians present at the debate are shocked and distressed by these comments.
- A group campaigning against field sports holds a demonstration on the occasion of a local hunt near Dumfries. In a leaflet they give out to passers-by there is a picture of a seriously injured animal caught, which distresses some of the recipients.

Some of these situations have already arisen in Scotland. None of them would be intended to fall within a stalking offence. However, the threshold and scope of the offence as drafted mean that it is entirely possible such incidents would be covered by the wording. There is also a clear danger that an offence with such a low threshold will lead to the criminal law intervening in legitimate debate and will encourage people to use complaints to the police in an attempt to silence those who disagree with them.

…

> Introducing an offence with a low threshold like amendment 378 could serve to encourage such complaints against perfectly legal statements or activity, with an inevitable detrimental effect on free speech. Part of this detriment is the chilling effect – the culture of fear that is created when people are led to believe that the law criminalises far more than it actually does. People begin to censor themselves because they have been intimidated by the threat of the law being used against them, and this shuts down debate.[668]

840. Amendment 378 was not moved in[669] and the Bill was introduced with a list of prohibited behaviour and other amendments.[670]

841. In conclusion, while media concerns over freedom of the press were not expressed, the Scottish Parliament listened to the concerns by other groups. This translated into withdrawing amendments that did not receive popular support.

6.2. Australia

842. Although there is no consistency in approaches between Australian jurisdictions, in general, stalking in Australia "appears to have arisen more directly as a response to domestic violence situations…with the offence itself being conceived as an 'adjunct to the arsenal of legal weapons arrayed against domestic violence.' …This is clearly evident in the political implementation of stalking legislation."[671]

843. Legislative debates indicate that in some states there were significant concerns expressed over the wide scope of the provisions and their impact on legitimate activities.

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[668] See pages 1 and 2 of the written submission from the Christian Institute, available at http://archive.scottish.parliament.uk/s3/committees/justice/inquiries/criminaljusticeandlicensing/CJL.S2.65.pdf

[669] See The Criminal Justice and Licensing Bill: Stage 2, Justice Committee 20 April 2010.

[670] See the Bill as amended at Stage 2 (stalking was introduced as section 31B) at http://www.scottish.parliament.uk/S3_Bills/Criminal%20Justice%20and%20Licensing%20(Scotland)%20Bill/b24as3-amend.pdf
The Bill as passed is accessible at http://www.scottish.parliament.uk/S3_Bills/Criminal%20Justice%20and%20Licensing%20(Scotland)%20Bill/b24bs3-aspassed.pdf.

[671] See Emma Ogilvie, "Stalking: Legislative, Policing and Prosecution Patterns in Australia," Australian Institute of Criminology (2000) *Research and Public Policy Series No. 34*, p 56 ("Ogilvie").

844. The anti-stalking provisions contained in The Criminal Code Act 1899 of Queensland and in the Crimes Act 1958 of Victoria, as amended, are the most relevant Australian enactments to this study as they provide for specific defences not found in other Australian jurisdictions. We start with Queensland, the first Australian state to introduce law reform in this area.

6.2.1. Queensland

845. Queensland inserted anti-stalking provisions in its Criminal Code in November 1993 out of concerns for victims of domestic violence, in particular between former partners:

> Violence committed against people by estranged partners has made our community painfully aware of the fact that some individuals who may be disposed towards violence are not deterred by restraining orders. Therefore, new measures such as that embodied in this Bill must be enacted.[672]

846. The legislation was drafted after a general review of the Criminal Code by the Queensland Government.[673] During the review process, consultation was undertaken through the Domestic Violence Resource Centre and the Women's Legal Service.[674]

847. Within the Queensland Government, the Women's Policy Unit (Office of the Cabinet) and the Domestic Violence Unit in the police force were consulted.[675] During the consultation, it was reflected that the Queensland criminal law indeed did not adequately protect victims who had been followed, placed under surveillance, contacted or sent offensive items in circumstances where they felt harassed, intimidated or threatened.[676] To address this concern, the Queensland Government intended to add an offence of stalking to the *Criminal Code* in order to extend protection of individuals who had been subjected to activities which caused them reasonably to believe that they might be the subject of unlawful violence.[677] This move reflected the Government's recognition of the possibility that stalking behaviour might lead

[672] Queensland Hansard 1993 (9 November) 5473, cited in Ogilvie.
[673] Explanatory Notes to *Criminal Law Amendment Bill 1993*, available at http://www.legislation.qld.gov.au/Bills/47PDF/1993/CriminalLawAmdB93E.pdf
[674] *Ibid.*
[675] *Ibid.*
[676] *Ibid.*
[677] *Ibid.*

to violence, and the anti-stalking legislation was designed to protect victims from the potential of violence.[678]

848. In general, the women's interest groups welcomed the creation of a new offence of stalking in Queensland.[679] Nevertheless, in the parliamentary debates on 18 November 1993, the Government was criticized for failing to consult the community at large, particularly the Queensland Law Society, the Criminal Code Review Committee and the Queensland Law Reform Commission, before enactment of the anti-stalking legislation.[680] It was revealed that the Queensland Law Society was among a number of groups writing to the Government expressing its grave concerns over the new legislation.[681]

849. By the Criminal Law Amendment Act 1993,[682] sections 359A "Unlawful stalking" and 359B "Summary proceedings for unlawful stalking" were added to the *Criminal Code.* Basically, the criterion for stalking was a "course of conduct" involving a "concerning act" (such as following, telephoning, sending gifts) on at least two separate occasions with an intent that the victim felt apprehension or fear. The provisions were however heavily criticized as the drafting was ambiguous, complicated and the provisions were difficult to interpret.[683]

850. The main problems identified in the 1993 provisions are summarized as follows:

- The requirement for a "course of conduct" and the requirement for at least two "concerning acts" (which listed the prohibited acts) were uncertain as it was unclear whether the concerning acts needed to be separated from each other. For instance, it was questionable whether they could be made up of two isolated and unconnected concerning acts, or whether the two concerning acts had to be the same kind of acts. Answers to these questions were unclear from the anti-stalking legislation. Also, section 359A(2)(a) required a repetition of

[678] Douglas, p 5.
[679] Queensland Hansard 1993 (18 November) 6065, 6076. See also R A Swanwick, "Stalkees Strike Back – the Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland" (1996-1997) 19 *University of Queensland Law Journal* 26 at 27.
[680] Queensland Hansard 1993 (18 November) 6076.
[681] *Ibid*. The contents of those concerns were not made available.
[682] The full provisions of the *Criminal Law Amendment Act 1999, are accessible at* http://www.legislation.qld.gov.au/legisltn/acts/1993/93ac065.pdf
[683] See Douglas, pp 7-12, and The Explanatory Notes to *Criminal Code (Stalking) Amendment Bill 1999,* available at http://www.legislation.qld.gov.au/Bills/49PDF/1999/CrimCodeStlkAmdBExp99.pdf ("EN 1999")

concerning acts at least twice on the victim. Thus one prolonged activity would not satisfy the definition of unlawful stalking.[684]

- The mental element of the offence was stated in section 359A(2)(b). According to that section, the offender must have intended that the victim be aware that the course of conduct was directed against him/her. Therefore, a conviction was unlikely if such intent could not be proved.

- Section 359A (2)(c) required that the victim must have been aware that the course of conduct was directed against him/her but not against a third party. Thus if the victim of stalking was not aware of the stalking behaviour but such behaviour has caused detriment to a third party, it was not considered to be stalking.

- The reasonable person test stipulated in section 359A(2)(d) also complicated the matter. Pursuant to that section, the course of conduct must have caused a reasonable person in the victim's circumstances to believe that the concerning offensive act was likely to happen. When examining the section together with section 359(3) and the definition of the "concerning offensive act", it was unclear whether the victim should be "seriously concerned" or whether it was sufficient that a reasonable person would be "seriously concerned." It was also uncertain how to prove the belief that the concerning offensive act was likely to happen.

- The anti-stalking legislation did not empower the criminal courts to impose restraining orders on the offenders after prosecution.[685]

- The anti-stalking legislation did not expressly deal with cyberstalking.[686]

851. It was because of the above problems that the stalking provisions were revisited. The Attorney-General, Minister for Justice and Minister for The Arts released a discussion paper

[684] Sally Kift, "Stalking Law Reform Under Lawful Scrutiny" (1998) September *Proctor* 19 at 20, cited in Douglas.
[685] EN 1999, p.2.
[686] Sally Kift, "Stalking Law Reform Under Lawful Scrutiny" (1998) September *Proctor* 19, cited in Douglas Douglas.

on 30 June 1998, entitled *Discussion Paper on the Offence of Stalking,*[687] offering a number of options for reform.[688] However, several submissions indicated that the said discussion paper was seriously flawed.[689] As a result, the Queensland Government put forward a new proposal contained in the Criminal Code (Stalking) Amendment Bill on 31 August 1998.[690]

852. There was another round of public consultation on the said discussion paper and the consultation draft Bill, involving over 450 interested parties.[691] Apart from receiving submissions, there were also workshops for key stakeholders from several government departments, the Women's Legal Service and the Gold Coast Domestic Violence Service.[692] These consultations led to the Criminal Code (Stalking) Amendment Bill 1999,[693] which was subsequently passed.[694] The Queensland Government opined that this Bill represented a considered view of all submissions received, and that the amendments proposed had won substantial support from key stakeholders.[695]

853. The Queensland Criminal Code (Stalking) Amendment Bill (1999) was first introduced to the (Queensland) Parliament on 3 March 1999.[696]

854. The Bill proposed a number of significant amendments to the original 1993 enactment. The changes took into account the shortcoming of the old provisions, as discussed above, including clarifications of definitional problems, clarifications and expansions of conducts which amount to unlawful stalking, inclusion of matters which are immaterial for unlawful

[687] A copy of this discussion paper is available from the National Library of Australia. See the search record of the catalogue of the National Library of Australia at http://catalogue.nla.gov.au/Record/456565.
[688] See EN 1999 p 3, Sally Kift, "Stalking in Queensland: From the Nineties to Y2K" (1999) 11 *Bond Law Review* 144, at p 144 ("Kift"), and Stalking Law Reforms, Research Bulletin No. 7 /98, Queensland Parliamentary Library – Publications and Resources Section (November 1998).
[689] Kift. See also submission by the Queensland Council for Civil Liberties at http://www.qccl.org.au/documents/Sub_TOG_%2017Aug98_Stalking_Proposal.pdf.
[690] See EN 1999 p 3, and Kift.
[691] *Ibid.* Queensland Hansard 1999 (27 April) 1402 indicates that about 400 organisations within Queensland were contacted.
[692] *Ibid.*
[693] The *Criminal Code (Stalking) Amendment Bill 1999* is available at http://www.legislation.qld.gov.au/Bills/49PDF/1999/CrimCodeStlkAmdB99.pdf
[694] EN 1999 and Kift. The Bill was assented to on 30 April 1999. A new chapter 33A "Unlawful stalking" was inserted into the *Criminal Code* to replace the old anti-stalking provisions. This chapter contains sections 359A to 359F.
[695] *Ibid.*
[696] The *Criminal Code (Stalking) Amendment Act 1999* is available at http://www.legislation.qld.gov.au/LEGISLTN/ACTS/1999/99AC018.pdf

stalking, expansion of defences, provision of a mechanism for the courts to restrain unlawful stalking, and addressing the issue of cyberstalking.[697]

855. For example, in the old section 359A (4) enacted in 1993, a defendant was required to prove that his/her conduct did not amount to unlawful stalking. Under the new section 359D, the burden of proof no longer lies on the defendant.

856. In relation to the scope of the defences, it was expanded from "protection for conduct engaged in for the purpose of genuine political, industrial and public disputes", to also include "reasonable conduct for the purpose of the execution of a law, for a lawful trade occupation or business or for the giving or obtaining of information in which the person has a legitimate interest in obtaining or giving."[698] These proposed specific defences were approved by the Legislature and form part of the current law.[699]

857. The 1999 Bill was examined by the Scrutiny of Legislation Committee of the Queensland Parliament.[700]

858. Queensland's anti-stalking provisions were already at the time of the introduction of the 1999 Bill, the most widely drawn in Australia and perhaps in the world[701] and the proposed reforms included widening it further still to cover "almost every act of human behaviour"[702] and to remove the need to prove the person was in actual fear. Instead, only a reasonable expectation of fear would suffice. During the Second Reading of the Bill, the

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[697] EN 1999 pp 3-6, Douglas,p.12 and Daniel Sullivan, "A critical analysis of Queensland's cyberstalking legislation", available at https://www.nswscl.org.au/index.php?option=com_content&view=article&id=71:a-crit

[698] Queensland Hansard 1999 (3 March) 160.

[699] Section 359D of the Criminal Code ("Particular conduct that is not unlawful stalking") states:

" ***Unlawful stalking*** does not include the following acts—

(a) acts done in the execution of a law or administration of an Act or for a purpose authorised by an Act;

(b) acts done for the purposes of a genuine industrial dispute;

(c) acts done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest;

(d) reasonable conduct engaged in by a person for the person's lawful trade, business or occupation;

(e) reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving."

[700] The Scrutiny of Legislation Committee was a former committee of the Queensland Parliament, which was responsible for scrutinising primary and subordinate legislation. The Scrutiny of Legislation Committee's website is at http://www.parliament.qld.gov.au/work-of-committees/former-committees/SLC. The comments of the Scrutiny of Legislation Committee on the *Criminal Code (Stalking) Amendment Bill 1999* is contained in the Alert Digest No. 3 of 1999 tabled and ordered to be printed on 23 March 1999, which is available at http://www.parliament.qld.gov.au/documents/committees/SLC/1999/slcd0399.pdf.

[701] Queensland Hansard 1999 (13 April) 984.

[702] *Ibid.*

cumulative effect of the proposals were said to lead to a dangerous territory, where laws could be misused and abused:

> … the cumulative effect of widening this Bill in almost every respect is to lead to the Orwellian situation that the Scrutiny of Legislation Committee outlined. Yet it is much more serious, potentially, when we consider that so-called stalking now could arise simply by the sending of a fax or an email intentionally to a person, and from that one act, even though there was no intention to cause harm or apprehension, and none was caused and that possibly the intended recipient of the email or letter did not receive it, a serious crime has been committed.
>
> …
>
> So we have a situation in which this Bill takes the criminal law into new and possibly dangerous territory. It will give wide powers to the Police Service to charge individuals with serious offences when the law that they are being charged with breaking is so wide as to encompass almost every human interaction with another human. It is legislation that will have the potential of being misused and abused.[703]

859. The focus of criticisms was on the new ways of prohibited behaviour which included contacting through the use of any technology. This, together with the proposed removal of the requirement that the victim of stalking had to be aware of the behaviour in order for the offence to be committed, had the effect of making "the Queensland provisions very broad indeed, so that the only mental requirement of the offence is that the stalking conduct be 'directed at a person'."[704]

860. A complaint was made that the general discretion to prosecute was insufficient to safeguard legitimate interests and that extra protection was needed to prevent undesirable consequences on groups of people not specifically protected by the specific defences. The Scrutiny of Legislation Committee therefore recommended the inclusion of a general exemption of reasonableness in section 359 of Bill, similar to that in the UK legislation, the

[703] *Ibid.*, 986. Other similar concerns appear at 996.
[704] Urbas, p 7.

PHA 1997.[705] This exemption was called for in addition to the proposed specific defences and not instead of them.[706]

861. It was the understanding of the proponents of this recommendation that the general exemption would provide for an excuse based on reasonableness of the conduct in the circumstances of acts done by people not specifically covered by the specific defences.[707] During parliamentary debates, only some MPs supported the Committee's recommendation. In the end, it was rejected by the Government.[708] It said that because 'detriment'[709] must be proved to arise reasonably in the circumstances, and because it would also be necessary to look at whether the conduct is reasonable in order to determine if it was such that it would result in the alleged detriment, a general defence of reasonable conduct in the circumstances "would only serve to confuse matters."[710]

862. One can compare this situation with the one in the UK, where there were calls for more specific defences because the proposed and eventually enacted general defence of reasonableness in the particular circumstances is considered an insufficient safeguard to protect the freedom of the press and the right to peaceful protest/demonstration. By the time the Queensland Scrutiny of Legislation Committee made the recommendation, the UK PHA had less than 2 years of being in operation.

863. On the issue of protests and demonstrations, one MP's concern in the Queensland Legislature was directed at peaceful protests and where the line should be drawn between a genuine dispute and one which is not.[711] The Government overlooked this concern but it later clarified it in the following terms:

> For example, it would be quite wrong for a Government or some aggrieved party to seek to stifle a particular peaceful protest by reliance upon this provision in circumstances where our traditions of free speech and peaceful

[705] See Digest No. 3 of 1999 at p 20.
[706] Queensland Hansard 1999 (13 April 1999) 996.
[707] *Ibid.*
[708] Queensland Hansard (13 April 1999) 986-987.
[709] Detriment is what the course of conduct must bring about, and has a very wide meaning: including serious mental, psychological or emotional harm or preventing the person from going about normal daily personal or work activities.
[710] Queensland Hansard 1999 (27 April 1999) 1403.
[711] Queensland Hansard 1999 (27 April 1999) 1395.

assembly indicate that this protest was in relation to a genuine industrial dispute, political dispute or other genuine public dispute. So the maintenance of that provision in this Bill continues the defences that were available previously.

…

I draw the honourable member's attention to the current provisions of section 359A of the Criminal Code dealing with unlawful stalking and in particular subsection 4, which states—

> "It is a defence to a charge under this section to prove that the course of conduct was engaged in for the purposes of a genuine—
>
> (a) industrial dispute; or
>
> (b) political or other public dispute or issue carried on in the public interest."

Essentially, that provision has been continued. I draw the attention of the honourable member also to the provisions of section 346 of the Criminal Code, which provide for assaults and interference with freedom of trade or work. [712]

864. The Bill was reported without amendment and given the Third Reading, passed on 27 April 1999 and assented on three days later.

865. Apart from the above discussion, no significant public concerns were expressed by the media sector or civic groups over the impact of the new provisions on the relevant freedoms. Queensland is an illustration of the Legislature listening to public concerns but being determined to pass legislation which had been revised in various consultation exercises. While the government was successful in broadening the scope of the law, it also recognized specific defences, which eventually seem to have been accepted by concern groups.

[712] *Ibid*, 1405.

6.2.2. Victoria

866. Victoria introduced anti-stalking legislation "to remedy a long existing inadequacy in the criminal law - the lack of an appropriate remedy for women who had been harassed or followed over a period of time… The stalking provisions were deliberately not limited to any group of people although it was expected that they would protect women in particular, from various types of unwanted behaviour."[713]

867. The Crimes (Amendment) Bill 1994 (Vic)[714] was the draft law which included the insertion of the stalking offence, section 21A, into the Crimes Act 1958. The Bill exempted conduct that was engaged in by a person performing official duties.[715] Specific defences safeguarding the legitimate interests of other groups were inserted into the Crimes Act later, in 2003, and have since then been preserved. They recognize activities such as news-gathering, disputes and demonstrations. [716]

868. During the Second Reading of the 1994 Bill, the Government referred to consultation in which some members of the community had expressed concerns relating to the broadness of the provisions. It was pointed out by an MP that the provisions had the risk of being misused:

[713] Inez Dussuyer, Department of Justice, Vic, "Is stalking legislation effective in protecting victims?", 2000, available at http://www.aic.gov.au/media_library/conferences/stalking/dussuyer.pdf
[714] The Bill is accessible at http://www.austlii.edu.au/au/legis/vic/bill/cb1994172/
By the time the Bill was introduced, Queensland, the Northern Territory, South Australia and New South Wales had introduced stalking legislation.
[715] The exemption, which has since then been maintained, reads:
"(4)This section does not apply to conduct engaged in by a person performing official duties for the purpose of-
(a) the enforcement of the criminal law; or
(b) the administration of any Act; or
(c) the enforcement of a law imposing a pecuniary penalty; or
(d) the execution of a warrant; or
(e) the protection of the public revenue
that, but for this sub-section, would constitute an offence against sub-section(1)."
[716] "(4A) In a proceeding for an offence against subsection (1) it is a defence to the charge for the accused to prove that the course of conduct was engaged in without malice—
(a) in the normal course of a lawful business, trade, profession or enterprise (including that of any body or person whose business, or whose principal business, is the publication, or arranging for the publication, of news or current affairs material); or
(b) for the purpose of an industrial dispute; or
(c) for the purpose of engaging in political activities or discussion or communicating with respect to public affairs."

The other difficulty is in trying to distinguish what is bad or of evil intent. An action that is seen by the recipient to be aggressive or unwanted may not be seen in that way by the person carrying out the aggressive or unwanted action.

…

I have regular contact with people where my electorate office is situated. What I regard as a fairly normal kind of encounter as I wander down the street -- the way people get my attention about a social, political or other matter -- might be considered by some people as threatening.

I encounter these people on a weekly or even daily basis and have come to regard them as characters. It is the sort of colour and movement of Brunswick Street that one would expect, and I am sure that the same kind of behaviour applies to other parts in Melbourne, namely, St Kilda.

Because I am engaging in a form of communication with someone in a situation of reasonable control, I would be almost offended if the police or anyone else came to my assistance. Usually I do find a way of gracefully terminating the meeting -- not in every case -- but I do not need to call for assistance.

I can imagine other people whose jobs do not expose them to such characters to the same extent feeling alarmed, but I do not think my experience is an unusual one. I believe it to be the experience of many people who work around those areas of town, and they too would equally feel comfortable in handling such situations.

Nevertheless, it indicates that care and discretion has to be used in the application of this new offence and that it was not imposed beyond need. I regard the best sort of society as one where you have a minimum of regulations, rules and controls over peoples' lives.[717]

[717] Legislative Assembly, 16 November 1994, 1240.

869. While supporting the introduction of stalking provisions and recognising that their main purpose was to protect women, MPs of the Opposition anticipated that the provisions would have to be amended in due time in order to protect people who carry out activities in the public interest:

> I foreshadow an amendment to the stalking provisions because there is a need to protect people from being accused of the crime of stalking if they are going about something that is carried out in the public interest which is not provided for in the legislation -- that is, they are part of a legitimate political, public or industrial dispute in which there are other ways society can deal with that situation.[718]

870. The above-mentioned amendment related to the introduction of a defence for those who are involved in community protest to make a political or social point, or related to an industrial dispute:

> I have given the minister a copy of the opposition's amendment which we believe would be helpful. The amendment could not be moved in the other place because the committee debate was curtailed, so our arguments have not been put to the Government. Perhaps we can agree on the need to protect individuals from harassment and to cover people who are involved in a community protest, an industrial dispute or normal civil disobedience to make a political or social point. Those situations are covered by appropriate laws and regulations and people should not be inadvertently caught up in an activity that relates to stalking. We do not think that was ever the intention but it is possible that the bill may be interpreted that way.
>
> During the committee stage I will move an amendment which, if accepted, will give people accused of stalking a defence.
>
> …
>
> Through that amendment the opposition seeks to convince the Government to remove the unintended consequence that the bill could be interpreted in this

[718] Council Assembly, 7 December 1994, p 1240.

> way. I look forward to any undertaking the minister can give about the Government's awareness of our point about people who are unwittingly caught up in an offence when their activities were of a totally different nature.[719]

871. The proposed amendment was in these terms:

> In a proceeding for an offence against sub-section (1) it is a defence to the charge for the accused to prove that he or she engaged in the course of conduct for the purpose of a genuine -
>
> (a) industrial dispute; or
>
> (b) political or other public dispute or issue carried on in the public interest.[720]

872. Other MPs had supported the amendment and indicated that it mirrored the Queensland provision.[721] For example, one MP said that:

> The Attorney-General has said in the media that it is not her intention to pick up those sorts of activities which would pose significant civil liberties problems. The most useful way of doing that would be for the Attorney-General to accept the opposition's amendment.[722]

873. Stressing on the possibility of the legislation being misused, it was argued:

> A person engaged in a community action might be required to picket a building because of an industrial dispute or may be engaged in community action to protect a park or a particular facility, as I have recently experienced with the Fitzroy Swimming Pool. From time to time those people might be involved in hassling a person in authority to make a point and could be seen to be spending a lot of time at a particular premises. I believe there are adequate provisions to deal with those matters if they affect a person's safety. The

[719] Council Assembly, 7 December 1994, p 1243.
[720] Council Assembly, 7 December 1994, 1251.
[721] Legislative Assembly, 16 November 1994, pp 1885, 1901.
[722] Legislative Assembly, 16 November 1994, p 1902.

> question of civil liberty should be dealt with in an entirely different context than stalking legislation.
>
> …
>
> The opposition believes this is a necessary change, and I will be looking forward to a positive response from the Government.[723]

874. The amendment was not supported by the Government of the time who gave an undertaking that it would be dealt with at another occasion.

875. When the Crimes (Stalking) Bill[724] went before the Victoria Parliament in 2003, the Bill had been amended by inserting defences qualified by "without malice" (which are currently in force in section 21A(4A)) and by expanding the list of instances of "conduct", which included cyberstalking.[725] According to the Government, the Bill hung around on the notice paper for almost nine months for further consultation.[726]

876. Describing the 2003 Bill as a 'threat to free speech', some media outlets and lawyers had warned that it was a serious threat to the ability of the community to receive information through media outlets.[727] The main attack was on the new provision of publishing a statement or material on the Internet or other electronic communication (the current section 21A(2) (ba)) as it created uncertainty on publishers and journalists. However, it was conceded that the

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[723] Legislative Assembly, 16 November 1994, 1252.

[724] The Bill is accessible at http://www.legislation.vic.gov.au/domino/web_notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/714c331ecc93085cca2570d70018cefa/$FILE/551079bi1.pdf

[725] There is a list of 14 types of conduct in the current version of s. 21A (2) of the Crimes Act. The ones inserted by the 2003 Bill are:

(2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct which includes any of the following—

(b) contacting the victim or any other person by post, telephone, fax, text message, e-mail or other electronic communication or by any other means whatsoever;

(ba) publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material—

(i) relating to the victim or any other person; or

(ii) purporting to relate to, or to originate from, the victim or any other person;

(bb) causing an unauthorised computer function (within the meaning of Subdivision (6) of Division 3) in a computer owned or used by the victim or any other person;

(bc) tracing the victim's or any other person's use of the Internet or of e-mail or other electronic communications;"

[726] See Legislative Assembly Program, 18 November 2003, p 1665.

[727] Kenneth Nguyen, *Stalking Bill 'A Threat To Speech'*, The Age, 6 April 2003, accessible at http://www.theage.com.au/articles/2003/04/05/1049459857415.html

probability of media entities being prosecuted was low.[728] Nevertheless, they said that: "Parliament should make it very clear that no article published in the mainstream media could be caught by the act."[729]

877. The Attorney-General indicated that the Government had listened to the communities' concerns, including media organisations', and understood the unintentional impact of the provisions on the freedom of expression. As a result it claimed it narrowed the scope of the legislation, including introducing specific defences:

> As members of a Government that listens and then acts, we took on board the concerns of those media outlets and put out a further discussion paper - an options paper,[730] in fact - on that aspect of the legislation. In the course of the consultation it was suggested to the Government that the legislation might have been too broad in relation to stalking in that it would have allowed a person to be charged with and convicted of stalking if they had no subjective intent to stalk somebody and did not cause any harm to a particular person. Again we listened to the community, and these amendments narrow the scope of the legislation.
>
> …
>
> But I repeat that following the introduction of the legislation concerns were raised that the proposed stalking amendments may have unintentionally restricted freedom of speech by extending the course of conduct which constituted stalking to cover the publication of material on the Internet. In particular, concerns were raised that the legislation could potentially make journalists and media organisations liable for stalking by virtue of the fact that the newspaper in which the article appeared was published on the Internet.

[728] *Ibid.*
[729] *Ibid.*
[730] The Options Paper was most likely not available to the public. This is because according to p 1678 of the Legislative Assembly Hansard of the Crimes (Stalking) Bill on 18 November 2003, it was sent to the relevant media organisations and then returned to the Government. Efforts have been made to locate it but with no avail.The Options Paper is not even available from the catalogues in the Melbourne Law Library and Victorian Law Library. We also directly consulted the Victorian Law Reform Commission, which is in charge of drafting this type of documents (see http://www.lawreform.vic.gov.au/our-approach/publication-types) but obtained no information.

> As I said, the legislation was split, and after subsequent consultation a number of concerns were expressed. We believe those concerns had merit, and accordingly the house amendments were amended to respond to the potential adverse effects of the bill. The proposed amendments are intended to ensure that the offence of stalking does not apply to a range of legitimate conduct, such as the conduct engaged in by media organisations in the normal course of their business. Also the amendments will require actual harm to be proved for an offence to be made out where the accused did not form a subjective intention to cause harm.
>
> In narrowing that second aspect of the bill there has been substantial consultation with stakeholders, in particular with groups such as the centres against sexual assault and the like. They are very supportive of the bill and the proposed amendments.[731]

878. In supporting the Bill, an MP indicated that the amendments were introduced to ensure that the offence of stalking did not apply to legitimate behaviour, including that engaged by the media:

> does not apply to a range of legitimate conduct, such as the conduct engaged in by media organisations in the normal course of their business. Most significantly it also requires that actual harm be proved for an offence to be made out when the accused did not have a subjective intention to cause harm. That is an important safeguard against the worthy but perhaps broad ambition of the original bill.[732]

879. Also supporting the Bill, another MP pointed out that the Bill ensured that "if no malice was intended and the activities were part of a normal, lawful business, including news services and as has been said before, parliamentary business and other issues, that defence is reasonable and is allowed."[733]

[731] Legislative Assembly, 18 November 2003, pp 1674-1675.
[732] Legislative Assembly, 18 November 2003, p 1676.
[733] Legislative Assembly, 18 November 2003, p 1681.

880. However, an MP was concerned with the people who had conducted normal activities and would now be required to defend themselves in a court if the person against whom they conducted those activities should decide to take action. He continued:

> There are many other examples, and the member for Footscray ought to understand that in the normal course of his political activities he could well be hauled up to prove that he had not conducted something with malice - as we all could. It would be very difficult, because of course there is some malice in the political spectrum. We are trying to destroy our political opponents; that is the name of the game.
>
> It is absolute nonsense to say to people, 'This is not going to stifle free speech', because that is an unintended consequence of this bill. That is the position we are putting to the Government today, and that is the position we are seeking answers on.[734]

881. On the interaction between malice and the proposed defences and the other expansions, the Attorney General was asked to explain what the Government's interpretation of the word malice is. He was unable to provide any, pointing out that it is part of the common law and that it if for the judges to give an interpretation.

882. Another major issue during the debates was the ramifications of the cyberstalking provisions; in particular the proposed section 21A(2)(ba):"publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material" which transforms the legislation completely, as such communication may not be directed to a particular person but to the whole world. It brings within the legislation specifically those persons in the business of news-gathering:

> This transforms the legislation from what is essentially private communication to the victim or to another person to publishing to the whole world, so it brings into play the full scope of publication by the established media channels of radio, television and Internet publishing - reporting that would not previously under the legislation have been covered at all. Also, of course, it brings in the

[734] Legislative Assembly, 18 November 2003, p 1682.

> publishing of non-media organisations, of individuals who have their own web sites, who put their own media releases on their own web sites or some other web sites. It is a dramatic transformation of the scope of the legislation. It is no wonder that media organisations and many others are alarmed about its ramifications.
>
> The Attorney-General says that in some instances under the existing legislation some acts in investigative journalism could constitute stalking and - he did not say this, but by extension - that some acts of private communication relating to potential news stories could constitute stalking.
>
> That is a very limited matter and under the existing law, as the member for Kew pointed out, in each instance it requires actual proof of harm, which in a practical sense is a significant requirement.[735]

883. On the issue of "without malice", it was suggested that the Government was trying to introduce recklessness through the back door thereby minimising the scope of the defence "in the normal course of a lawful business, trade, profession or enterprise (including that of any body or person whose business, or whose principal business, is the publication, or arranging for the publication, of news or current affairs material)":

> To come to the other major issue of 'without malice', the Attorney-General has consistently avoided responding to the reasonable requests of the opposition for some explanation of what the term is intended to mean. Let me put a possible interpretation on the record to elaborate on the concerns of the opposition. Without malice could be intended to refer to what was traditionally described as without malice aforethought, which was regarded as the traditional mental element constituting a criminal offence. If that is the case, under Australian law, as I recall my criminal law, malice aforethought can be constituted either by intention or by recklessness - that is, not caring whether or not particular consequences occur.

[735] Legislative Assembly, 18 November 2003, p 1686.

> If that is the case, arguably it would mean the defence is only available in the situation set out in proposed section 21A(3)(b),[736] or if the accused knew the result may occur as described in proposed section 21A(3)(a), provided that did not constitute reckless conduct.
>
> How exactly is it intended to be cast? Malice would not seem to refer to maliciousness in the ordinary sense of the word; it would seem to refer, on one interpretation, to without malice aforethought in the traditional meaning of the term, which can be constituted either by intention or recklessness. Some would argue, although not I, that pure knowledge as set out in paragraph (a) of subsection (3) can constitute the reckless element of intention.
>
> This is not just an idle question but goes to the scope of the defence, and it raises the legitimate concern that people who act in the genuine course of their activities in the media or in other professions and occupations or in the course of political discourse could still be convicted of an offence.[737]

884. The Attorney-General responded by repeating that judicial discretion would be a sufficient safeguard,[738] with which answer members were extremely dissatisfied as they noted that whenever there is ambiguity, it is for the legislature to clarify it as the courts need direction from Parliamentary debates in order to understand the statutory intention:

> … it is not some insignificant thing. It is not as though you are going to get a penalty infringement notice: this is not like a speed camera. Ultimately what we are doing is creating an offence that has a penalty attached of up to 10 years imprisonment.
>
> I would have thought it was incumbent upon us all to search for the definition of 'without malice', because it is apparently a defence as a result of an

[736] In the Bill, it read: "4(2) In section 21A(3) of the **Crimes Act 1958**, **omit** "and it actually did have that result". Thus s. 21A (3) (a) and (b) read: "(3) For the purposes of this section an offender also has the 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 if— (a) the offender knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear; or (b) the offender in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result."
[737] Legislative Assembly, 18 November 2003, pp 1686-1687
[738] See Legislative Assembly, 18 November 2003, pp 1687-1688.

extensive consultation process which we, the Law Institute of Victoria,[739] Liberty Victoria[740] and the Age[741] got left out of but which has been gone into to protect freedom of speech and freedom of expression!

…

It is the motive or purpose for which the occasion is used that is ultimately decisive, not the party's belief in the truth of the matter.

This amendment creates a defence in relation to the press, industrial disputes, political activities or other communications in respect of public affairs. We can argue about whether it is broad enough or whether it is clearly defined, but clearly the duty is specified. It is the duty which we are looking at and which this amendment is attempting to establish in a very clumsy way. By putting this amendment in the Attorney-General is saying, 'Yes, if you have some form of duty or motive - that is, that you wish to communicate something in relation to public affairs - then you should be given a defence'.

What I do not understand - and this appears to be a logical inconsistency which the courts will have to grapple with - is why the definition of 'malice' says that if you are acting in a way that is inconsistent with that motive, then that is malicious. Therefore if an accused person establishes on the balance of probabilities that they were engaged in political activity, an industrial dispute or their normal course of business, as long as they were behaving in that way - and they have already established that as a matter of fact as part of the defence process - what is the purpose of the additional words 'without malice'?

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[739] The Law Institute of Victoria ("LIV")'s website states: "The LIV is generally acknowledged by business, Government and the general public as the leader of the legal profession in Victoria. Having recently celebrated 150 years, the LIV continues to maintain our dedication to representing the needs of our members and making invaluable contributions to the law and the broader community. With more than 15,000 members, reflecting all sectors of the legal profession, the LIV represents a compelling force of opinion and expertise." See http://www.liv.asn.au/About-LIV accessed on 13 February 2013.

[740] "Liberty Victoria's website states: "Liberty Victoria is one of Australia's leading civil liberties organisations. Since 1936 we have worked to defend and extend human rights and freedoms in Victoria" See http://www.libertyvictoria.org.au/ accessed on 13 February 2013.

[741] The Age is an Australian newspaper which was first published on 17 October, 1854. For its circulation and readership as at September 2012, see http://adcentre.com.au/media/448741/readership%20circulation%20map%20september%2012.pdf

> If you accept the definition of 'malice' as acting in a way that is inconsistent with either the duty or motive that has already been established, what is the precise meaning of the word? I have offered a definition, and I will repeat it for the Attorney-General. It means:
>
> ... a motive for or a purpose of defaming a party that is inconsistent with the duty or interest that protects the occasion of the publication. It is the motive or purpose for which the occasion is used that is ultimately decisive, not the party's belief in the truth of the matter.[742]

885. Hon. J. M. Madden, Minister for Sport and Recreation explained that while there was a possibility that journalists, publishers, and persons engaging in lawful protests may be caught by the provisions, the defences ensured that this would not be the case, provided the course of conducted complained of was carried out "without malice." The Minister gave an example that under the new section 21A(4A), an investigative journalist may publish critical information which may have the consequence of causing distress and mental harm to an individual. He said that this did not mean that this information should not be published where there is no malice. [743]

886. He further indicated that "where an offender's real purpose is 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 another person, malice will be present. It will therefore not be possible for a person who happens to be a journalist or other profession [sic] to use their profession as a cover to stalk and to then try to rely on the defence."[744] This statement was maintained in the "Crimes (Stalking) Bill as sent print – explanatory memorandum."[745] In other words, if the journalist or other professional were not using his profession for his personal agenda as a cover to stalk, then the professional would remain protected.

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[742] Legislative Assembly, 18 November 2003, pp 1688-1689. Other similar comments appear at the bottom of p 1689.
[743] Parliament of Victoria, Parliamentary Debates (Hansard), Legislative Council, 19 November 2003, p1439, available at http://www.parliament.vic.gov.au/downloadhansard/pdf/Council/Spring%202003/Council%20Spring%20Extract%2019%20November%202003%20from%20Book%206.pdf
[744] *Ibid.*
[745] Available at http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/9D830232116C04F0CA2570D700196255/$FILE/551079exa1.pdf

887. The amendments were passed by majority without further significant debate.

888. No media reports are available which directly commented on the amendments of the Bill. However, on the basis of what was reported before the eventual compromise of the government, the media sector should regard it as satisfactory. Before the amendments were made, media outlets and lawyers had voiced out concerns, as discussed above. The specific defence for news media in section 21A (4A)(a) reflects the concerns of freedom of the press amongst media groups.

889. In conclusion, Victoria provides an illustration of the 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" has been maintained as a qualifying requirement for the defences. 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.

6.3. New Zealand

890. The Harassment Act 1997 started as part of the Harassment and Criminal Associations Bill[746] and "the impetus for the legislation came primarily from growing police and public concern about gang activity in New Zealand."[747]

891. Before the Bill was introduced, there had been no detailed study or substantiated empirical evidence of the gang concern. Furthermore, the Bill was not subject to a report as recommended by Human Rights Commission under section 7 of the New Zealand Bill of Rights Act.[748] This affected the harassment provisions too as they were drafted "based on a

[746] The Bill was first introduced on 20 August 1996 by the Ministry of Justice, see Doug Graham, "Harassment and Criminal Associations Bill introduced," 20 August 1996, accessible at http://www.beehive.govt.nz/release/harassment-and-criminal-associations-bill-introduced. Parts I to IV refer to harassment.
[747] Harassment and Criminal Associations Bill 1997, no 215–1 ii (the select committee reports); Justice and Law Reform Select Committee "Harassment and Criminal Associations Bill Explanatory Material" i – ii; as cited in Jane Mountfort, "The Civil Provisions of the Harassment Act 1997: A Worrying Area of Legislation?" (2001) 32 *Victoria University of Wellington Law Review* 999 ("Mountfort"), accessible at http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/VUWLRev/2001/49.html?stem=0&synonyms=0&query=stalking
[748] Mountfort, Part IV, A.

perception that the existing law did not provide adequate protection for victims of the behaviour referred to in the policy papers as harassment or stalking":[749]

> Because the harassment provisions were included as part of the larger Bill, they received relatively little individual attention at the select committee stage. This meant the general application of the harassment provisions did not receive the degree of analysis that could usually be expected for legislation significantly altering existing law. With the exception of the submission of the Auckland Council of Civil Liberties, the submissions did not raise serious concerns about the potential for the harassment provisions to infringe rights and freedoms. That submission raised concerns that the vagueness of the definition of harassment could lead to innocent persons being caught by the Act. The committee said little to address these seemingly valid concerns and no changes were made. The Report of the Ministry of Justice cited a need to include all possible situations in need of the intervention of the law within the ambit of the Act. Indeed, the difficulty of framing legislation widely enough to include all possible situations, yet still clear enough to avoid constitutional attack, has been a problem in drafting harassment and stalking laws in other jurisdictions.[750]

892. The provisions related to harassment were said to also provide protection for victims of harassment who could not rely on the domestic violence legislation.[751]

893. On 23 January 1997, the New Zealand Privacy Commissioner reported to the Ministry of Justice on the Harassment and Criminal Associations Bill.[752] The Commissioner pointed out that while there were provisions in the Bill aiming at enhancing "the rights of individuals to be free from harassment in their personal and private lives. I support these provisions. However, there are other aspects in which the bill will, in various ways, restrict liberties

[749] Mountfort, Part IV, B.
[750] Mountfort, Part IV, B.
[751] Mountfort, Part IV, C.
[752] Harassment and Criminal Associations Bill - Report by the Privacy Commissioner to the Minister of Justice on the Harassment and Criminal Associations Bill (other than provisions dealing with interception warrants), 23 January 1997 ("Privacy Commissioner Report"), accessible at http://privacy.org.nz/harassment-and-criminal-associations/

previously enjoyed, through criminalising or restricting freedom of association."[753] For example, in the case of the proposed criminal harassment, he said that it may impact on the area of political or industrial protest:

> I think that we should be cautious about extending the bounds of criminality further as there may be unforeseen effects and the law may be invoked in circumstances which are not anticipated. For instance if the element of intent was removed there may be a risk of the law being used in the area of political or industrial protest.[754]

894. In respect of the civil regime, the Memorandum from the Ministry of Justice to the Justice and Law Reform Committee on the Harassment and Criminal Associations Bill on 17 June 1997 stated that the "lawful purpose" defence was at least intended to protect legitimate behaviour such as picketing, protesting, or media investigations.[755] It was though acknowledged that it was a general defence that left the court with discretion to determine in the context of each individual case whether the particular act in question was done for a lawful purpose.[756]

895. Regarding the acts of members of the media, the Commonwealth Press Union recognized that they clearly might fall within the definition of criminal harassment in the Bill but that 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.[757] With regard to the media sector falling within the civil harassment provisions, it was commented that that would be a little more likely; in particular within restraining orders as

[753] Privacy Commissioner Report, para 1.3.
[754] Privacy Commissioner Report, para 2.13.
[755] *Memorandum of Ministry of Justice to Justice and Law Reform Committee on the Harassment and Criminal Associations Bill*, 17 June 1997, 38.
[756] Ministry of Justice Report on late submission on *Harassment and Criminal Associations Bill*, 14 July 1997, 8-10, as cited in Burrows and Cheer").
[757] Recognised in the Submission of the Commonwealth Press Union: *Report of the Ministry of Justice to Justice and Law Reform Committee on the Harassment and Criminal Associations Bill*, 17 June 1997, 32 ("Submission of the Commonwealth Press Union") as cited in John Burrows and Ursula Cheer, "Media Law in New Zealand" (2005), 5th ed. OUP, p 281.

the threshold is less stringent than for criminal harassment and the orders could be tailored-made to the particular acts in question, following the provisions in sections 19 and 20.[758]

896. During Parliamentary debates on the Bill, concern was expressed on the broad definition of civil harassment, in that abuse of the procedure could occur and provide a curb on freedom of expression and civil liberties. It was thought that the court's power to make a restraining order might be used to delay or stop legitimate inquires from journalists. In the only media submission on those provisions, the Commonwealth Press Union argued that there was a potential for a misuse of the civil regime.[759] The government response was that there were sufficient safeguards in the provisions and that a judge could be able to exercise his discretion to refuse a restraining order, should the acts in question be carried out for a lawful purpose.[760]

897. It has been observed that the defence of lawful purpose for civil harassment "has similarities to the defence of lawful authority in the law of torts. It recognises that there are activities like debt collection, investigative journalism, religious proselytising, and door-to-door selling which may cause people to feel annoyed or harassed but which are legitimate activities that should not be prohibited. But even these activities if engaged in unreasonably could give rise to a civil action."[761]

898. More recently, the defence of "lawful purpose" in section 17 of the HA was touched upon in the context of reviewing the law of privacy and more particularly the law of surveillance. It was pointed out that while surveillance could be justified in some instances when it is carried out by law enforcement officers under warrant, this may also be applicable to the media:

> …this may also be true of, for example, the media, who may use a hidden camera to obtain information of real public concern where there is no other effective method of obtaining it. In such circumstances section 17, the "lawful

[758] John Burrows and Ursula Cheer, "Media Law in New Zealand" (2005), 5th ed. OUP, p 281 ("Burrows and Cheer").
[759] Submission of the Commonwealth Press Union as cited in Burrows and Cheer, p 281.
[760] In *Beadle v. Allen* [2000] NZFLR 639, at 657, Judge Potter said *obiter* that investigative journalism could be a lawful purpose. The burden of proving the lawfulness of the purpose is on the respondent.
[761] Comment obtained by email from Mr Malcolm Luey, General Manager, Criminal Justice Group, Ministry of Justice, New Zealand, 1 March 2013.

> purpose" defence, may well be called in aid, and we think it would meet the case.[762]

899. The above concession was made because the Law Commission proposed to amend the HA by adding to section 4 (where specified acts are proscribed), paragraph (ea) "keeping the person under surveillance."[763]

900. The Law Commission is more recently of the view that the lawful purpose defence should be reformulated:

> It would be our preference that the lawful purpose defence should be reformulated to more clearly reflect the element of proportionality, but this is an issue which goes wider than the scope of this report.[764]

901. In conclusion, the extent of public concerns over the impact of anti-stalking legislation on freedoms of the press, demonstration / protest and expression was minimal in New Zealand. 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.

6.4. Canada

902. Canada's first criminal harassment provisions were proposed in April 1993 within the context of Bill-126 entitled "An Act to Amend the Criminal Code and the Young Offenders Act." The reforms in relation to section 264 "criminal harassment responded to "cases of women being stalked by ex-husbands or ex-boyfriends, and celebrities by obsessed fans"[765]

[762] New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3*, Report 113, 2010, at 5.13 ("Review of the Law of Privacy 3")
[763] Review of the Law of Privacy 3, recommendation R21.
[764] Review of the Law of Privacy 3, at 5.16.
[765] Rebecca Kong, *Criminal Harassment*, Juristat Canadian Centre for Justice Statistics, Statistics Canada – Catalogue no. 85-002-XPE Vol. 16 no. 12, December 1996, p 2 ("Kong").
This article is accessible at http://publications.gc.ca/Collection-R/Statcan/85-002-XIE/0129685-002-XIE.pdf.

which had been highly publicized not only in the US but also in Canada. Section 264 came into force on 1 August 1993.

903. The harassment legislative reforms in Canada were criticized as responding primarily to media attention and political opportunism rather than paying more attention to the concerns of women's groups.[766]

904. During the Second Reading of the Bill in the House of Commons, "members from both opposition parties took the opportunity to question the motivation for and the sincerity behind a Government initiative introduced so late in its mandate."[767]

905. At the Parliamentary Committee stage, not much time was given to witnesses for a thorough preparation of all the issues involved in the anti-stalking reform initiative:

> Witnesses wishing to appear and present briefs were placed in the unenviable position of developing a complete response to a complex legislative proposal in this same brief time. For most organizations, time constraints made it impossible to examine the problem of stalking in its broader social context. Essentially, witnesses were forced to respond to the proposals without the benefit of a sustained and contextualized examination of the problem.[768]

906. The Parliamentary Committee on Bill C-126 stood from 11 May to 2 June 1993. During that time, various concerns were raised to the Committee about the potential of the anti-stalking provisions to curtail otherwise legitimate activities. For example, witnesses at the Committee hearings expressed concern that various activities such as labour-related picketing, political speech and demonstration, as well as "women trying to collect maintenance arrears under existing support orders" could inadvertently fall under the ambit of section 264.[769]

907. Impact of the legislation on freedom of the press was also briefly alluded to by Lucya Spencer, Vice-President of the National Organization of Immigrant and Visible Minority

[766] See Rosemary Cairns Way, "The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism" (1994) 39 McGill Law Journal 379 ("Cairns").
[767] Cairns, 394.
[768] Cairns, 398.
[769] House of Commons, Legislative Committee on Bill C-126, 34th Parl, 3rd Sess, Issue 5 (2 June 1993) at 1628 (Hollander Layte) ("Layte").

Women of Canada, who further added that the legislation potentially violated Charter protected rights:

> The distinction between legitimate and illegitimate behaviour has not [been] made. Without a clear intention, standard, and language, Bill C-126 can make behaviour that is perfectly legitimate appear [il]legal. For example, a reporter following a politician or perhaps a wife telephoning her former husband every day for child support payment. We believe a vague law like this may not be able to withstand a Charter challenge.[770]

908. To deal with the potential problem of legislative overreach, the witnesses suggested essentially four interrelated solutions. The first was to ensure that parties involved in the administration of criminal justice (e.g. police officers, crown attorneys, and judges) received sufficient training.[771] This was important not only in terms of focusing on the primary purpose of section 264 (namely, to protect victims of stalking, who are predominantly women), but also to properly sensitize actors in the administration of criminal justice to gendered violence and the dynamics of power and control. By properly educating these actors, the provisions would likely be more effective in achieving its purposes while simultaneously less likely to be used for a purpose for which it was not intended.

909. The second suggestion, adopted by many different advocacy groups, was the idea of adding a preamble to section 264 that would, as with the first suggestion, help contextualize the purpose of the provision and ensure that it would not be used in improper situations or for improper purposes.[772]

910. The third suggestion was to broaden the "lawful authority" defence in section 264(1) so that it would have more leeway to protect uncontemplated activities. Suggestions were made to define more clearly what lawful authority entailed, as well as to broaden the statutory

[770] House of Commons, Legislative Committee on Bill C-126, 34th Parl, 3rd Sess, Issue 1 (11 May 1993) at 1551 (Lucya Spencer)
[771] See Beverly Bain, Susan Bazilli & Judy Rebick, "Too Little Too Fast", Brief by the National Action Committee on the Status of Women to the Legislative Committee on Bill C-126 (26 May 1993) at 2.
[772] *Ibid* at 4.

language from "without lawful authority" to less restrictive alternatives such as "without lawful excuse" or "without lawful authority or purpose".[773]

911. The fourth and final suggestion brought forward during the hearings was to define specific exclusions in the statute; types of activities that would be contemplated *ex ante* as falling under the "lawful authority" defence. The most common statutory exclusion agreed upon by advocacy groups during the Committee meetings was labour-related picketing activities.[774]

912. In the end, the government decided not to include the final three substantive suggestions, but did support, in principle, the idea of increased education and training for judges, crown attorneys, police officers, and other key actors in the criminal justice system. For example, in 1999, the Federal/Provincial/Territorial Working Group on Criminal Harassment for the Department of Justice Canada created a criminal harassment handbook to help guide the practice of police and crown prosecutors.[775]

913. With respect to the preamble suggestion (i.e. the second suggestion), the Parliamentary Committee on Bill C-126 decided not to incorporate a preamble into the legislation due to skepticism about the effectiveness of preambles in general as well as a desire to keep the Criminal Code free of an excessive number of preambles for fear that too many may convolute the law.[776]

914. The proposal to broaden the language of the lawful authority defence to "without lawful authority or purpose" (i.e. the third suggestion) was rejected due to the concern that it would weaken the legislation too much. As one of the Committee members opined: "[o]ne can think of a number of lawful purposes…that would basically allow the accused to wrap himself in the cloak of a lawful purpose, and really could defeat the whole goal of the provision".[777]

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[773] House of Commons, Legislative Committee on Bill C-126, 34th Parl, 3rd Sess, Issue 3 (27 May 1993) at 1538 (Hon Marian Boyd).
[774] Layte.
[775] See Criminal Harassment Handbook, which has been referred to in several sections above.
[776] House of Commons, Legislative Committee on Bill C-126, 34th Parl, 3rd Sess, Issue 3 (27 May 1993) at 1643 (Michelle Fuerst); Issue 5 (2 June 1993) at 1719 (Nicholas Bala).
[777] House of Commons, Legislative Committee on Bill C-126, 34th Parl, 3rd Sess, Issue 6 (2 June 1993) at 2118 (Glenn Rivard).

915. Finally, the specific exclusion of labour-related activities (included in the fourth suggestion) was deemed unnecessary by the Parliamentary Committee. The reasoning provided was that labour-related activities would clearly be excluded by the lawful authority defence due to the enactment of provincial statutes that allow and regulate strikes and picketing.[778] Furthermore, during the debates in the House of Commons, the Minister of Justice made the additional point that a similar provision, the section 423 offence of intimidation, was almost never used in the context of labour disputes.[779]

916. In conclusion, despite the insufficient time given to witnesses for a thorough preparation of all the issues involved in the anti-stalking draft initiative, the concerns on freedom of expression were serious, while the concerns on freedom of the press only briefly alluded. The Parliamentary Committee did address the suggestions raised but gave justifications for not incorporating them all. In particular, the suggestion of a less restricted defence than "lawful authority" was rejected on the basis that it would weaken the legislation too much. So was the suggestion to specify the type of activities that would fall under the "lawful authority" defence. This was because instances of lawful authority were already provided in enacted 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.

6.4.1. Manitoba

917. Bill-40[780] was the draft law leading to the enactment of the Domestic Violence and Stalking Act, C.C.S.M. c. D93. Introduced in June 1998 to the Legislative Assembly of Manitoba, Bill-40 had the purpose of providing civil remedies to victims of extreme violence perpetrated by stalkers and domestic abusers. The Bill made Manitoba the first Canadian province to legislate a tort of stalking.

918. When moving the Bill, the Minister of Justice and Attorney-General said that the

[778] *Ibid* at 2154 (Rob Nicholson).
[779] House of Commons Debates, 34th Parl, 3rd Sess (6 May 1993) at 19022-23.
[780] The Report by the Manitoba Law Reform Commission on Stalking, Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997), had proposed specific provisions which were modified during Parliamentary debates. The Report is accessible at http://www.manitobalawreform.ca/pubs/pdf/archives/98-full_report.pdf ("Manitoba Law Reform Commission").

> provisions will be clearly worded to ensure that both parties understood what behaviour is prohibited. While providing victims with meaningful remedies, the proposed legislation will also ensure that the rights of those accused of stalking behaviour or domestic violence are recognized.[781]

919. Unlike in the legislative process at the Federal level for Bill C-126, few concerns were raised during the legislative process for the DVSA regarding infringements on freedoms of press, demonstration, and expression. For example, these concerns were not raised during Parliamentary Debates or during the sitting of the Parliamentary Committee on law amendments. Mention of these issues was also absent from the Manitoba Law Reform Commission report on stalking, from which Bill-40 ultimately drew heavily from.[782]

920. The most relevant criticism of the draft legislative may have come from the Manitoba Association for Rights and Liberties, who submitted in writing that "the bill in its current form may be over-broad in a number of respects, and ought to be reconsidered and redrafted with an eye to minimizing the infringement of the civil liberties of a "respondent". The Association was especially concerned about the broad definition of domestic violence, the balance of probabilities standard as too low a burden, and the onus on the respondent to prove that stalking *did not* occur in order to have a protection order set aside.[783]

921. However, it should be noted that the Manitoba Legislature did eventually pass a version of the lawful authority defence in the DVSA that was broader than the language used in section 264 of the Criminal Code. Specifically, the wording of section 2(2) of the DVSA is that stalking occurs "without lawful excuse or authority", instead of just "without lawful authority" in section 264 of the Criminal Code.[784] It is unclear from the legislative discourse whether the reasoning for this deviation was out of concern for the aforementioned freedoms or whether there were alternative motivations. It is also interesting to note that this language is in line with the third suggestion originally proposed by Parliamentary Committee witnesses at the federal level regarding section 264 of the Criminal Code to deal with concerns of legislative overreach.

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[781] Manitoba Legislative Assembly Debates (13 May 1998) (Hon. V. Towes).
[782] See Manitoba Law Reform Commission.
[783] Manitoba, Legislative Assembly, Hansard 36th Leg, 4th Sess, No 48 (18 June 1998) written submission to the Manitoba Legislative Assembly Standing Committee on Law Amendments (Manitoba Association of Rights and Liberties).
[784] DVSA, section 2(2).

6.5. US

922. US anti-stalking statutes vary from state to state but many exempt from their scope "constitutionally protected activities" or activities carried out for a "legitimate purpose". These are very general exemptions/defences. Some are more specific and give details of what those activities entail. The use of general terms in conjunction with vague definitions of what amounts to stalking/harassment left room for ambiguities and therefore for constitutional attack.[785]

923. When the first anti-stalking legislation were being implemented in the US between 1990 and 1993, organizations such as the American Civil Liberties Union (A.C.L.U.) complained that those statutes had the potential for abuse by law enforcement officers and that "prosecutors could use the laws, especially the broadly written ones, to suppress the rights of political dissidents and others."[786] The A.C.L.U. fought for the safeguard of constitutionally-protected activities, including those of investigative reporters:

> The concern is that legal behavior may be indistinguishable from some illegal behavior, especially where statutes punish mere presence. Examples typically cited by civil liberties experts as cases that could fall within the purview of these statutes are investigative reporters who follow public figures to do stories on them …. Thus, a state law that prohibits the mere act of following a person could draw even private detectives, policemen, or suspicious neighbors within its coverage. Washington State has recognized this possibility and its anti-stalking statute explicitly provides that a private investigator, acting within the capacity of his license, is not stalking within the meaning of the statute.[787]

924. Another concern related to whether the type of person the reforms were said to protect was really women as opposed to legislators, judges and politicians:

> stalking has been presented not only as a manifestation of male violence against women, but also as a risk of celebrity or public status - and therefore as

[785] Callie Anderson Marks, "The Kansas Stalking Law: A "Credible Threat" to Victims. A Critique of the Kansas Stalking Law and proposed legislation" (1997) 36 *Washburn Law Journal* 468.
[786] Morville, 935.
[787] Morville, 935.

> a potential risk to legislators, judges and politicians. In fact, *U.S. News and World Report* reported that the number of threats to United States Members of Congress rose from 394 to 566 in the four years between 1987 and 1991. This representation of stalking makes it an issue which touches the lives and experiences of politicians. It is therefore likely to engage their understanding and galvanize their energies in ways that other violence issues, particularly violence against marginalized groups, may not.[788]

6.5.1. California

925. California is considered the leading jurisdiction in modern anti-stalking legislation. In 1990, the crime of stalking did not exist. The extension of protection for those who suffered harassment and those who were victims of domestic violence was a "stay-away order from the court under various provisions"[789]

926. The California legislature made stalking a crime in 1990, "a decision that reflected two concerns. First, truly obsessional people would not be deterred by an injunction. Indeed, several of the Orange County victims had obtained domestic violence injunctions or civil harassment orders against their killers.[790] Second, the unwanted contact was viewed not only as a warning sign of future violent crime, but as a crime itself. The repeated unwanted visits, phone calls, or letters caused their own, separately cognizable legal harms." [791]

927. Some commentators argued that California's anti-stalking enactment was more in response to the murder of Rebecca Schaeffer, a rising young star, by a stalker in 1989. While her death received intense media attention that was "sufficient to galvanize a political response", the death of another 4 women in Orange County, California, further "highlighted the gaps in existing laws" in dealing with stalking.[792] Stalking then became a problem that

[788] Cairns, 386.
[789] California SB 2184, Senate Bill, 1990 (Adds § 646.9 to the Penal Code). See Statutory Record 1889-1990: § 646.9 (1990) 1527 Added, Operative January 1, 1991, accessible at http://192.234.213.35/clerkarchive/
[790] The civil harassment orders are reference to those that can be applied / granted under the Cal. Civ. Proc. Code 527.6, discussed in Parts 1.11 and 3.6.1 above. This statute was enacted in 1978.
[791] Aaron H. Caplan, "Free Speech and Civil Harassment Orders" (2013) *64 Hastings Law Journal* 781, 794.
[792] Paul Mullen, Michele Pathe, and Rosemary Purcell, *Stalkers and Their Victims* (Cambridge University Press, 2000) at p.255.

received national media attention following highly publicized stalking incidents.[793] The media thus helped to shape the climate that led to the legislation.

928. When first enacted, the California Penal Code's stalking provisions were considered narrow in scope because they prohibited stalking when linked with a threat of physical violence.[794]

929. The stalking provisions in § 646.9 of the Penal Code have been amended on several occasions to extend their scope. However, constitutionally protected activities have been safeguarded so that they are not part of the course of conduct or a credible threat, as defined. Conduct that occurs during labor picketing has also been exempted from the application of the offence of stalking.

930. In 2002, Senate Bill 1320 was introduced to, among other things, "clarify the definition of "credible threat" by specifying that constitutionally protected activity is not included within its meaning."[795] A constitutionally protected activity includes freedom of speech, the press, as well as the right to peaceful assembly (First Amendment, Bill of Rights, U.S. Constitution[796]). This was recognised during Parliamentary debates.[797]

931. No information is found about any concerns from the media sector in California during the relevant legislative processes. Relying on the fact that the statute specified intent and exempted constitutionally protected activity, it was commented that California's anti-stalking statute was "carefully drafted to defeat overbreadth challenges."[798]

[793] Dawn Morville, 'Stalking Laws: Are They Solutions for More Problems' (1993) 71(3) Washington Law Review 921 at 923, available at http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1799&context=lawreview.
[794] Morville, 929.
[795] The Bill is accessible at http://legix.info/us-ca/measures;2001-02;sb1320/doc
[796] The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
[797] SB 1320, 30 April 2002, p P. As to the cases involving "constitutionally protected activity", see Part 1.11 above.
[798] Robert Miller, "Stalk Talk: A First Look at Anti-Stalking Legislation" (1993) 50(3) *Washington and Lee Law Review* 1303 at 1318, available at http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1775&context=wlulr.

6.5.2. Nevada

932. The state of Nevada enacted anti-stalking legislation in June 1993.[799] By February 1993, 30 states had passed laws creating the crime of stalking. The co-chairman of the Senate Committee on Judiciary (in charge of examining the draft law jointly with the Assembly Committee on Judiciary) pointed out that "The basis was the perceived inadequacy of criminal law to address threatening and intimidating behaviour which did not fall within the existing definitions of criminal conduct. Nevertheless, these crimes caused victims substantial emotional distress and often led to physical harm."[800] The joint Committee heard extensive evidence from stalking victims in the domestic violence context. After hearing such testimony, the chairman of the Assembly Committee noted that "stalking was the precursor for other serious crime such as rape and murder…is a crime which emanates out of the obsession of the stalker, primarily for the victim …this crime 'can come from love, from hate, or from other emotions.' "[801]

933. The Nevada legislation contains very specific exemptions protecting constitutionally protected activities, "including, but not limited to" picketing which occurs during a strike, work, stoppage or any other labor dispute; the activities of a reporter, photographer, camera operator or other person while gathering information for communication to the public if that person is employed or engaged by or has contracted with a newspaper, periodical, press association or radio or television station and is acting solely within that professional capacity; the activities of a person that are carried out in the normal course of his or her lawful employment; and any activities carried out in the exercise of the constitutionally protected rights of freedom of speech and assemble.

934. In 1993, the Nevada State Press Association (now Nevada Press Association) and the Nevada Broadcasters Association did express some concerns during the legislative process.

[799] See the enactment at http://www.leg.state.nv.us/Division/Legal/LawLibrary/Statutes/67th/Stats199303.html#CHz233_zABz199

[800] See Minutes of the Joint Meeting of the Senate Committee on Judiciary and the Assembly Committee on Judiciary, 17 February 1993, p 251, at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB199,1993.pdf

[801] Minutes of the Joint Meeting of the Senate Committee on Judiciary and the Assembly Committee on Judiciary, 15 March 1993, http://www.leg.state.nv.us/Session/67th1993/93minutes/S_JDJT_315.html

They did not oppose the legislation, but said that the language of the exemption for constitutionally protected activities should be clarified.[802]

935. The Introduction Bill had an exemption for activities "authorized by specific constitutional or statutory law." However, a bill in a similar language had been struck down in Florida for being too vague.[803] As such, the Nevada State Press Association proposed an amendment to create specific exemptions for picketing, news-gathering activities, activities in the normal course of lawful employment, and the exercise of free speech and assembly.[804] The amendment was adopted in substantially the same language and was passed as Amendment No. 346 during the Second Reading in the Nevada Senate.[805]

936. The Assembly Committee on Judiciary did not concur with the amendment, as it believed it would have given the press a license to stalk.[806] The Senate Committee on Judiciary did not recede from the amendment.[807] Eventually, a Conference Committee between the two houses was called, and it passed the amendment in its conference report.[808] Both houses adopted the conference report, and the bill was passed.

937. Since then there have been a few amendments to the anti-stalking legislation in the Nevada Revised Statutes, mainly related to cyber-stalking. For example, adding a provision to the effect that if Internet or network site, text messaging or electronic mail or similar means are used in a manner that substantially increases the risk of harm or violence, a more serious offence would be committed.[809] The justification for introducing cyber-stalking was

[802] Minutes of the Joint Meeting of the Senate Committee on Judiciary and the Assembly Committee on Judiciary, 15 March 1993, http://www.leg.state.nv.us/Session/67th1993/93minutes/S_JDJT_315.html; Minutes of the Senate Committee on Judiciary, 19 April 1993, http://www.leg.state.nv.us/Session/67th1993/93minutes/S_JD_419.html.
[803] Minutes of the Senate Committee on Judiciary, 19 April 1993, http://www.leg.state.nv.us/Session/67th1993/93minutes/S_JD_419.html.
[804] For the full text of the amendment proposed by the Nevada State Press Association, see p 197-198 at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB199,1993.pdf
[805] See p 204-206 at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB199,1993.pdf
[806] See p 214-216 at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB199,1993.pdf
[807] See p 216-217 at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB199,1993.pdf
[808] See p 218 at http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB199,1993.pdf
[809] SB 551, 13 June 2001, pp 2785-2786, and SB 316, 9 June 2009, p 306.

that there were no laws in Nevada addressing what law enforcement agents saw as an increasing problem.[810]

938. However, one Senator said he felt the current definition of stalking was broad enough to include computers and nothing additional needed to be added. Another Senator added that for the use of electronic communication the penalty would be higher and therefore demanded an explanation as to how this was the case. The proponent of the Bill responded by noting that a message through the Internet attracted numbers of people, including children, and therefore the potential for harm increased.[811]

939. More opposition voices were heard pointing to the need to avoid criminalizing innocent conduct, as the main objective of the Bill was to tackle illegal acts by pedophiles luring children through the Internet:

> the wording of this bill criminalizes some innocent acts in an effort aimed at the illegal acts of pedophiles. … she did not believe this was the intent of this bill.[812]

940. The above amendments in relation to cyber-stalking do extend the scope of the stalking provisions to acts that might be totally innocent. On the other hand, as noted, Nevada did not have other laws dealing with cyber-stalking. This, together with the safeguards could be one reason why this amendment has not raised major public concerns.[813] The situation is different in other American jurisdictions, as discussed below.

941. While civic groups such as the American Civil Liberties Union (A.C.L.U.)'s alerting of the potential for abuse of certain anti-stalking statutes and fighting for the safeguard of constitutionally-protected activities, including those of investigative reporters, might have influenced the legislatures in California and Nevada, there is no concrete evidence of it. However, those Legislatures did pass the laws with such safeguards. In California, no media concerns over the impact of the legislation were reported by the media sector, while in Nevada the Nevada State Press Association's (now Nevada Press Association) and the

[810] Minutes of the Subcommittee of the Senate Committee on Judiciary, 12 April 2001.
[811] *Ibid.*
[812] *Ibid.*
[813] Please also refer to Part 4.5 Introduction, above.

Nevada Broadcasters Association's concerns were heard and acted upon by the Legislature, in particular, in relation to expanding the defences.

6.5.3. Cyber-stalking and the First Amendment

942. In 1999, a report from the Attorney General to the Vice President stated that all states should amend their stalking laws to cover cyber-stalking. At the same time, it recognised that the Internet is an important tool for protected speech activities and that anti-stalking provisions should be carefully formulated in order to protect freedom of speech guaranteed by the First Amendment:

> Less than one third of the states have anti-stalking laws that explicitly cover stalking via the Internet, e-mail, pagers, or other electronic communications. California, for example, only recently amended its stalking statute to cover cyberstalking. ... While the general stalking statutes in some states may cover cyberstalking, all states should review their laws to ensure they prohibit and provide appropriate punishment for stalking via the Internet and other electronic communications.
>
> …
>
> As a result of the breadth of conduct potentially involved in stalking, anti-stalking statutes need to be relatively broad to be effective. At the same time, however, because of that breadth and because stalking can involve expressive conduct and speech, anti-stalking statutes must be carefully formulated and enforced so as not to impinge upon speech that is protected by the First Amendment. This is particularly true with regard to cyberstalking laws, which frequently will involve speech over the Internet. The Internet, moreover, has been recognized as an important tool for protected speech activities.[814]

[814] Cyber stalking: A New Challenge for Law Enforcement and Industry - A Report from the Attorney General to the Vice President, August 1999.

943. There are now many states that have included cyber stalking provisions within their stalking legislation. Additionally, since 2006 some states have begun to tackle the problem of cyber bullying.[815]

944. The above trend has prompted several criticisms. For example, some commentators have suggested that "seemingly innocuous words uttered repeatedly to an unwilling recipient reach the level of harassment."[816]

945. Commenting specifically on Arizona's cyberstalking and online bullying proposals, critics expressed that they opened "wide a door to potential constitutional violations by making it a crime to offend or annoy others."[817]

> No one is defending attacks on others via the Internet. Rather, critics of the measure say it fails to make important distinctions.
>
> …
>
> Among potential First Amendment issues that critics have identified:
>
> The proposal fails to distinguish between harassing speech delivered one-to-one, such as in an e-mail or telephone call, and harsh or offending speech on a web posting intended for the public with no specific individual intended as a target.
>
> …
>
> Clearly the web provides ways for launching anonymous, unrelenting attacks against people — particularly young people. But the web also has provided new opportunities for people to air views outside the acceptable, mainstream order of things. Many online discussions include frank — and sometimes

[815] For a list of the states that have implemented cyber-stalking provisions, see "State Cyber stalking and Cyber harassment Laws", at http://www.ncsl.org/issues-research/telecom/cyberstalking-and-cyberharassment-laws.aspx
For a list of states that have implemented cyber-bulling provisions between 2006 and 2010, see "Cyber bullying" at http://www.ncsl.org/issues-research/educ/cyberbullying.aspx
[816] "Effort to combat bullying would punish too much speech", First Amendment Center, 13 April 2012, accessible at http://www.firstamendmentcenter.org/effort-to-combat-bullying-would-punish-too-much-speech
[817] *Ibid.*

profane or lewd — speech, which while offensive is not in and of itself illegal.[818]

946. In some states, provisions that protect free speech may help strike a right balance between the need to tackle true cyber- stalking /bullying and the need to respect freedom of speech/expression. This is because in states including Rhode Island, North Carolina, Mississippi, Michigan, Maryland, and Louisiana, there are provisions in their anti-cyberstalking or anti-cyberbullying laws that specifically exempt constitutionally protected speech.[819] For example, section 7 in Alabama's anti-cyberbullying bill (HB 416) explicitly states that the law shall not affect the freedom of speech and freedom of expression of the students.[820]

947. On the other hand, the anti-cyberstalking law in Washington does not include a provision that expressly excludes constitutionally protected speech. In response to the use of the anti-cyberstalking law against an anonymous individual who posted videos on the Internet mocking police officers in Renton, Washington, one commentator suggested to include an explicit clause to protect free speech in order to clarify the statute and prevent misuse again.[821]

948. An academic article has most recently made a suggestion on how cyberbullying laws could stand on firm constitutional grounds including First Amendment concerns.[822] First, the law should only prohibit "traditional" classes of speech outside First Amendment protection, such as true threats, obscenity, defamation, fighting words, etc. The prohibited speech must be repeated "so often that it creates substantial disruption to the lives of the victims", following the landmark court decision on freedom of speech in schools *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969).[823] Second, criminal law should

[818] *Ibid.*
[819] Aimee Fukuchi, 'A Balance of Convenience: Burden-Shifting Devices in Criminal Cyberharassment Law' (2011) 52 Boston College Law Review 289 at p.331-338, available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3147&context=bclr .
[820] Full text available at http://alisondb.legislature.state.al.us/acas/searchableinstruments/2009RS/Printfiles/HB216-eng.pdf
[821] Brian Scott, 'Anti-Cyberstalking Laws: Misuse and the First Amendment Right to Free Speech' (*Rutgers Computer and Technology Law Journal*, 22 October 2012), available at www.rctlj.org/2012/10/anti-cyberstalking-laws-misuse-and-the-first-amendment-right-to-free-speech/
[822] Lyrissa Barnett Lidsky and Andrea Pinzon Garcia, "How not to criminalize cyberbullying" (2013) Missouri Law Review (forthcoming). Available at SSRN: http://ssrn.com/abstract=2097684.
[823] Full text available at http://www.bc.edu/bc_org/avp/cas/comm/free_speech/tinker.html.

also target protection of children, in which First Amendment concerns would lessen. Third, criminalization should not be expected to be effective in every context, and certain types of cyberbullying should be redressed by education and social assistance.

949. Another academic article suggests that anti-cyberbullying laws should adopt from traditional anti-stalking laws the exemptions for "constitutionally protected activity" including, but not limited to, "picketing and organized protests."[824]

6.6. South Africa

950. The South African Domestic Violence Act, 116 of 1998 (DVA) defines stalking for the civil law and only if the person stalked is in a domestic relationship with the stalker. In order to extend the scope of the law to the non-domestic/non-relationship context, a new law was proposed. The Protection from Harassment Bill (B 1_2010)[825] was introduced to Parliament on 2 May 2010 and contains very similar civil law provisions to those in the DVA, with criminal law undertones.[826]

951. In relation to criminal harassment, the Government was of the view that it was difficult to set clear parameters of what constitutes criminal stalking as ordinary behaviour in legitimate circumstances may be caught:

> The offence of stalking is by nature imprecise, as behaviour which is otherwise considered quite ordinary becomes threatening in context. Stalking is difficult to define as a concept, some actions falling within the ambit of stalking may constitute a legitimate pursuit of a love interest but seen in a different context could engender immense fear in the object of the attention. It is difficult to define at what point the behaviour warrants criminal sanction. Consequently it is difficult to set clear parameters in legislation.
>
> …

[824] Naomi Harlin Goodno, "Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws" (2007) 72 Missouri Law Review 125 at p. 155, available at SSRN: http://ssrn.com/abstract=1674176.

[825] The Protection from Harassment Bill (B 1_2010) is accessible at http://us-cdn.creamermedia.co.za/assets/articles/attachments/25700_100208b1-10.pdf

[826] For instance, when a person is harassed by someone whose identity is unknown to him, the court may order the police to investigate in order to ascertain the identity.

> The Commission also takes heed of the view that twentieth-century lawmakers have been spurred into action by a moral panic surrounding "celebrity stalking", and have hastily enacted anti-stalking laws, creating a legal shell waiting to be filled. [827]

952. Based on common law case development and academic opinion, the South African Law Reform Commission (ZALRC) emphasized that stalking behaviour as a crime was addressed by way of a number of existing common law offences, including assault, *crimen injuria*, trespassing or malicious damage to property.[828] For example, a violation of dignity where the conduct of the stalker amounts to insulting or molesting the complainant, or it is calculated to upset or to instill fear, is prosecuted as *crimen injuria*. The enactment of a specific offence of stalking was not recommended. However, the ZALRC recommended that to effectively utilize the common law crimes where stalking behaviour occurs, "training of and development of guidelines and protocols for prosecutors, judicial officers, police officers and other key personnel in handling cases of stalking behaviour" should be implemented.[829] At the same time, the applicability of the common law offences to stalking behaviour was to be divulged to the public.[830]

953. With regard to the main reasons for extending the scope of the DVA to the non-domestic context, the ZALRC explained in its Issue Paper that civil remedies in South Africa, except for the remedies under the DVA which are generally inexpensive, were inaccessible to most of the South African population who don't even have the necessary financial resources to retain the services of a lawyer, not to mention to make an application to the High Court for an interdict, i.e. a prohibition or protection order.[831] Another reason was that even the DVA had its deficiencies such as when arrests by peace officers without a warrant can only be made if there is reasonable suspicion that violence would be committed against the complainant (section 3 of the DVA). Thus for victims where violence is not reasonably suspected, the DVA offers no protection.

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[827] South African Law Reform Commission Stalking (Project 130) Issue Paper 22 (2003) ("Issue Paper 2003"), Chapter 3, paras 3.16 and 3.20; accessible at http://www3.worldlii.org/za/other/zalc/ip/22/ ("Issue Paper").
[828] South African Law Reform Commission: Project 130 Stalking, November 2006 ("ZALRC Report"), paras 2.61-2.67.
[829] *Ibid.*
[830] *Ibid.*
[831] Issue Paper 2003, para 3.2. See also Chapter 2, para 2.12.

954. The ZALRC mentioned overseas legislation dealing comprehensively with protection orders under a single statute, such as Western Australia's Restraining Orders Act 1997 (ROA 1997) and the Australia Capital Territory's Protection Orders Act 2001 (POA 2001).[832] It suggested that combining domestic and personal concepts under one statute would "provide a central legislative basis for protection orders. This could be seen as recognition of the importance of protection orders as a means of combating violence, abuse and harassment."[833]

955. The problem was that this approach could be perceived as downplaying more serious crimes and conduct. Thus the ZALRC weighed in the idea of taking into account the differences between domestic and non-domestic violence as justifying an approach, which is for instance adopted in Queensland and Victoria; i.e. one statute dealing with domestic violence issues and another with non-domestic ones.[834]

956. In its Discussion Paper, the ZALRC believed "that the imperative to enact legislative measures to combat violence against women who do not find themselves in a domestic relationship is equally compelling and that similar if not the same arguments put forward in ***S v. Baloyi*** [835] hold true for women outside of a domestic relationship."[836]

957. In its Final Report on Stalking, the ZALRC thought that it was "imperative to provide effective legal recourse against stalking inter alia to women who wish to enforce the right not to embrace cultural practices which amount to stalking."[837] This was reference to some women having expressed objection to western models.

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[832] The ROA 1997 provides for violence restraining orders to protect against acts of personal violence, and misconduct restraining orders to prevent intimidating or offensive behaviour, property damage and disorderly conduct. The two orders' difference is based on the defendant's behaviour rather than on the relationship between the applicant and the defendant. The POA 2001 allows applicants to obtain a domestic violence order or a personal protection order.

[833] Issue Paper 2003 , para 3.4.

[834] And also in Northern Territory and South Australia. The legislation is cited at footnote 80 of the Issue Paper : Domestic Violence Act 1992 (NT), Justices Act 1928 (NT), Domestic Violence (Family Protection) Act 1989 (Qld), Peace and Good Behaviour Act 1982 (Qld), Domestic Violence Act 1994 (SA), Summary Procedure Act 1921 (SA), and the Crimes (Family Violence) Act 1987 (Vic).

[835] In *S v. Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), the Constitutional Court determined that the imperative for legislation to address violence within a domestic setting derives from section 12(1) of the Constitution, which reads: "Everyone has the right to freedom and security of the person, which includes the right – . . . (c) to be free from all forms of violence from either public or private sources; . . ."

[836] South African Law Reform Commission Stalking (Project 130) Discussion Paper 108 (2004) ("ZALRC Discussion Paper"), para 3.153.

[837] "ZALRC Report", para 1.6. This report includes only summaries of responses received from the public and concern groups. One such response relates to the suggestion of including as a criminal offence the act of applying for a protection order against stalking or harassment maliciously or erroneously; para 2.16.

958. The ZALRC was of the view that the expansion of the DVA to partially apply to matters of stalking that are not of a domestic nature might cause confusion due to the specificity of the DVA and therefore did not recommend the expansion of the DVA to include stalking of persons other than those in domestic relationships. It confirmed its provisional recommendation that a civil remedy for stalking should mirror the civil remedy provided for in the DVA. However, this was not to be so in its entirety but taking into account the differences between the domestic and non-domestic context.

959. When Bill B 1_2010 (called the stalking bill) was approved by the South African Cabinet in mid October 2009 and before it went to Parliament, concerns were expressed over its broadness and its effect on the work of journalists; in particular, on those who conduct in-depth investigations. It was pointed out that "the definition of harassment was wide enough to include methods journalists used daily to obtain information in investigations.[838]" The bill was compared with the UK PHA: "A similar law in the UK is replacing libel lawsuits, and has seen injunctions taken against photographers in particular."[839] A member of the South African National Editors Forum (Sanef)[840] was quoted:

> In order to secure an interview with such a person (who has become the subject of a public- interest inquiry) journalists may be required to adopt conduct such as 'following, watching, pursuing or accosting' a person 'or loitering outside of or near the building or place' where a person resides, works, carries on business, studies or happens to be.[841]

960. Explaining the concern more specifically, it was noted that:

> Sanef's concern is that though the definition qualifies the conduct by stating that it must be 'unreasonable', in the absence of a preamble citing freedom of the media (clause 16 of the bill of rights) as a right to be specifically respected,

[838] "New 'stalking' bill worries media", *Business Day*, 26 October 2009, accessible at http://www.bdlive.co.za/articles/2009/10/26/new-stalking-bill-worries-media
[839] *Ibid.*
[840] Sanef's website states that it is "a non-profit organisation whose members are editors, senior journalists and journalism trainers from all areas of the South African media. We are committed to championing South Africa's hard-won freedom of expression and promoting quality, ethics and diversity in the South African media.": http://www.sanef.org.za/about/, accessed on 8 February 2013.
[841] *Ibid.*

> due cognisance of the role of the media will not be respected, and journalists may be subjected to a protection order being served on them.[842]

961. A media law specialist agreed that "the harassment definition was wide enough to curtail media coverage."[843]

962. Written presentations to parliament's justice committee reveal a number of similar concerns emphasizing that a restraining order imposed on those who conduct news-gathering activities would have the effect of delaying publication and freezing speech:

> News is a perishable commodity and to delay its publication even for a short period may well deprive it of value," Avusa[844] lawyer Dario Milo told the committee. "The moment you have got an interim protection order against a journalist or a newspaper, that freezes the speech and that could have a detrimental impact upon public discourse.[845]

963. Sanef, and Project Management South Africa (PMSA) which promotes the development of and access to project, programme and portfolio management knowledge produced locally and around the world, indicated that not only the stalking bill but also other listed bills "could impact upon the freedom of the press and said new measures amount to the state clamping down on access to information."[846]

964. During public hearings, Sanef made a joint submission with Print Media South Africa regarding a media exemption based on public interest.[847] They said that the Bill could have

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[842] *Ibid.*
[843] *Ibid.*
[844] Avusa is described as "leading South African media and entertainment company", see http://www.securities.com/Public/company-profile/ZA/AVUSA_LTD_en_2038328.html
[845] "New bills 'amount to state clampdown', 19 October 2010, Times, accessible at http://www.timeslive.co.za/local/article716609.ece/New-bills-amount-to-state-clampdown.
See similar concerns in "Protection from Harassment Bill criticized in Parliament", *Business Day*, 19 October 2010 at http://www.bdlive.co.za/articles/2010/10/19/protection-from-harrassment-bill-criticised-in-parliament
[846] *Ibid.*
[847] This submission is found in the Meeting Report Information: "Protection from Harassment Bill: public hearings ,18 October 2010. **Source URL:** http://www.pmg.org.za/node/23795
Links:
[1] http://www.pmg.org.za/minutes/13
[2] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/6c35le7mkDRP7F5c0w8mh6bmlCrMFFjHWj0omU261NU/mtime:1287734268/files/docs/101019HB1_0.doc
[3] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/R-nVem3jlq2CjyAD4ijtc05u8nLVzhg-X-IXNgpSmxw/mtime:1287734314/files/docs/101019HB2_0.doc

unintended consequences for the media, that the definition of harassment was overbroad and put journalists at risk of arrest and imprisonment whilst in the pursuit of legitimate journalistic activities, that the exemption in the Bill for conduct that was not unreasonable was not enough to protect journalists. They submitted that there had to be a public interest override, as the test of reasonableness, which was included in the Bill, did not cover the media and that the media had self-regulatory structures such as the Broadcasting Complaints Commission and Press Council, these structures had not been challenged and they distinguished journalists from stalkers. Thus these organisations requested a public interest defence to be included in the Bill.

965. Also during public hearings, AVUSA accepted the Bill in principle but pointed out to the potential impact of the Bill on news gathering, news publishing and the ability to attend court proceedings where protection and interim orders were sought against journalists. Legitimate news gathering activities had to be protected by the right to freedom of expression. The potential harm of this Bill would strike at the gathering and publishing of news. AVUSA proposed three draft options that would not render the Bill a curtailment of journalistic activities. The first draft option should be the inclusion of the intent to harass; the second one

[4] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/5x9kozfO6Fzr4mPaw7lmaUpH28dreOo8aTrYwX22G3I/mtime:1287734374/files/docs/101019HB3_0.pdf
[5] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/7HqhF4vXCMP-l2jIDVoRcrJEqBwp3pC551HNi5sixn0/mtime:1287734422/files/docs/101019HB4_0.rtf
[6] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/Twcnif3IS1WVdFr_Bz3h0ANLpNuzFhkFgV5EbGyKoBE/mtime:1287734559/files/docs/101019HB5_0.doc
[7] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/VwGKJK1lYEqI7EX6-kaO7-Gjx91ORAoHkAaKTkUOJ-0/mtime:1287734748/files/docs/101019HB6_0.doc
[8] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/9INvZjmBWq8vtFi1bm_VvlXiCRZ1-02jEfI7jL6V_bs/mtime:1287735026/files/docs/101019HB7_0.pdf
[9] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/8g9QWN-1WrF5_IW083Rc43sNgk1VMhQR8EsXSgWolWA/mtime:1287735077/files/docs/101019HB8_0.doc
[10] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/-pM5RJ9RobkE2TMWoT2idvRbBrf9K0u1Cnj1f2d5kLQ/mtime:1287735120/files/docs/101019HB9_0.rtf
[11] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/vKywWrKeW5FclCYIIv1LlmDMjV5n6allQcn_yWYP7Ws/mtime:1287735167/files/docs/101019HB10_0.doc
[12] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/OZ0oaYKU0sjZzpA69V19RHJU3XafC0d9gtqLcwq-LLY/mtime:1287735185/files/docs/101019HB11.doc
[13] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/uw7YYLIDkS4MC_Ih9AIwBVyEBcMmHZu15NH8GWwUbBM/mtime:1287735322/files/docs/101019HB12.pdf
[14] http://www.pmg.org.za/node/23710
[15] http://www.pmg.org.za/node/23709 . Audio recording of the meeting:
PC Justice: Public Hearings on Protection from Harassment Bill Part 1(am)
PC Justice: Public Hearings on Protection from Harassment Bill Part 2(pm)

would be to have a lawful excuse defence, and last one would be that an application for a protection order should be made with the journalist present.[848]

966. All the above media concerns were addressed at the opening speech of the Minister of Justice and Constitutional Development, who introduced the Bill. He indicated that the media freedom would be respected as it is enshrined in the Bill of Rights:

> The Bill also gives effect to section 7 of the Bill of Rights, which is a cornerstone of our democracy. This section enshrines the rights of all our people by affirming the democratic values of human dignity, equality and freedom. In terms of this section, the state is enjoined to respect, protect, promote and fulfil the rights contained in the Bill of Rights. To deal with the concerns of media freedom, the Bill is also crafted in a manner that ensures that it does not affect the reasonable activities of investigative journalists who may, in the course of their duties, be accused of harassment.
>
> This Bill is intended to address stalking by means of a quick, easy and affordable civil remedy in the form of a protection order. These provisions are not entirely new on our Statute Book. Hon members will notice that many of the provisions in the Bill have resonance with the Domestic Violence Act of 1998. The current Bill deals with stalking when the stalker and the victim are not in a relationship, while the Domestic Violence Act deals with transgressions where the two are in a relationship.
>
> …
>
> … . The view was expressed that the Bill might have unintended consequences and impact negatively on press freedom, particularly in the case of the investigative journalist. That is why the portfolio committee inserted the amendment. We are of the view that the compromise that has been made has found its way into the Bill in the form of factors to be considered by the courts, which constitutes an acceptable balance.[849]

[848] *Ibid.*
[849] South Africa Hansard 2011 (16 August).

967. Despite the apparent full support to the media, the Government explained that "reasonableness"[850] should still apply to journalists' behaviour, which together with the defences in section 9(5) provided sufficient safeguards. The Government did not assent to a complete public interest defence requested by the press and supported by the Centre for Constitutional Rights,[851] among other groups. The Government indicated that:

> We have … taken their concerns seriously and believe that the final Bill is a very satisfactory balance between the rights of individuals and the rights of people, such as journalists, to do their jobs. There are a number of safeguards for journalists in particular. Firstly, nobody will be prohibited in any way from performing their day-to-day activities. If someone believes that their behaviour amounts to harassment, they must approach a court for an order. Before the court grants such an order, it will have to be satisfied that the conduct does in fact amount to harassment. An integral part of the definition of harassment is that the conduct must be unreasonable.
>
> In order to protect people from being unfairly accused of harassment in the course of their work, such as may be the case in respect of journalists or police officers, the following factors have been included, which a court must take into account when determining whether conduct is unreasonable. These are whether the conduct is being engaged in for the purpose of detecting or preventing an offence, in order to reveal a threat to public safety or the

[850] Harassment is defined ins s. 1(1) of the PHA 2011 as:
" harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know-
(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-
(i) following. watching. pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
(iii) sending, delivering or causing the delivery of letters, telegrams packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person; or
(b) amounts to sexual harassment of the complainant or a related person;"

[851] Submission by the Centre for Constitutional Rights, 30 September 2010, accessible at http://www.shukumisa.org.za/index.php/2010/10/?attachment/_id=1200

> environment, to reveal an undue advantage in a competitive bidding process, or to comply with a legal duty.[852]
>
> Given that the hon Jeffery is speaking after me, I feel obliged here to comply with his specific request to acknowledge that this was in fact his idea, and I hereby do so. [Interjections.] It was a good idea, and we agreed with that fully. [Interjections.] When a court determines whether the conduct is unreasonable, all these factors, as well as any others the court considers relevant, must be taken into account. These must all be considered against the Constitution which places a high value on freedom of speech. We are thus quite comfortable that there are sufficient safeguards to ensure that only extreme behaviour by the journalists and the like would possibly be affected by this Bill, and that if the behaviour is that extreme, the person suffering as a result of that behaviour should be entitled to an order restraining it.[853]

968. The reference to Jeffery's idea in the speech of the Minister of Justice is to the factors listed in section 9 (5). During Parliament Justice Committee's (The Committee) Meeting deliberations, options for amendments were discussed. Two of those options related to inserting defences under clause 3 "Consideration of application and issuing of interim protection order" (current section 3), and "reasonableness" as a defence in both clause 3 and clause 6(2) (the current section 9(5)).[854]

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[852] Clause 9(5) of the B 1-2010 Bill states: "For the purpose of deciding whether the conduct of a respondent is unreasonable as referred to in paragraph *(a)* of the definition of "harassment", the .court must, in addition to any other factor, take into account whether the conduct, in the circumstances in question, was engaged in-
(a) for the purpose of detecting or preventing an offence;
(b) to reveal a threat to public safety or the environment;
(c) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or
(d) to comply with a legal duty,"
The PHA 2011 has kept the same provisions.

[853] South Africa Hansard 2011 (16 August).

[854] The two options discussed were:

Option A

(3A) The court may in its discretion refuse to issue an interim protection order pending a hearing in terms of section 6(2) [the original version in the Bill was clause 9(5), which is the current version in the PHA] refers to "Issuing of protection order" and was in terms of Option A 3(3A). if the court is of the opinion that the conduct in question might, on a balance of probabilities—
(a) be reasonable; or
(*b*) have been engaged in / have taken place —
(i) for the purpose of detecting or preventing an offence;

969. During the deliberations, the above options were rejected by hon Jeffery and agreed by the other members in the Committee. It was suggested that the options made it more difficult for a victim to obtain an interim relief and that because it was an ex-parte hearing, those defences were best left to the final hearing. Once a consensus was reached that the defences were unsuitable at the interim stage, there was no room for the "reasonableness" defence in options A A (3A) (a) and B (3AA) (a) as it was "inconsistent with the requirement that the court had to enquire whether the conduct was unreasonable".[855] In other words, the factors listed in (b) (i) to (iv) had to be determined by the court in relation to whether the conduct was "unreasonable."

970. Alluding to public submissions by several media groups expressing concerns that the Bill may be used against journalists who are legitimately and in good faith pursuing a story of public interest, and that some sections of the media had demanded the media should be exempted altogether, the representative of the African National Congress noted that the draft

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(ii) to reveal a threat to public safety or the environment;
(iii) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or
(iv) to comply with a legal duty.

Option B

Defences

3.AA In addition to any other defence available to a respondent in law, it is a valid defence under this Act if a respondent can show on a balance of probabilities that the conduct in question —

(*a*) is reasonable; or
(*b*) was engaged in / took place—
(i) for the purpose of detecting or preventing an offence;
(ii) to reveal a threat to public safety or the environment;
(iii) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or
(iv) to comply with a legal duty.

See Protection From Harassment Bill Working Draft 1 (8 June 2011) and Protection From Harassment Bill Working Draft 2(8 June 2011).

[855] *Ibid*. During the final deliberations, hon Jeffery reiterated his observations. See Protection from Harassment Bill: Extension of Chief Justice term of office, 13 June 2011. **Source URL:** http://www.pmg.org.za/node/27185

Links:
[1] http://www.pmg.org.za/minutes/13
[2] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/DnQYdgpJBJg_RHOdcR0GBDeTLn6QCa69OsMWEZKsaOw/mtime:1308307571/files/docs/110614workingDraft1-Bill.pdf
[3] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/26s4JwMjZ-cpii4e-5BiPo7VhObEU9N5Pn8xFU-nCAE/mtime:1308307670/files/docs/110614workingDraft2-Bill.pdf
[4] http://www.pmg.org.za/../../../../../../files/bills/100208b1-10.pdf
[5] http://www.pmg.org.za/node/27120.Audio recording of the meeting: PC Justice: Finalisation of Protection from Harassment Bill .

law represented the right balance and was a good compromise as it was "an attempt to take into account concerns about freedom of information and the media."[856]

971. An issue that was not explored but mentioned in passing by a supporter of the Bill can be interpreted as suggesting that an exemption for journalists could be achieved if there was a workable definition of journalist: "…if you have an exemption for journalists, how do you define a journalist without getting into the territory of registration, which is - not surprisingly - anathema to Sanef?"[857]

972. *Sanef* complained that they had not been properly consulted.

973. In conclusion, media's and civic groups' concerns in South Africa were serious in number and substance (we have grouped some of the criticisms under one concern when they addressed practically the same issues); 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 on the same matter. The seriousness of the concerns over the Bill can be explained on the grounds that its 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 the other countries', is different in the sense that in South Africa, journalists have been reported as often being harassed by people they reported about.[858] Thus the media might have reacted with more sensitivity to the impact of anti-stalking legislation on their daily work.

974. The Government's reaction to the criticisms mainly translated into assurances that under the new regime nobody, including journalists, will be prohibited in any way from performing their day-to-day activities.

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[856] South Africa Hansard 2011 (16 August).
[857] South Africa Hansard 2011 (16 August).
[858] "South Africa: Harassment, Threats against journalists increase", *Friedrich Ebert Stiftung*, 14 April 2010, accessible at http://www.fesmedia-africa.org/home/what-is-news/africa-media-news/news/article/south-africa-harassment-threats-against-journalists-increase/ . Examples referred to in this article include a BBC journalist being kicked out of a Press Conference room by the African National Congress Youth League's president after the journalist criticized him, and a eNews journalist being arrested while covering a protest by nurses employed by the city council.

PART 7

7. Overview of the Extent of 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

975. After the enactment of anti-stalking legislation, public concerns in some jurisdictions are still being expressed over its impact on freedom of expression, freedom of the press, and freedom of demonstration/protest. It is the UK PHA which has attracted most of the criticisms and concerns.

7.1. UK

976. The concerns of how the PHA may be used by the state, quasi-official organisations and corporations to curtail the freedom of the press and the freedom of assembly are widely heard in the communities of the United Kingdom. Particular cases have stirred up fervor, as shown in Parts 4 and 5 above. Those concerns have continued.

977. The concerns which were expressed immediately after the enactment of the PHA in 1997 indicate that there was a real and serious threat that the new legislation could be used to curtail the freedom of the press:

> Without doubt, the Act does constitute a serious threat to press freedom: powerful subjects of investigative journalism and their lawyers will use it, sometimes for justifiable reasons, and sometimes to hide wrongdoing. A court may grant an injunction preventing a journalist (or the newspaper in question) from contacting the subject and this could prevent investigation not only of that story, but potentially of future stories relating to the same subject. The very real risk is that civil proceedings can be brought against journalists with a view to injunctions being obtained--the standard of proof required will be on the balance of probabilities, and not the criminal standard of beyond all reasonable doubt, and if that injunction is breached and proven, criminal penalties of up to five years could be waiting!

> One further concern is that the Act may provide the opportunity for impecunious plaintiffs to flex their muscles against the media. Unlike libel, legal aid will be available, just as it is for malicious falsehood, and it cannot be long before this avenue is used against the media.[859]

978. In relation to the activities of photographers, the following concern was also expressed in this way:

> It has always been possible to envisage some circumstances in which the more intrusive or more determined activities of photographers could involve liability, but the new Act, with its belt-and-braces combination of criminal sanctions and civil orders, widens these circumstances quite significantly, so that liability is quite readily foreseeable.[860]

979. The damaging effects of the PHA provisions are intensified because there are no specific defences protecting legitimate activities, such as those involving journalists and press photographers:

> Journalists and Press photographers could easily find themselves accused of criminal harassment since the nature of their work will often involving attempting to speak to or to take photographs of persons who do not desire their attentions. It is not uncommon for houses of people in the news to suddenly find that their home is in effect under siege by massed ranks of reporters and cameramen. Such behaviour can quite often cause harassment and even if the police and CPS decide not to press charges there is nothing in the act to prevent private prosecutions [NB or application for injunctions].
>
> …
>
> A government minister who is discovered to be having an affair may therefore be fair game for massed photographers but the relatives of someone who has been murdered will not. However what if the person being investigated is a suspected, but not proved, fraudster?. Investigative journalists such as Roger

[859] Martin Davis, "Good News all round? The Protection from harassment Act 1997" (1997) *Entertainment Law Review* 191, p 192 ("Davis").
[860] Colin R. Munro, "Photographs and Legality" (1997) *Entertainment Law Review* 197, p 200.

> Cook often have to lie in wait for such people who have good reasons to be reluctant to be interviewed about their business activities. Robert Maxwell was notoriously quick to issue libel writs in order to prevent scrutiny of his activities and it could well be that other lesser fraudsters could be equally quick to take out private prosecutions for harassment in order to prevent journalistic investigation of their activities.[861]

980. Concerns expressed in relation to the PHA provisions being used to restrain legal protests were expressed in the following terms:

> It is possible that the act could be used to stifle lawful protests. Anti blood sports activists regularly attend fox hunts and attempt to disrupt them by blocking roads, blowing horns etc. Fox hunters could claim that these actions cause them Harassment and in a rural area Fox hunters are likely to have the support of the local police and magistrates. If convicted of criminal harassment the anti blood sports protesters could then be subjected to a restraining order banning them from going near another hunt. Any such attempt to use the act in this way would almost certainly be in breach of article 11 of the European Convention of Human Rights but is possible.
>
> Anti Roads protests are becoming more frequent and usually involve protesters attempting to prevent workmen cutting down trees, using earth moving equipment etc. This could be considered to be harassment of the workmen rendering the protesters liable to arrest and prosecution.[862]

981. In the context of protests, the Government was said to have extended the scope of the PHA deliberately in that area when it introduced collective harassment in 2001: "In its response to its own 2001 consultation on animal rights extremism, the Labour Government asserted that it should be "an offence for a group of people to collude with each other to cause

[861] Neil Addisson and Timothy Lawson-Cruttenden, Blackstones Guide to the Protection from Harassment Act 1997 (Chapter2).
[862] *Ibid.*

harassment, alarm or distress where each of the perpetrators only undertakes one act of harassment."[863]

982. ARTICLE 19, an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information, submitted to the United Nations Human Rights Committee that the Protection from Harassment Act 1997 is "so broadly worded that it has been used to prevent demonstrations."[864] They suggested to the Committee to pose, among others, the following question to the United Kingdom:

> Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?[865]

983. The restrictions of the PHA on freedom of assembly recently came to the attention of the United Nations Special Rapporteur in its 2013 visit to the United Kingdom. In its news release, it noted that,

> …another area of concern to me is the use by private companies of civil injunctions, under the Protection from Harassment Act 1997, to stop peaceful protests. Such injunctions are reportedly difficult to challenge. The issue of aggravated trespass, to curtail the right to freedom of peaceful assembly, is also very problematic, especially in the context of the increasing privatization of public space.
>
> The United Kingdom, like much of the world, is going through some tough economic challenges that will undoubtedly cause dislocation and discontent. It is in such difficult times, with angry and frustrated citizens, that the respect for freedom of peaceful assembly must be at its highest. To quote Martin Luther King, "the ultimate measure of a man [country] is not where he stands in moments of comfort and convenience, but where he stands at times of

[863] David Mead, "A chill through the back door? The privatised regulation of peaceful protest" (2013) *Public Law* 100, p 107 ("Mead").
[864] "Submission to the 91st Session of the United Nations Human Rights Committee on Respect for Freedom of Expression in the United Kingdom of Great Britain and Northern Ireland" (London, October 2007), ("Freedom of Expression Submission"). This submission was supported by case law, discussed earlier.
[865] Freedom of Expression Submission, p 12.

> challenge and controversy." That is the challenge for the United Kingdom in these times.[866]

984. In fact, the PHA has been criticized "as being a weapon for corporations against peaceful protesters to stifle legitimate protest"[867] as companies use the Act to apply for very broad injunctions (which can include any person who has notice of the injunction) to prevent any kind of protest against them. For example, the PHA has been used to shut down protests against militarism and climate change, and civil rights groups fear a "dangerous and undemocratic trend" lobbied by large corporations to limit the right to protest.[868]

985. Economic concerns flowing from allowing corporations to limit the right of protest have also being pointed out in the following way:

> Establishing a framework which allows commercial targets to seek injunctive relief against protesters raises clear concerns about allocating risk and defraying costs from the public purse and onto private interests.[869]

986. The trend by corporations of using collective harassment and the accompanying weapons under the PHA has been described by women's rights campaigners as a "legal hijacking", arguing that laws designed to protect women are being commandeered to stifle protest and undermine other rights.[870]

987. Other examples have been cited where the PHA has been used to intimidate peaceful protestors and punish almost all forms of dissent. The following passage gives the full picture of the concern:

> The law creates an offence of pursuing "a course of conduct which amounts to harassment of another". Harassment is defined as "alarming the person or causing the person distress". The act can be used to impose injunctions on

[866] *Statement by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the United Kingdom.*, 23 January 2013, accessible at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12945&LangID=E.
[867] http://www.guardian.co.uk/commentisfree/libertycentral/2009/jun/01/liberty-central-protection-harassment, accessed 3 February 2013.
[868] "Protection form Harassment Act 1997", *The Guardian*, 4 November 2009 ("The Guardian, 4 November 2009"), accessible at http://www.guardian.co.uk/commentisfree/libertycentral/2009/jun/01/liberty-central-protection-harassment.
[869] Mead, p 106. See also pp 109 to 115.
[870] *The Guardian*, 4 November 2009.

people, criminalising their previously lawful activities. As the injunctions use civil law to create criminal offences, they require a much lower standard of proof: hearsay evidence and untested and unproven allegations can be used to criminalise any action the police or the courts wish to stop.

In 2001, the act was used to prosecute protesters outside the US intelligence base at Menwith Hill, who were deemed to have distressed American servicemen by holding up a placard reading "George W Bush? Oh dear!" In the same year a protester in Hull was arrested under the act for "staring at a building". In 2004, police in Kent arrested a woman who had sent two polite emails to an executive at a drugs company, begging him not to test his products on animals. In 2007, the residents of a village in Oxfordshire were injuncted from protesting against a power company's plan to fill their lake with fly ash – in case they caused alarm or distress to the company's burly security guards.

Having discovered what a useful tool it had become, in 2005 the government amended the act in a way that seemed deliberately to target peaceful protesters and smear them as stalkers. Originally you had to approach one person twice to be "pursuing a course of conduct"; now you need only approach two people once. In other words, if you hand out leaflets to passers-by which contain news that might alarm or distress them, that is now harassment. The government slipped in a further clause, redefining harassment as representing to "another individual" (ie anyone) "in the vicinity" of his or anyone else's home (ie anywhere) "that he should not do something that he is entitled or required to do; or that he should do something that he is not under any obligation to do". This is, of course, the purpose of protest. These amendments, in other words, allow the police to ban any campaign they please. Surreptitiously inserted into the vast and sprawling 2005 Serious Organised Crime and Police Act, they were undebated in either chamber of parliament.

…So who can blame Powell-Von Heussen[871] for being unable to face the monster to which she unwittingly gave birth? The government, police and

[871] She was the victim of an aggressive stalker for 17 years and campaigned for an anti-stalking law.

> corporations have used the law she requested to ban people from acting very much as she did: peacefully seeking to change the way the world is run.[872]

988. On the form of harassment to deter lawful activities added in 2005, it was expressed that legislative changes were bringing "a wider private law framework of control and regulation."[873] This is evidenced in the explanatory notes to the PHA "the amendment was aimed at activities 'involving threats and intimidation which forces an individual or individuals to stop doing lawful business with another company or with another individual.'"[874] The concern was put as follows:

> control is becoming as much a function of private law as it is of the criminal law .... There is real concern that our right to dissent, to persuade and to make known our views might be at the mercy of unaccountable private commercial hands, the very targets of the protest. [875]

989. In relation to the injunction to deter protests obtained by the *British Airports Authority (BAA)*,[876] the newspaper *The Independent* expressed its discontent of the effect of limiting the scope of freedom of expression. The editorial article made strong remarks against the PHA as follows:

> The 1997 Protection from Harassment Act was designed to protect vulnerable individuals from stalkers, not to shield corporations from legitimate protest. Yet that was the law on which BAA built its case…The Government should dismantle the authoritarian legislative apparatus it has established by stealth in recent years. And in doing so it will send a firm message that public bodies in

[872] "Why Protesters are now stalkers," *The Guardian*, 5 February 2009, accessible at http://www.guardian.co.uk/commentisfree/2009/feb/05/anti-stalking-liberty-central
Similar comments are found in "High Court Injunctions- the weapon of choice to slap down protest." *The Guardian*, 27 October 2009, accessible at http://www.guardian.co.uk/uk/2009/oct/27/high-court-injunctions-protests
[873] Mead, p 106.
[874] Mead, p 106. The Explanatory Note referred to is Note 304 of the Serious Organised Crime and Police Act 2005, accessible at http://www.legislation.gov.uk/ukpga/2005/15/notes/division/6/1/14/1
[875] Mead, pp 115-116.
[876] *Heathrow Airport Ltd & Ors v. Garman & Ors* [2007] EWHC 1957 (QB).

> Britain - both governmental and commercial - have no right to gag their critics.[877]

990. A Memorandum submitted to the Human Rights Committee by political activist Barnaby Pace, a 4th year engineering student at Warwick University, to the Joint Committee on Human Rights in 2009, denounced the PHA as "one of the most worrying subversions of legislation in recent years…(and reinforced by the SOCPA act)."[878]

991. In May 2009,[879] the Government took the view that the PHA "contains adequate safeguards to prevent innocent people from being caught by the offences that it creates"[880] due to, among other things, its three defences. To further assure the public, it reiterated that the PHA was "not intended to criminalise people who campaign lawfully against particular activities or businesses and the Government does not believe it has this effect."[881]

992. In relation to the Joint Committee on Human Rights' recommendations about changes to Practice Direction 39 and 25 of the Civil Procedure Rules[882] relating to injunctions brought against protestors under the PHA, the Government did not accept the Committee's recommendations, which had been put in the following terms:

> …we are concerned that the Protection from Harassment Act 1997 (which was not designed to deal with protestors, but has developed over time to encompass this area of activity) has the potential for overbroad and disproportionate application. We do not consider that, in the usual course of events, there is any pressing need for applications against protestors to be made without providing the possibility for protestors to make representations on the proposed injunction. This is particularly so given the potential risk of

[877] "Protest and survive: the fight to protect free speech goes on," *The Independent,* 7 August 2007, accessible at http://www.independent.co.uk/voices/editorials/leading-article-protest-and-survive-the-fight-to-protect-free-speech-goes-on-460534.html.
[878] See Memorandum submitted by Barnaby Pace at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/141/141we39.htmThe SOCPA refers to the Serious Organised Crime and Police Act 2005.
[879] *The Government Reply To The Seventh Report From The Joint Committee On Human Rights Session 2008-09 Hl Paper 47, HC 320 (*"The Government Reply May 2009"*)*, accessible at http://www.official-documents.gov.uk/document/cm76/7633/7633.pdf
[880] The Government Reply May 2009, p 6.
[881] The Government Reply May 2009, p 6.
[882] These Rules have been discussed in Parts 4 and 5 above.

> substantial costs faced by protestors who seek to amend or revoke an injunction once it has been granted.
>
> We recommend that the Government reverse the presumption that hearings for protection from harassment injunctions are held in private, where they relate to the activities of protestors. Practice Direction 39 to the Civil Procedure Rules should be amended to make clear that applications for injunctions relating to protests are not covered by paragraph 1.5. In addition, and applying the same reasoning, we recommend that Practice Direction 25 be amended to ensure that applications for injunctions relating to protest activities may not be made without notice being given to any individuals or organisations named on the application. These recommendations will assist the courts in ensuring that injunctions against protestors are necessary and proportionate within the context of the rights to freedom of speech and peaceful assembly.[883]

993. The Government did not address the absence of specific defences or any unjust result in individual cases. Its response is recorded as follows:

> The Government notes the evidence which has been submitted to the Committee by the Save Radley Lakes campaign[884] setting out concerns about the way in which an injunction was granted by the High Court and served against the campaign. While the Government would not wish to dispute the evidence submitted, we are not convinced of the need to amend the Civil Procedure Rules in the absence of further evidence of a problem in this area. The Government would be happy to look at this if further evidence of a problem were provided. We agree with the Committee that the courts should ensure that injunctions are necessary and proportionate within the context of rights to freedom of assembly and free speech.[885]

[883] Joint Committee on Human Rights, Parliament of the United Kingdom, *Demonstrating respect for rights? A human rights approach to policing protest*, 23 March 2009, HL 47-I/HC 320-I, paras 99-100 ("Joint Committee 23 March 2009"), accessible at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47ii.pdf
[884] This was in relation to the RWE Npower case as discussed in Part 4 above.
[885] The Government Reply May 2009, p 6.

994. In a 2010 supplementary response,[886] the Government looked again at the Committee's recommendations about changes to Practice Direction 39 and 25 of the Civil Procedure Rules (CPR) in relation to injunctions brought against protestors under the PHA. However, it maintained its previous stance. It said:

> The Government remains unconvinced of the need to make changes and as requested we set out our reasons below in full.
>
> The Committee's concerns are centred on its belief that interim injunctions can restrict peaceful protest. The Government considers that the Rules provide sufficient safeguards to ensure that those who are the subject of injunctions have the opportunity to make representations and the Civil Procedure Rules Committee would be unlikely to be convinced about the need for change on the basis of what appears to be an isolated case.
>
> CPR 25, applies to *all* interim remedies, not just those under the Protection from Harassment Act 1997. An application for an interim remedy made without notice to the other side will not be successful unless the courts consider that there are good reasons for not giving notice (CPR 25. 3).
>
> Practice Direction 25 provides further safeguards. For example, paragraph 3.4 provides that where an application is made without notice to the respondent, the evidence must also set out why notice was not given. Paragraph 5.1 provides that
>
> > Any order for an injunction, unless the court orders otherwise, must contain (amongst other things):
> >
> > (1) an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay;

[886] Joint Committee on Human Rights, Parliament of the United Kingdom, *Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008-09*, 3 February 2010, HL 45/HC 328 (" Government Reply 2010"), accessible at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/45/45.pdf

(2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable; and

(3) if made without notice to any other party, a return date for a further hearing at which the other party can be present.

Therefore, even if an application comes before a judge without notice, and evidence is only presented by the applicant, it does not necessarily follow that the judge will make the order requested. The judge could dismiss the application altogether; could order it to be heard on notice with both parties present; or could make an interim order. Where an interim injunction is issued without notice to the other party, a further hearing date will be fixed for the purpose of allowing the respondent to attend to either defend the matter or to apply to vary or set aside the order.

If we were to alter CPR 25 so that an interim remedy could not be applied for without notice in certain circumstances such as protest activities, we would have to define the circumstances and define protestors. It would be difficult to create appropriate definitions that could not be exploited by those intent on harassment or intimidation given there is no legal definition of a protestor and anyone could claim to be engaged in protest activity.

More significantly, we are not convinced that the interests of justice would be served by removing the possibility of an interim injunction without notice in relation to protestors. A small number of individuals associated with single issue protest campaigns have pursued a determined course of criminal activity that amounts to harassment and intimidation of targeted individuals. The Government is clear that such targets should have the same protections from harassment as any other victim of harassment.

Nor are we convinced by the Committee's argument that CPR 25 should be changed because, "the potential risk of substantial costs faced by protestors who seek to amend or revoke an injunction once it has been granted" is greater than if they had been able to make representations at the initial hearing. Costs

> could be similarly incurred if an individual had the opportunity to contest an interim injunction prior to it being granted.
>
> In relation to CPR 39, paragraph 1.5 of Practice Direction 39 which requires hearings, including proceedings brought under the Protection from Harassment Act, to be listed by the court in private, we are not convinced of the need to reverse this presumption.
>
> Although it is clearly possible for an initial hearing to take place without notice being given to the respondent under CPR 25, paragraph 1.5 of Practice Direction 39 does not exclude the respondent from a hearing in private. A private hearing would include only the people involved in the case, their witnesses and solicitors. Additionally, although applications under the Protection from Harassment Act 1997 are listed as private hearings, this does not preclude parties making representations to the Judge for the matter to be heard in public. The Government does not therefore see the need to review Practice Direction 39.[887]

995. The Joint Committee on Privacy and Injunction pointed out to the inequality of arms between litigants under the PHA which could lead to unjust settlements:

> The overlay provided by the Protection from Harassment Act is frequently relied upon by applicants for super-injunctions. Again, an assessment of alleged harassment is very fact sensitive and where there is a stark inequality of arms (and, particularly, funding) between the parties, the poorer party will typically be unable to take the costs risk of litigating a fact-sensitive issue, at vast expense, with an uncertain outcome. This too may lead to unjustified concessions by way of settlement, which, ironically lead to the courts feeling that they are making the correct appraisal of these cases. This iterative loop is likely to be highly misleading over time and lead to judicial over-confidence.[888]

[887] Government Reply 2010, p 16.
[888] Joint Committee on Privacy and Injunctions – Oral and Written Evidence (2011), para 42.

996. With regard to the specific stalking offences, before such offences were inserted in the PHA 1997, a review of Act was conducted by the UK Home Office by way of consultation, between 14 November 2011 and 5 February 2012. The consultation "sought the views of key partners and directly affected parties, including the police, practitioners, and other Government departments and organisations with a direct interest in preventing stalking."[889]

997. Several respondents to the consultation observed that the offences in the PHA 1997 were being used on protesters. They regarded this as a "threat to freedom of expression".[890] The Government, which focus was on the new proposed offence of stalking, did not respond to those comments. Rather, it noted that the proposed offence was justified in light of public concern.

998. As noted above, the restrictions of the PHA on freedom of assembly have recently come to the attention of the United Nations Special Rapporteur in its 2013 visit to the United Kingdom. It is unknown whether a Government response to those concerns would be forthcoming.

999. Mr. Justice Tugendhat, in answering questions for the Joint Committee on Privacy and Injunction reminds us that the PHA was passed before the Human Rights Act 1998. He also mentioned that the PHA, which is a privacy statute has been applied to the media:

> It was passed to deal with the problem of stalkers, as everybody knows. I do not think it was contemplated by Parliament when it was passed that it would apply to the media. It did not take more than a year or two for the courts to decide that it did apply to the media, in the case of *Thomas v News Group Newspapers*. We apply it, as you know; I granted an injunction under it last week.[891]

1000. Finally, it is worth-mentioning that an attempt to abolish the Human Rights Act 1998 and related legislation has recently failed. The Human Rights Act 1998 (Repeal and

[889] "Review of the Protection from Harassment Act 1997: Improving protection for victims of stalking"- Summary of Consultation Responses and Conclusions, July 2012, p 3 ("Consultation 2012").
[890] Consultation 2012, pp 7, 15, and 19.
[891] Joint Committee on Privacy and Injunctions – Oral and Written Evidence (2011), Q518.

Substitution) Bill had its first reading on 25 June 2012. A motion for the bill's second reading was moved on 1 March 2013, but was withdrawn at the end of the debate.[892]

1001. In conclusion, public 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,[893] injunctions under the PHA have continued to apply to the media as shown in Part 4.1 above.

7.2. Australia

1002. Prior to the expansion of defences under the Queensland stalking law in 1999, the Model Criminal Code Officers Committee (MCCOC) had noted that the Queensland stalking offence was problematic because, among others, it contained a limited vague exception of 'public interest' and 'genuine industrial dispute' in (the old) section 359A (4).[894] It was problematic on the basis that it was uncertain as to whether investigative journalism and

[892] The Bill as introduced is accessible at http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0031/2013031.i-ii.html

[893] See for example, Joint Committee on Privacy and Injunctions – Oral and Written Evidence (2011).

[894] Model Criminal Code Officers Committee, *Non-fatal offences against the person,* October 1998; see section on stalking, para 5.1.22 onwards ("MCCOC"); accessible at http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/mcloc_mcc_chapter_5_non-fatal_offences_against_the_person_report.pdf
The old section 359A (4) read:
"It is a defence to a charge under this section to prove that the course of conduct was engaged in for the purposes of a genuine industrial dispute; or political or other public dispute or issue carried on in the public interest."
The current relevant section reads:
"**359D Particular conduct that is not unlawful stalking**
Unlawful stalking does not include the following acts—
(a) acts done in the execution of a law or administration of an Act or for a purpose authorised by an Act;
(b) acts done for the purposes of a genuine industrial dispute;
(c) acts done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest;
(d) reasonable conduct engaged in by a person for the person's lawful trade, business or occupation;
(e) reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving."

protests for causes other than industrial disagreement, such as heritage protection, peace and anti-abortion, would fall under the exception of 'public interest.'[895]

1003. The expansion of the defences, "coupled with the requirement for reasonableness in section 359B (d) also go some way to ameliorating the harshness of the liability imposed."[896] Furthermore, after the amendments, there is no longer a reversal of onus for the defences to the defendant.[897]

1004. On the interaction of freedom of expression, protests and the public interest defence under the Queensland anti-stalking legislation, it has been accepted that the legislation is not designed to halt peaceful protests.[898] On the other hand, it has been cautioned that the legislation might impose restrictions on email campaigns, which are widely used by several organizations, such as Amnesty International, as a form of protest.[899]

1005. Besides the comments in Part 6.2.2 above, there have been no comments about Victoria's impact on the relevant freedoms after amendments to the legislation.

7.2.1. Stalking and social media

1006. The concerns in Australian have focused on cyber-stalking. State stalking laws might be used to prevent an individual from publishing material on a social media page, such as Facebook. This is the warning as a result of an academic being "barred from visiting a Facebook page of another person after reaching an out of court settlement."[900] The particular Facebook page had started a debate relating to funding cuts at a university in Victoria. The case did not involve stalking laws but has given rise to the possibility that stalking legislation might be used to control interaction through social media.

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[895] MCCOC, para 5.1.23.
[896] Sally Kift, "Stalking in Queensland: From the Nineties to Y2K" (1999) 11(1) *Bond Law Review*, 144, 155; accessible at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1163&context=blr ("Kift").
[897] Kift, 154.
[898] Daniel Sullivan, 'A critical analysis of Queensland's cyberstalking legislation' (2002) *New South Wales Society for Computers and the Law Journal* 48, accessible at https://www.nswscl.org.au/index.php?option=com_content&view=article&id=71:a-critical-analysis-of-queenslands-cyberstalking-legislation&catid=20:june-2002-issue&Itemid=31
[899] *Ibid.*
[900] Find Law Australia, "Can Australian stalking laws be applied to social media?" (undated), accessible at http://www.findlaw.com.au/articles/4272/can-australian-stalking-laws-be-applied-to-social-.aspx, accessed on 22 February 2013.

1007. Attention has been drawn to Queensland's specific exemption if the acts are "done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest." Thus if the publishing of the material on the Facebook page was done for such genuine purposes, the person publishing such material would be presumably exempted from liability under the Queensland statute.[901] However, this is uncertain.

1008. It is also possible, but also uncertain, that the individual would also be able to rely on Victoria's specific defence that his conduct was "for the purpose of engaging in political activities or discussion or communicating with respect to public affairs."

1009. Both Queensland and Victoria expressly prohibit stalking via social media and other means of cyberstalking. Section 359B of Queensland Criminal Code explicitly includes 'contacting a person…through the use of any technology' in the definition of unlawful stalking. Section 21A of the Crimes Act 1958 of Victoria also specifically includes acts relating to e-mail or other electronic communication as the definition of stalking. Both Queensland and Victoria laws do not require actual apprehension or fear to arise from the complainant, but Queensland's intent requirement is more explicit as it requires the intent to direct the act at the complainant ("Unlawful stalking is conduct- intentionally directed at a person.")

1010. In fact, anti-stalking legislation has been used to control interaction through social media.

1011. For example, in ***R v. Paul Malcolm Hender*****son**,[902] the Queensland Court of Appeal unanimously upheld the conviction involving social network websites and sentencing of unlawful stalking with a circumstance of aggravation under section 359B of the Criminal Code. In this case, the defendant never met with the complainant but communicated with her through dating websites, Facebook and text messages, and persisted in sending offensive and even life-threatening messages despite her refusal. Thus those acts of sending the messages were directed at her.

1012. The appeal failed on the unsuccessful argument of the trial judge's misdirection. It was held that the trial judge had properly directed the jury on all the elements of

[901] *Ibid.*
[902] [2013] QCA 146,accessible at http://archive.sclqld.org.au/qjudgment/2013/QCA13-146.pdf

'circumstances' as found under section 359A of Criminal Code.[903] The appellant challenged the direction on the basis that the trial judge had not pointed out to the jury the statutory definition of 'circumstances' and therefore led them to consider only the perception of the complainant but not how the complainant responded to the messaging.

1013. However, regardless of the absence of reference to statutory meaning, the Court of Appeal held that the result would not have differed had ordinary meaning been applied. In particular, Mullins J noted that the statutory meaning of circumstances is limited by section 359 C (4) and (5) which provide that it is irrelevant to consider the intent to cause apprehension or fear and whether apprehension or fear was actually caused. Therefore, it was sufficient for the jury to look at any apprehension or fear that reasonably arose from the circumstances in accordance with its plain meaning.

1014. The trial judge in his direction to the jury, which was generally approved by the Court of Appeal, had referred to the messages as the "defendant's conduct" and did not try to distinguish between speech and conduct.

1015. In another case, the County Court of Victoria encountered an incident involving social media where a woman named Tanya Maree Quattrochi pleaded guilty to stalking Diana Degarmo, a runner-up in the America Idol contest, by hacking into her MySpace account and intercepting the emails of hers, her family and friends.[904] No further relevant details have been made available.

1016. Another case relating to social media also arose in Victoria, in ***Wilson v. The Queen***,[905] where the defendant had been charged with three stalking offences under section 21A, involving CF, CH and NK, by repeatedly transferring their pictures to various pornographic sites and posting comments about them. The appellate court described the stalking charges in the following way. Essentially, the applicant accessed photographs of CF

[903] "***circumstances*** means the following circumstances—
(a) the alleged stalker's circumstances;
(b) the circumstances of the stalked person known, foreseen or reasonably foreseeable by the alleged stalker;
(c) the circumstances surrounding the unlawful stalking;
(d) any other relevant circumstances."
[904] Mariza O'keefe, "American Idol cyber-stalker was jailed", The Age, 29 May 2009, accessible at http://news.theage.com.au/breaking-news-national/american-idol-cyberstalker-jailed-20090529-bpnz.html
[905] [2012] VSCA 40, accessible at http://www.garrycollins.com.au/Court%20of%20Appeal/[2012]%20VSCA%2040.pdf

and HP online from various social networking websites. He posted those photographs on pornographic sites, some of which were based overseas. The photographs appeared in close proximity to those of women who bore a resemblance to both CF and HP, making it seem as though CF and HP were featured in the sites themselves. The women depicted on the pornographic sites were shown either nude, or participating in sexual activity of some kind.

1017. The applicant further linked the photographs of both CF and HP to the pornographic sites by means of a series of anonymous comments referring to them by name, and/or description. The overall effect was to create the impression to anyone accessing that site that CF and HP were involved in pornography. In relation to NK, the applicant did not attach any photographs to any pornographic site, but nonetheless did link her to those sites through various comments that he made.

1018. If anyone sought from Google any of these three names, they would be directed at once to the sites in question. They would naturally assume that each of the victims had participated voluntarily in whatever was to be seen on that site.

1019. The appeal was dismissed without a review of the elements of the offence or defences. In fact the applicant had pleaded guilty but argued that his plea had been entered under duress. The judges held that the conviction was not affected by how many times the trial judge considered the transfer of pictures and the number of comments posted so long as there have been repeated occurrences.

1020. Moreover, as the judge was passing sentence after a guilty plea, the appellate court did not consider it problematic that the trial judge had relied on the victims' impact statements which detailed the particulars of their stories. One example cited that "CF said that she was so affected by what the applicant had done to her that she had moved away from her home town, in order to get away from him. Indeed, she said that she had taken the extreme, but necessary, step of legally changing her name. She said, credibly, that she had been profoundly, and permanently affected by the applicant's conduct."

1021. Stalking via other internet means has also been prosecuted in ***DPP v. Sutcliffe***[906] where the Australian defendant sent offensive e-mails, amongst others, to the victim residing

[906] [2001] VSC 43.

in Canada. While this case shows how the court has brought internet stalkers to justice, the main issue in this case was jurisdiction. The court held that the stalking legislation had extra-territorial effect and therefore Victoria was an appropriate jurisdiction. To confine the conduct to have its effect only in Victoria, as noted by Gillard J, would stultify the legislation and make it unworkable in cases that are clearly stalking. This, therefore, could not have been the intention of Parliament.

1022. At present, the extra-territorial effect of the anti-stalking law in Victoria is confirmed by sections 21A (6) and (7) of Crimes Act 1958. Both the magistrate and the appellate judge considered the e-mails as a course of conduct and did not single out any speech as primary factor of a conviction in unlawful stalking.

1023. One of the challenges of cyber-stalking probably lies in determining repeated events. For instance, any unsolicited communications sent in rapid succession may be problematic to prosecution in ascertaining whether they are repeated events or a single instance.[907]

1024. A comparison with the above cases can be made with a case directly involving threatening communications on Facebook found in the Australian Capital Territory (ACT), an area enclosed by New South Wales. In ***Agostino v. Cleaves***[908] the offence was not one of stalking but the using of Internet in a way that reasonable people would think was menacing, pursuant to section 474.17(1) of the Criminal Code 2005 (Commonwealth). This is a typical case involving social networking sites where the Supreme Court of the ACT dismissed the appeal and held Agostino liable for posting threatening messages on the personal profile site of the victim and his relatives on Facebook, as well as uploading pictures of pistols and bullets to his own Facebook profile sites.

1025. No case has specifically addressed the online stalking problems arising from trades, professions, news-gathering, demonstration or other activities. It has been widely noted that the major problem of cyberstalking lies with enforcement and the issues of conduct element.[909]

[907] Jonathan Clough, *Principles of Cybercrime*, Cambridge University Press (1st edn, 2010), 376.
[908] [2010] ACTSC 19.
[909] Louise Ellison and Yaman Akdeniz, 'Cyber-stalking: the Regulation of Harassment on the Internet' [1998] Criminal Law Review, December Special Edition: Crime, Criminal Justice and the Internet, accessible at http://www.cyber-rights.org/documents/stalking_article.pdf ; Judge David Harvey, Cyber-stalking and Internet

1026. Finally, to tackle cyber bullying, a rising problem affecting mainly the teenage population in Australia, the Victoria Crimes Act 1958 introduced provisions through the Crimes Amendment (Bullying) Act 2011.[910] Now, a "course of conduct" also includes the making of threats, the use of offensive words, and the performing of abusive or offensive acts. This amendment came into force in mid 2012 and would also impact on Internet servers. There seems to be no comprehensive assessment of teenage cyber bullying and how the new laws would impact on freedom of expression in new generations.[911]

7.3. New Zealand

1027. Although at the time of its enactment, little attention was given to the HA 1997, increasingly the Act has shown signs of "potentially oppressive application" for social relations and individual freedoms and rights in New Zealand.[912]

1028. For example, given the recent proposals to amend the HA to include a specified act by way of electronic communication, and other related plans to control speech in general, it has been suggested that the New Zealand Government, as well as that of Great Britain, is looking "for any possible excuse to shut down internet freedom."[913] It has been commented that:

> Free speech is the absolute cornerstone of a free society. All too often it is silenced "For the good of the people" by governments. The trouble is that Governments tend to chip away at people's rights very slowly. Just 1 nibble at a time. That way, the citizens tend not to notice it before it's too late.[914]

1029. In a submission to a Panel of the Social Services Select Committee (SSSC) in 2011, the person aggrieved, Mr Axford, explained how the HA 1997 was being used to stifle his

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Harassment: What the Law Can Do, 2003, accessible at http://www.netsafe.org.nz/Doc_Library/netsafepapers_davidharvey_cyberstalking.pdf; Angela Maxwell, Cyberstalking, June 2001, accessible at http://www.netsafe.org.nz/Doc_Library/cyberstalking.pdf;

[910] The Bill is accessible at http://workplacebullying.org/multi/pdf/Brodies-law.pdf.

[911] For a description of the forms cyber-bullying can take, see "Cyber bullying and Australia," Mibba Creating writing (undated), accessible at http://www.mibba.com/Articles/People/3673/Cyberbullying-and-Australia/, accessed on 22 February 2013.

[912] Mountfort,Part I.

[913] See comments on the "Editorial: Centuries of Press Freedom under threat", *The New Zealand Herald*, 3 May 2012, accessible at http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=10803103; accessed 26 February 2013.

[914] See comments of Anette Novak, "Free speech: a fundamental right", *The New Zealand Herald*, 3 May 2012, accessible at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10803056; accessed on 26 February 2013.

freedom of demonstration and protest when he complained against mainly Child Youth and Family (CYF) and the Ministry of Social Development (MSD):

> They claimed I have taken things too far and was harassing their staff and making it unsafe for them because of my protesting. How quickly they could try and turn it around in me to the point they reversed the roles and cast themselves as victims and I the perpetrator and claimed I made it personal.[915]

1030. The submission pointed out that the Police believed the protest actions were in a form of harassment affecting the CYF staff. However, it was submitted that the protest had never been towards any specific CYFS staff member, but towards the organization of CYF as a whole as there was never any individual identified and therefore not any action fitting the definition of harassment under the HA 1997. Furthermore, it was submitted that it was highly doubtful that the techniques of protest employed were capable of causing any staff member to fear for his or her safety. This is a clear example of Police misuse of the HA 1997 to curtail freedom of protest and demonstration.

1031. In a supplementary written submission to the SSSC which sought to clarify matters,[916] Mr Axford summarized the responses he received during hearings held by the Chief Executive's Advisory Panel (CE Panel). For example, in April 2012, the CE Panel accepted that Mr Axford's time and energy in "responding to what he sees as poor quality work and abuses of power by Child, Youth and Family stems from his concern for the wellbeing of children and their families."[917] It was clarified through a submission by a doctor from the CYF that in fact Mr Axford had not targeted individual staff. However, this last part was not made public. The consequence for Mr Axford was that people who used to support him withdrew their support because of the harassment accusations; when in fact there was no harassment behaviour in his actions at all.

1032. Lawyers for Mr Axford sent a letter to the Police indicating that Mr Axford had "never identified any individual in his protests nor has there been any action fitting the

[915] http://www.parliament.nz/NR/rdonlyres/31868E7D-7A30-47BD-B6F2-AEAC103A26DB/248252/50SCSS_EVI_49DBHOH_PET3061_1_A275959_GraemeAxfordS.pdf
[916] Supplementary: Graeme Axford to Petition and Submission 2011/33, at http://www.parliament.nz/NR/rdonlyres/18315014-95C5-43C9-A607-345BBB9A0E6A/248253/50SCSS_EVI_49DBHOH_PET3061_1_A275959_GraemeAxfordS.pdf
[917] *Ibid.*

definition of harassment under the Act…We therefore respectfully submit that the Police have no legitimate reason to prevent our client from engaging in a lawful exercise of his rights. Any attempts to limit our client's ability to protest would be a breach of his rights under New Zealand Bill of Rights Act and various other international legislations to which New Zealand is a party."[918] Mr Axford indicated in his written submission that since the letter to the Police, he was not bothered by them.

1033. Finally, on the application of the HA provisions to the media, it has been commented that "if engaged unreasonably, investigative journalism could arguably run the risk of attracting an application under the Act."[919]

7.4. Canada

1034. Overall, there did not seem to be too much in the way of public concern over negative effects on freedom of expression and other related freedoms immediately after the enactment of section 264 of the Criminal Code by the Parliament of Canada and the DVSA by the Parliament of Manitoba. Little evidence of these concerns can be found in newspapers, academic journals, or other publications during the immediate years following enactment (1993 and 1998, respectively).

1035. Neither the Canadian Association of Journalists nor the Canadian Journalists for Free Expression, the two largest journalists' association, have voiced out any concerns about criminal harassment charges being brought against the media. The Canadian Civil Liberties Association has not had concerns about misuse of the criminal harassment provisions as well.

1036. In recent years however, this discourse seems to have changed in Canada to a certain degree thanks in part to two high-profile (but unrelated) incidents. The first incident involved Rob Ford, the mayor of the City of Toronto. On 2 May 2012, Mayor Ford was involved in an altercation with a reporter, Daniel Dale, from a well-known daily newspaper, Toronto Star.[920] Ford alleged that the reporter was taking pictures over his backyard fence and into his private property. Police were called in and investigated the matter to determine whether the actions

[918] *Ibid.*
[919] Burrows and Cheer, p 282.
[920] "Agitated Mayor Rob Ford confronts reporter outside home", *CBC* News (2 May 2012) accessible at http://www.cbc.ca/news/canada/toronto/story/2012/05/02/toronto-ford-house-incident.html, accessed 29 March 2013.

of the Toronto Star reporter constituted "besetting or watching [Ford's] dwelling house" under section 264(2)(c) of the Criminal Code.

1037. The police investigations, which included looking at photos taken on the reporter's phone camera as well as Ford's private surveillance cameras, found nothing to substantiate the claims.[921] "Dale said he never stepped foot on Ford's property last Wednesday night, took no photographs over the fence, and was only researching a public interest story on the mayor's bid to buy public parkland adjacent to his property — a rare request for a private citizen."[922]

1038. While the reporter was never criminally charged and the matter never had its day in court, it ignited a media firestorm in which importance of freedom of the press was pitted directly against privacy interests in the context of criminal harassment as well as trespass on private property.[923] It also put in question whether the conduct of a member of the press in investigating a well-known politician ought to be treated differently than other persons under the criminal harassment analysis. On an interview, Mayor's brother declared:

> "It's done. It's just one of many things that we dealt with the Star, and there's going to be many more," he said. "As I said yesterday, I don't believe it's Daniel Dale. I believe he was sent there by his superiors and that goes back to their credibility.
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> "You don't go to the mayor's house, you know, without having approval from someone higher up. That's what I hear."[924]

1039. The second incident that put the public spotlight on the interaction between anti-stalking laws and freedom of expression was the tragic suicide of 15-year-old Amanda Todd of Port Coquitlam, British Columbia, Canada on 10 October 2012. The case revolved primarily around the issue of cyber stalking. An online stranger blackmailed Todd with a topless photo of her and eventually circulated the photo over the internet. Todd was

[921] "Police find 'no evidence' to charge reporter over confrontation with Mayor Rob Ford", The Star, 9 May 2012, ("The Star ,9 May 2012")accessible at http://www.thestar.com/news/gta/2012/05/09/police_find_no_evidence_to_charge_reporter_over_confrontation_with_mayor_rob_ford.html.
[922] *Ibid.*
[923] Edward Prutschi, "Rob Ford, Toronto Star Reporter And The Issue Of Legitimate Journalist Or Creepy Stalker" (podcast) accessible at http://crimlawcanada.com/media/prutschi/rob-ford-toronto-star-reporter-and-the-issue-of-legitimate-journalist-or-creepy-stalker/, accessed 29 March 2013.
[924] The Star ,9 May 2012.

subjected to continuous harassment at a number of different schools and eventually took her own life.[925] A YouTube video of Todd explaining the incidents through a series of written signs went viral and attracted over 14 million views as of 30 March 2013.

1040. The Todd case galvanized public support for efforts dealing with cyber stalking and cyber bullying in a more comprehensive manner. It also highlighted the gap between existing legislation protecting victims of harassment and new realities brought about by the proliferation of the internet, e-mail, and social media.

1041. Prior to the Todd case, a Private Member's Bill, Bill C-273, entitled "An Act to Amend the Criminal Code (Cyberbullying)" had been introduced for first reading on 19 September 2011.[926] The Bill amended existing sections of the Criminal Code (viz. sections 264, 298, and 372) to include electronic manifestations of the respective offences.[927] Specifically, section 264 would have been amended to include conduct that was communicated by means of a computer or a group of interconnected or related computers, including the internet, or any similar means of communication. Similar amendments were proposed in relation to section 298, which covers defamatory libel, and section 372, which covers false messages.

1042. On 27 March 2013, the House of Commons concurred with the Standing Committee on Justice and Human Rights not to proceed any further with Bill C-273, primarily due to concerns about redundancy (in that current provisions were broad enough to capture computer-based communications) as well as general concerns about further criminalization as a proper response to the problem of cyber bullying.[928] During the hearings conducted by the Standing Committee on Justice and Human Rights, freedom of speech and freedom of expression featured prominently in the concerns brought forward by witnesses. In particular,

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[925] Katina Dufour, "Amanda Todd case highlights issue of online bullying", *The Telegraph UK* (16 October 2012) accessible at http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9612030/Amanda-Todd-case-highlights-issue-of-online-bullying.html, accessed 29 March 2013.
[926] Canada, Bill C-273, An Act to Amend the Criminal Code (Cyberbullying), 41st Parl, 1st Sess, 2011, (first reading 19 September 2011).
[927] Nevena Urosevic, "Private member's bill proposes to amend the Criminal Code to address cyberbullying", *Borden Ladner Gervais LLC* (9 January 2013) accessible at http://www.lexology.com/library/detail.aspx?g=57289fed-921c-4771-a0e7-dee30852c1a1, accessed 28 March 2013.
[928] House of Commons, Votes and Proceedings, 41st Parl, 1st Sess, Vote No 654 (27 March 2013) accessible at http://www.parl.gc.ca/HouseChamberBusiness/ChamberVoteDetail.aspx?FltrParl=41&FltrSes=1&Vote=654&Language=E&Mode=1, accessed 29 March 2013.

reference was made to Professors Lyrissa Lidsky and Andrea Pinzon Garcia of the University of Florida, Levin College of Law, who argued that criminalization of cyber bullying posed a threat to freedom of speech.[929]

1043. In defending Bill C-273, Hedy Fry, MP for Vancouver Centre, responded that:

> in every democratic society we have to find that balance between having freedom of speech or freedom of expression and inflicting serious and severe harm. That's where the Criminal Code has defined certain elements on which freedom of speech infringes, things like hate speech.[930]

1044. Reference was also made during the hearings to the idea that "the level of protection to which expression may be entitled will vary with the nature of the expression. The further that expression is from the core values of this right [as with the offence of defamation] the greater will be the ability to justify the state's restrictive action."[931]

1045. This "hierarchy of expression" idea may have been brought forward as a conceptual tool to help demarcate where the line was to be drawn between unacceptable online harassment and freedom of expression on the internet.

1046. Finally, a more recent case has been reported by the media about a university student who posted a photo of an anti-police graffiti on her Instagram account.[932] The photo showed a drawing of a high-ranking police officer, who frequently appeared in the media during student protests, with a bullet hole in his forehead. She claimed that she did not draw the graffiti. She was arrested and charged with criminal harassment and intimidation against the police officer. Since the charge was brought over posting a photo, rather than drawing it, this case could presumably have implications for the media who also post such photos. The repercussions of this case remain to be seen. So far, the Canadian media such as CBC has not

[929] House of Commons Debates, Standing Committee on Justice and Human Rights, 41st Parl, 1st Sess (25 February 2013) at 1600 (Robert Goguen) accessible at http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5998689&Language=E&Mode=1&Parl=41&Ses=1, accessed 28 March 2013.
[930] *Ibid* at 1601 (Hon Hedy Fry).
[931] *Ibid* at 1552 (David Wilks).
[932] "Anti-police graffiti photo posted online, gets Montreal woman formally charge," CBS, 17 April 2013, accessible at http://www.cbc.ca/strombo/alt-news/montreal-woman-formally-charged-for-posting-photo-of-anti-police-graffiti-online.html.

picked up such implications for media, and has treated it as raising an issue of "policing in social media", rather than a press freedom issue.

1047. A number of persons have commented on this incident on the Internet to the main effect that the law is applied to protect those with power but not the real victims.[933] One commentator expressed his views in the following way:

> The charter protects her right to free speech. It's a stretch to call the image itself a threat, and posting a picture of it is nothing more than an act of citizen-journalism or artistic commentary. If the police take death threats so seriously, where are they in aggressively prosecuting the thousands of domestic disputes that result in death threats every year?[934]

7.5. US

1048. Concerns about the constitutionality of stalking legislation largely arose after their being passed into law in a considerable number of states. In 1992, for example, after around 20 states had passed stalking legislation, Christian Science Monitor quoted the American Civil Liberties Union as having said that some of the anti-stalking laws could be overbroad. One of the worries was that anti-stalking laws could be applied to "restrict investigative reporters' attempts to get an interview with a public figure."[935]

1049. In another report by Associated Press, Vivian Berger, Vice Dean of Columbia Law School, was quoted for her concern that some anti-stalking laws "could trample constitutional protections of free speech and movement."[936]

1050. The anti-stalking laws in California and Nevada both did not cause much public concern over their constitutionality. However, in many other states, there were concerns either of overbreadth or vagueness. Recent attempts to expand anti-stalking laws, in particular related to cyberstalking, have often met constitutional challenges and public backlash.

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[933] *Ibid.* Comments posted.
[934] *Ibid.*
[935] Elizabeth Ross, 'Problem of Men Stalking Women Spurs New Laws' *Christian Science Monitor* (Boston, 11 June 1992), http://www.csmonitor.com/1992/0611/11061.html.
[936] Kiley Armstrong, 'Tortured Suitors: What Makes Them Tick?' *Associated Press* (New York, 12 November 1992), http://www.apnewsarchive.com/1992/Tortured-Suitors-What-Makes-Them-Tick-/id-5692f8f2b3a806d3da40a984b02c28d8.

1051. For example, in 2011 the federal anti-stalking law was used to prosecute a man for posting criticism of a public figure on Twitter.[937] The law in question had been amended in 2005 to prohibit "a course of conduct that causes substantial emotional distress" and to include the use of "any interactive computer service" in such conduct. While the District Court of Maryland dismissed the charge, he ruled that the law was unconstitutional as applied to the facts, but it was not itself unconstitutional. The Electronic Frontier Foundation (EFF), a digital civil liberties group, criticized both the case and the law as unconstitutional and entered amicus curiae brief to the court against the government.[938] The Government's response by way of amendments to the provisions in 2012 has been heavily criticized as not clarifying the law but instead as opening the door for further litigation on First Amendment grounds, as those laws would restrict the freedom of expression. This has been more comprehensively discussed in Part 4.5.1 above.

1052. In 2012, an attempt in Arizona to expand the law to tackle bullying and stalking faced public backlash from the media sector.[939] Arizona House Bill 2549 attempts to make it a crime to use any electronic or digital device to communicate using "obscene, lewd or profane language" or to suggest a lewd or lascivious act, if done with the intent to "terrify, intimidate, threaten, harass, annoy or offend". The Media Coalition comprised of the Motion Picture Association of America, the Recording Industry Association of America, the Association of American Publishers and other groups, criticized the bill as violating the First Amendment.[940]

1053. Thus concerns over the impact of anti-stalking laws on freedom of expression have focused on the expansion of such laws to cover communication through electronic means.

7.6. South Africa

1054. It took more than a year for the PHA to come into operation after the Act was signed into law on 2 December 2011.[941] On 27 April 2013, the legislation became fully operative

[937] *United States v. Cassidy*, discussed in Part 4.5.1 above.
[938] "Judge: Prosecution of Online Critic Under Anti-Stalking Law Unconstitutional'" (*Electronic Frontier Foundation*, 15 December 2011), http://www.eff.org/press/releases/judge-prosecution-online-critic-under-anti-stalking-law-unconstitutional
[939] Suzanne Choney, "Arizona law would censor the Internet" *NBC News* (2 April 2012), http://www.nbcnews.com/technology/arizona-law-would-censor-internet-631407
[940] *Ibid.*
[941] The reasons why the PHA 2011 did not come into force over a year of being singed into law are unclear. Some suggested that the Government was involved in drafting regulations that would make the application of

with the Government emphasizing that the procedure for applying for protection orders is inexpensive and requires no legal representation. In a media statement, the Government announced that the PHA "seeks to afford protection to some of the most vulnerable in society who may be victims of harassment… it will for example, benefit the poor and indigent who are not able to afford expensive legal remedies, children who are subject to bullying in schools…, individuals who are being harassed by cyberstalkers and those who are subject to sexual harassment."[942]

1055. The Government also announced that Regulations of the PHA had been published in the Government Gazette on 12 April 2013 and have also come into effect. The Act is to be designated as the "Protection from Harassment Act, 2011 (Act No. 17 of 2011)."[943]

1056. Before the PHA came into force, but after it was enacted, concerns over the new law on issues such as employment relations were expressed, which may have a bearing on freedom of expression as employees and managers fear that their exercise of free speech might be further curtailed by the new provisions.

1057. Under the PHA, protection orders can be issued against any person who contravenes the provisions of the Act, but there is an overlap between the PHA and the Employment Equity Act, as both pieces of legislation cover protection against harassment:

> Interestingly, despite the fact that statutory protection against harassment in the workplace can already be found in the Employment Equity Act, harassment in the workplace is not excluded from the PHA. It is thus conceivable that a harassed employee may seek to have a protection order issued against a colleague or manager. This may have a significant impact on workplace relations and the employee relations climate in the workplace.
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> …

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the legislation clearer. See Bianca Capazorio, "Crucial stalker law still on hold," *Post*, 16 February 2013, accessible at http://www.thepost.co.za/crucial-stalker-law-still-on-hold-1.1471599

[942] "DoJ & CD champions anti-harassment Act", The Department of Justice and Constitutional Development, Media Statement -2013, 28 April 2013, available at http://www.justice.gov.za/m_statements/2013/20130428-pha.html

[943] "Regulations in terms of the Protection From Harassment Act, 2011" is available at http://www.justice.gov.za/view/DownloadFileAction?id=188137

> Resorting to serious interventions such as obtaining a protection order against a colleague could have disastrous consequences to workplace harmony.[944]

1058. It has been recently reported by the media that a man who was allegedly stalked by his ex-girlfriend for eight months, has claimed that he lost his job and friends as a result of the stalking. He would now use the PHA against her.[945] The alleged stalking behaviour occurred via text messages, originally from an unknown number. After the man hired a private investigator, he discovered that the text messages came from his ex-girlfriend. No more details have been made available. It would appear that this person is not "poor and indigent" (the people the PHA seeks to protect) as he has been able to afford engaging a private investigator.

1059. How the PHA is going to be applied in practice remains to be seen.

[944] "The New Protection from Harassment Act" in Human Strategy for Business, News section (undated) accessible at http://www.hrfuture.net/news/the-new-protection-from-harassment-act.php?Itemid=812, accessed on 22 February 2013.
[945] "Man to use new stalker law to fight ex", *News24*, 2 May 2013, available at http://www.news24.com/SouthAfrica/News/Man-to-use-new-stalker-law-to-fight-ex-20130502

PART 8

8. Recommendations for the Way Forward in Hong Kong

8.1. Overview of recommendations

1060. This report concludes with seven recommendations for the way forward, beginning with the general recommendation that more social science studies need to be done on the problem of stalking in Hong Kong. The main recommendation is that any new criminal or civil liability based on a person's stalking of another should exempt legitimate activities, such as news gathering activities, discussion of public affairs, lawful employment, unless those activities involve the use of violence, the threat of violence, intimidation or other illegal means.

1061. It is recommended that a new criminal offence of 'Stalking' be enacted within a new Part IVA of the Crimes Ordinance (Cap. 200). The proposed offence is not based on the UK model and thus does not entirely follow the LRC's recommendations in its 2000 report. The proposed offence is defined more clearly and narrowly. It criminalises a course of conduct consisting of at least two prohibited stalking acts (same or different acts) that cause a person reasonably to fear for one or another's safety. A list of prohibited acts will be specified. The mental element is either intention or recklessness; objective standards of *mens rea* will not suffice.

1062. Four categories of exemptions from criminal liability are proposed: (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 organization; (c) activities of a person carried out in the normal course of his or her lawful employment; and (d) activities of a person carried out for the sole purpose of discussing or communicating matters that concern public affairs. Defendants will have only an evidential burden to raise an exemption-based defence.

8.2. Underlying policy for the way forward

1063. There must be a policy to inform the way forward. We recommend that such a policy be based on four basic propositions:

1. Stalking, loosely defined as the persistent harassment of one person by another, remains a problem in Hong Kong and must be addressed by law.

2. The current law does not adequately address the problem of stalking, in terms of (i) protecting persons from being the victims of stalking, (ii) providing remedies for actual victims, and (iii) censuring those who have harmed others by stalking.

3. In providing a more effective legal response to the problem of stalking, the reforms should not overreach and interfere with fundamental freedoms protected by the Basic Law, such as the freedoms of expression, assembly and demonstration.

4. New legal measures to address stalking should not apply to news activities and peaceful discussion of public affairs, even where such activities may in fact harass another person. Existing laws will continue to apply to prohibit and regulate news and expressive activities that are illegal and harmful (e.g. intimidation, use or threat of violence, inciting to violence, contempt of court).

1064. An evidence-based approach to public policy requires an elaboration of each of these propositions with reference to available evidence.

8.2.1. Stalking remains a problem

1065. Evidence of the phenomenon of stalking in Hong Kong is mostly anecdotal, i.e. individual case reports, while more comprehensive data on stalking is still lacking.

Anecdotal evidence

1066. There is an abundant amount of anecdotal evidence, typically in the form of reported court cases or news reports, suggesting that stalking remains a problem in Hong Kong. The LRC Report published in 2000 cited 38 cases or situations of stalking.[946] One of those cases, important for our present purposes, was the notorious one of the media stalking a High Court judge because of dissatisfaction with his decisions. It involved a four-day "paparazzi trail" of the judge (and instances of printing, publishing or instigating such printing or publishing of

[946] LRC, Chapter 3. See also G.M.K.H. Leung, K.P.L. Carew and S.L. Chow, "A Proposal for Assessment and Management of Stalking in Hong Kong", accessible on the website of the Centre for Criminology, HKU.

articles) which was later found to amount to contempt of court case under the branch of scandalizing the court. The case was ***The Secretary for Justice v. The Oriental Press Group Limited and Others***.[947] In relation to the pursuit and harassment of the judge, he, as a professional judge, was in fact not affected by the conduct. The Court of Appeal however noted that in a contempt of court case "it is the effect of the conduct complained of on others that is material and not whether the person to whom the conduct has been directed had in fact been affected by it."[948]

1067. In addition to those cases mentioned in the LRC Report and in the 2011 Consultation Paper on Stalking, the following cases of stalking, most of which were reported after 2000, can be added to the body of anecdotal evidence.

1068. In ***HKSAR v. Tsui Chu Tin***,[949] stalking behaviour led to the stabbing to death of a woman by her former boyfriend where such conduct had its root in his major personality disorder. After the break-up of a less than a one-year relationship, a serving police constable (the appellant), stalked the victim by following, telephoning her place of work and home, and threatening. He had also stalked two of his previous girlfriends.

1069. The victim complained to the police and the appellant was charged with three offences of loitering "causing (the deceased) reasonably to be concerned for her safety or well-being" between May and June 1998. Bail, pending trial on 23 July 1998, was granted on 29 June 1998 with the condition that the appellant must not approach, or interfere with, the deceased. However, three days before the trial, the appellant killed the victim.

1070. Various psychiatric and physiological reports left in no doubt that the appellant continued to represent a potentially serious danger to women who might in the future form an intimate relationship with him. He was sentenced to life imprisonment with a minimum term of 12 years to be served.

1071. One question that arises is whether the existence of a stalking provision might have assisted the deceased. Tsui breached the bail conditions for his loitering charges, and it was likely that he would also have breached an injunction or bail conditions for a stalking offence.

[947] [1998] 2 HKLRD 123, and *Wong Yeung Ng v. The Secretary for Justice* [1999] 2 HKLRD 293.
[948] [1999] 2 HKLRD 293, at 330.
[949] [2007] 4 HKLRD J2. Referred to as incident (13) in the LRC Report, p 40.

The problem can be traced to the decision to grant Tsui bail and the completeness of the information upon which that decision was made.

1072. In ***HKSAR v. Lo Kwok Wai***,[950] the Defendant Lo had been stalking PW1, a woman with whom Lo had a prior relationship. On the morning of 4 December 2009, PW2, a colleague of PW1, was escorting PW1 to work as PW1 has become scared of Lo's conduct. A scuffle took place between Lo and PW2. Lo was charged with assault occasioning actual bodily harm, convicted and sentenced to 24 months probation. His appeal was dismissed.

1073. In ***Ng Yiu Ki v. Chan Yuk Fung***,[951] the Defandant was found in breach of the injunction order made against her as result of her stalking behavior directed towards the Plaintiff who was a male doctor working in the Queen Mary Hospital. She had sent letters, gifts and copies of academic papers to his office, stalked him and waited for him after work. She admitted to breaching the order and was ordered to pay a fine of $10,000 and the Plaintiff's costs.

1074. Another area where criminal harassment-like conduct arises is in relation to debt collection activities, which was said in the LRC Report to be commonly reported in the press. Statistics show that in 2012, 1%, or 4 cases, of the total criminal intimidation cases were related to such activities, a drop of 60.0%, or 6 cases, when compared to data for 2011.[952]

1075. The following two cases show that injunctions have been granted against persons employing debt-collecting practices. In ***Derrens Apparel and Sourcing Ltd v. Poon Kin Fai*** [953] an interlocutory injunction was granted against a garment supplier who employed people to make repeatedly phone calls and visits to the office of its debtor company in abusive and intimidating language.

1076. In ***Law Kin Man Freeman v. Chan Kin Hung***[954] an injunction was granted arising out of harassing behaviour by debt collectors who showed foam boards with statements incriminating the plaintiff bank manager of money-laundering and committing other criminal

[950] HCMA595/2010, 23 Nov 2010, CFI, para 15.
[951] DCMP3254/2009, 6 May 2010, DC.
[952] Brief Report on Hong Kong's Law and Order Situation in 2012, accessible at http://www.legco.gov.hk/yr12-13/english/panels/se/papers/se0129cb2-546-1-e.pdf ("Law and Order 2012").
[953] HCA 1424/2007, unrep.
[954] DCCJ 4563/2007.

behaviours at the entrance of his branch. Because the statements were defamatory, the injunction was granted to protect the reputation and career of the plaintiff.

1077. Two other debt collection related cases are ***Wong Wai Hing v. Hui Wei Lee***[955] and ***Etacol (Hong Kong) Ltd v. Sinomast Ltd***,[956] both of which are described below in the section on the tort of harassment.

1078. In the context of rental dispute, an injunction was granted in ***Cheung Wing Lan v. Kwok Chung Chee***.[957] The plaintiff inherited a village house from the deceased owner as his grandson, whilst the defendant was the deceased's son. The defendant's harassing behaviour mainly involved demands for rental from the house via letters and notices affixed to the house structures. This was regarded as unjustified because alternative legal avenues were available to further his aim. An injunction to prevent the deceased's son from continuing his unjustified acts was granted.

1079. Most recently, the case of the female nurse who stalked her former boyfriend for almost six years (***Lau Tat Wai v. Yip Lai Kuen Joey***)[958] made headlines. The Court of First Instance heard that, the defendant Yip, a female government nurse, had harassed the plaintiff Lau, Yip's boyfriend of four months, after the latter had decided to end the relationship which had started in 2007. The harassment behaviour consisted of sending malicious emails not only to Lau, but also to his friends and colleagues, and sending SMS messages and making telephone calls to Lau. Yip also hired a private detective to conduct surveillance on Lau and, as put it by the judge "resorted to tactics widely used by debt collectors;"[959] for example, red paint splashing on iron grill of Lau's home. As discussed more fully below, the Court of First Instance judge described the defendant's conduct as "outrageous", ordered almost $1 million in damages for the plaintiff and made an injunction against the defendant.

[955] [2001] 1 HKLRD 736.
[956] HCA 3126/2003 (15 September 2006).
[957] HCAP 9/2009, unrep.
[958] HCA 1466/2011 (24 April 2013).
[959] HCA 1466/2011, para 23.

Domestic violence context

1080. There is a close connection between domestic violence and stalking, especially at the point of relationship breakdown or post-breakdown.[960] Thus data on the prevalence of domestic violence, especially in relation to the use of preventive restraint orders, may be further evidence of stalking incidences in Hong Kong. In the criminal sphere, statistics show that a total of 2,002 criminal cases of domestic violence (mainly caused over money and relationship problems) were recorded in 2012, a rise of 74 cases or 3.8% when compared with 1,928 cases in 2011.[961] In 2012, 23.1% or 515 cases of criminal intimidation were related to domestic violence, a rise of 1.0% or 5 cases when compared with 2011.[962]

1081. In the civil law sphere, the Domestic and Cohabitation Relationships Violence Ordinance (DCRVO) was amended in 2009 to extend protection to spouses, former spouses, other relatives, cohabitants and former cohabitants via injunctions. The DCRVO came in force on 1 January 2010. Under the DCRVO, an injunction application to the District Court can be made, with or without the assistance of Legal Aid, by victims of physical, verbal and psychological abuse.

1082. However, the DCRVO does not expressly cover general harassment or stalking, like in the South African Domestic Violence Act 1998 and the Manitoba Domestic Violence and Stalking Act 1999.

1083. Broadly speaking, there are four types of injunction orders under the DCRVO: (1) non-molestation order, where the abuser is restrained from molesting the applicant; (2) ouster order, where the abuser is excluded from a particular property or a part of property; (3) entry order, where the abuser is required to permit the applicant (and a minor if any) to remain in common residence; and (4) participation Order, where the abuser is required to attend an anti-violence programme (AVP) as approved by the Director of Social Welfare (DSW), with a view to changing his attitude and behaviour that led to the granting of the injunction order.

[960] See e.g. references to stalking behavior in these two family law dispute cases: *S v. Z*, unreported, FCMC14535/2005, 10 Sept 2007, DC, para 40; *Re an Infant*, unreported, FCMP222/2006, 6 July 2007, DC, para 5.
[961] Law and Order 2012.
[962] Law and Order 2012.

The Secretary of Labour and Welfare indicated that in 2009, the DSW received three referrals to AVP from the court. No such referral was made in 2010.[963]

1084. A party breaching a DCRVO injunction could be subject to arrest by the police if the court attached an authorization of arrest to the injunction at the time of its grant or at any time during the validity period of the injunction (24 months subject to extension). The justification for an authorisation of arrest is that a breach of injunction per se is not a criminal offence.

1085. In the absence of an authorisation of arrest, a police officer may nevertheless carry out an arrest of the breaching party who has caused a breach of the peace or is suspected of committing a criminal offence.[964] If police arrest is not possible, the victim has to enforce the injunction by applying for a committal for contempt of court,[965] for example under section 48B of the District Court Ordinance, Cap. 336.

1086. Information provided by the Judiciary to the Social Welfare Department (SWD) show that the number of cases where injunctions were granted by the court pursuant to the DCRVO were 26 in 2009, and 23 in 2010; while as at 10 March 2011, the number of injunction applications yet to be heard by the court was eight. No further breakdown was available from the Judiciary, such as the proportion of cohabiting and matrimonial couples.[966]

1087. Harmony House, a local non-profit organisation specialized in addressing issues of family violence, reports that there were 39 legal aid applications seeking an injunction order in 2009, and 28 in 2010.[967] Harmony House appears to suggest that there is limited success in seeking an injunction order under the DCRVO mainly due to the high refusal rate (over 50%) in granting legal aid to applicants.[968]

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[963] Replies to Legco Questions, LCQ13:Domestic Violence, accessible at http://www.lwb.gov.hk/eng/legco/16032011_Q13.htm ("LCQ13").
[964] Annotated Ordinance Cap. 189 [3.20].
[965] *Ibid*
[966] LCQ13.
[967] Harmony House, Hong Kong Women's NGO Forum, Working With CEDAW, Centre for Comparative and Public Law, 7th May 2011; accessible at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.law.hku.hk%2Fdiversity%2Fwp-content%2Fuploads%2F2011%2F05%2FTAO-Queenie-Harmony-House-For-website.pdf&ei=iF5OUbe8EcLw4QStjoGYBQ&usg=AFQjCNHKGjlIqrpRtec3a_-Mvku_o4kMAQ&sig2=ZZK8EoU0ZZT5apfTkOwD3A
[968] *Ibid*.

Hong Kong International Violence Against Women Survey (IVAWS)

1088. Between December 2005 and March 2006, a survey by telephone was conducted on a random sample of Hong Kong women about their experiences of physical and sexual violence by men.[969] This survey did not include questions on stalking or harassment; thus behaviour such as watching or following was not covered. Questions on physical violence included threats of violence. The most frequent forms of physical violence over the lifetime involved actual violence (such as pushing, grabbing, slapping, kicking, hitting with something) rather than threats of violence, which often accompanied the violence.

1089. In order to provide the picture of violence against women in Hong Kong, we comment briefly on the survey's findings.

1090. Across their adult lifetime (since age 16) 80.1 per cent did not experience any violence, while 6.5 per cent experienced physical violence only ('threats to hurt physically' represented 3.5 per cent), 5.2 per cent experienced both physical and sexual violence in the same or separate incidents, and 8.3 per cent experienced sexual violence only.

1091. In the five years preceding the survey, 91.7 per cent did not experience any violence, while 2.9 per cent experienced physical violence only ('threats to hurt physically' represented 1.4 per cent), 1.5 per cent experienced both physical and sexual violence, in the same or separate incidents, and 3.9 per cent experienced sexual violence only.

1092. Two-thirds of the respondents were married or cohabited with a male partner.

1093. Across their adult lifetime and in the five years preceding the survey, threats to hurt physically by any intimate partner (current and previous husbands, de facto partners and boyfriends) represented 1.7 per cent (adult lifetime) and 0.5 per cent (in the previous five years).

1094. Across their adult lifetime and in the five years preceding the survey, threats to hurt physically by any non-partner (such as family members and relatives, men who are known

[969] Broadhurst R., Bouhours B., & .Bacon-Shone, "Hong Kong International Violence Against Women Survey", Hong Kong, China and Canberra, Australia: The University of Hong Kong, Social Science Research Centre and the Australian National University, Centre of Excellence in Policing and Security. 2012, url: http:/hdl.handle.net/10722/146076 ("The HK IVAWS").

(such as friends, work colleagues, neighbors and teachers, and strangers) represented 1.2 per cent (adult lifetime) and 0.8 per cent (in the previous five years).

1095. Of the countries surveyed by the IVAWS, which included Australia, Costa Rica, the Czech Republic, Denmark, Mozambique, the Philippines and Switzerland; Hong Kong, along with the Philippines, recorded the lowest levels of Violence Against Women. In Hong Kong, the low rate was consistent with low prevalence rates across all types of crime.

1096. Another interesting data is that victims of violence were much more likely to regard violence inflicted by non-partners as a crime than violence by intimate partners (45% and 14% respectively). Women were more likely to report to the police if they had been injured, if they perceived the incident was serious, or if they regarded it as a crime. The main reasons for not contacting the police were that the incident was too minor and that the victim or/and her family dealt with it.

1097. While surveys and statistics on stalking in the overviewed jurisdictions can be useful to compare the stalking trends among the respective jurisdictions; Hong Kong cannot rely on them to assert that the same trends would arise in the Region. Furthermore, those trends vary from year to year.[970]

1098. The LRC Report noted the absence of comprehensive data on stalking, and unfortunately since then there still has yet to be a comprehensive survey carried out in Hong Kong. Researchers and specialists on stalking suggest that adequate anti-stalking legislation must address not only data supplied by surveys, but also insights derived from cultural analysis. In this way, provisions could accurately reflect specific local social problems and values.[971] Furthermore, the concept of "reasonableness", used in some anti-stalking statutes

[970] For example, the findings of the *Report Stalking Victimization in the United States,* referred to in Part 2 above, include information on the victim-offender relationship. It was revealed that in 2005, the most prevalent relationship was "known, other" (subdivided into friend/roommate/neighbor; known from work or school; acquaintance or relative), followed by "known, intimate" (subdivided into current intimate (spouse and boy/girlfriend) and former intimate (ex-spouse and ex-boy/girlfriend)). While the statistics in Victoria show that for the period 2007/08, the most prevalent relationship was "not related/associated," this was not the case in the following years when "unspecified" relationship was the most prevalent.

[971] Orit Kamir, *Every Breath You Take - Stalking Narrative and the Law* (The University of Michigan Press, 2001), p 211 ("Kamir").

must have regard to the social context.[972] A study could also assist in assessing people's relative tolerance and acceptance of distress.

1099. The Department of Special Education and Counseling of the Hong Kong Institute of Education recommended that the Government should collaborate with related organizations to undertake large scale studies on sexual harassment on a regular basis. This recommendation should also apply to harassment/stalking in general[973] as it will also remind legislators who the real victims of stalking are. We generally agree with this view, as such data will help to inform the reform process and subsequent reviews of any reforms implemented.

Recommendation 1

We recommend that the Government promote and sponsor comprehensive surveys and social science studies of the problem of stalking in Hong Kong. Such research can only enhance evidence-based policy making in this area.

8.2.2. Inadequacy of existing laws

1100. The extent to which perpetrators of stalking are liable and the victims protected under Hong Kong's existing criminal and civil laws was examined by the LRC in their 2000 Report.[974] Since then very little has changed in terms of the relevant criminal law offences that can be used to respond to stalking; however, there has been some development in the civil law, to the extent that the Hong Kong lower courts have recognized a general tort of harassment for which it is possible to obtain interlocutory injunctive relief.

[972] For comments on this aspect see Kamir, pp 190-194.
[973] The study on Student's Sexual Attitudes and Views on Sexual Harassment was conducted by the Department of Special Education and Counseling of the Hong Kong Institute of Education between May and November 2011, commissioned by the Equal Opportunities Commission. The findings were published in March 2013 and revealed that that 50% of the interviewed students experienced various forms of sexual harassment. Over a half of the sexually harassed students "keep silent" (58%) while 51% "complain to the harassers." See http://www.eoc.org.hk/EOC/Upload/ResearchReport/SH_eExecutive%20Summary.pdf.
[974] See Law Reform Commission Report on Stalking (2000), Chapter 4 ("LRC").

1101. The relevant criminal laws[975] include the Public Order Ordinance, Cap 245 (e.g. behaving in a noisy and disorderly manner), Offences against the Person Ordinance, Cap 212 (e.g. assault and battery), the Crimes Ordinance, Cap 200 (e.g. loitering, criminal intimidation), etc. It should be noted that criminal libel is still an offence under section 5 of the Defamation Ordinance, Cap 21.

1102. For non-violent forms of stalking, the police are most likely to use the offences of loitering or criminal intimidation if there is to be any criminal law response. However, as the LRC report highlighted, the loitering offence is problematic because it "does not cover behaviour such as following, watching or approaching another person in such a way as to cause that other person to fear for his safety or to be concerned for his 'well-being'".[976] Also it was noted that "it is difficult to prove loitering in a public place which is accessible to and frequented by ordinary citizens".[977] The intimidation offence is problematic because it "does not help in situations where the stalker harasses his victim without making any threats".[978] It was also noted that the offence was difficult to prove because of its specific intent element and the need for the threat to be of an illegal act.

1103. Thus there remains a serious gap in the criminal law to address persistent harassment of a person that is non-violent and does not amount to criminal intimidation or loitering.

1104. Relevant civil actions[979] include, trespass, nuisance, intimidation, defamation, threats causing nervous shock, etc. Remedies such as injunctions under several statutes are also available to victims, while damages have also been granted for harassment behaviour. The most interesting development is the general tort of harassment, which has been recognized in several Hong Kong cases and most recently in the 2013 decision of the Court of First Instance. These developments are summarized below.

[975] The criminal laws discussed by the LRC are: Power to bind over to keep the peace or to be of good behaviour, Public Order Ordinance, Assault and battery, Assault occasioning actual bodily harm, Wounding or inflicting grievous bodily harm, False imprisonment, Loitering, Telephone and post office statutes, Public nuisance, Intimidation, Criminal attempt.
[976] LRC, para 4.70.
[977] *Ibid.*
[978] *Ibid.*, para 4.77.
[979] The civil laws discussed by the LRC are: trespass to land, private nuisance, watching and besetting premises, intimidation, harassment on highway, defamation, trespass to the person, threats causing nervous shock, false imprisonment, involuntary admission under the Mental Health Ordinance, sexual harassment, invasion of privacy; it was unsure whether there was a tort of harassment.

Legislation dealing with specific forms of harassment

1105. Provisions of the Sex Discrimination Ordinance, Cap 480; Disability Discrimination Ordinance, Cap 487; Race Discrimination Ordinance, Cap 602; and Landlord and Tenant (Consolidation) Ordinance, Cap 7, deal specifically with harassment. Under the first three enactments, civil claims for harassment in employment and other fields are made before the District Court in like manner as any other claim in tort (sections 76, 72 and 70 respectively of the first three Ordinances[980]).

1106. To take an example, the Race Discrimination Ordinance, Cap 602 (RDO), in particular Part 3 and Part 4, deals with racial harassment, also in employment and other fields. For example, under section 7 (1) of the RDO, one person harasses another person if:

> On the ground of the race of that other person or a near relative of that other person, the first mentioned person, engages in unwelcome conduct (which may include an oral or written statement), in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated by that conduct.

1107. Under section 7 (2) of RDO, a person harasses another person if:

> On the ground of the race of that other person or a near relative of that other person, the first mentioned person, alone or together with other persons, engages in conduct (which may include an oral or written statement), that creates a hostile or intimidating environment for the second named person.

1108. The Landlord and Tenant (Consolidation) Ordinance, Cap 7 (LTCO) contains criminal offence provisions attracting imprisonment terms and compensation orders for damage, loss or inconvenience suffered by the tenant or subtenant. Sections 70B (Harassment in relation to tenure and rent of domestic premises) provides that:

> 7. Any person who unlawfully deprives a tenant or sub-tenant of occupation of any premises commits an offence and is liable on conviction on indictment to a fine of

[980] The relevant parts in the Sex Discrimination Ordinance, Cap 480, are in particular Part III and Part IV, while in the Disability Discrimination Ordinance, Cap 487, they are in particular, Part III and part IV.

$500000 and, in addition, on a second or subsequent conviction, to imprisonment for 12 months.

8. Any person who, with intent to cause a tenant or sub-tenant-

(a) to give up occupation of any premises or part of premises; or

(b) to refrain from exercising any right or pursuing any remedy in respect of any premises or part of premises,

does any act calculated to interfere with the peace or comfort of the tenant or sub-tenant or members of his household or persistently withdraws or withholds services reasonably required for occupation of the premises as a dwelling commits an offence and is liable on conviction on indictment to a fine of $500000 and, in addition, on a second or subsequent conviction, to imprisonment for 12 months.

1109. Section 119V of the LTCO (Harassment in relation to new tenancies of domestic premises) provides that:

(1) Any person who unlawfully deprives a tenant or sub-tenant of occupation of any premises commits an offence and is liable on conviction on indictment by the court-

(a) on a first conviction, to a fine of $500000 and to imprisonment for 12 months;

(b) on a second or subsequent conviction, to a fine of $1000000 and to imprisonment for 3 years.

(2) Subject to subsection (3), any person who, in relation to any premises-

(a) either-

(i) does any act calculated to interfere with the peace or comfort of the tenant or sub-tenant or members of his household; or

(ii) persistently withdraws or withholds services reasonably required for occupation of the premises as a dwelling; and

(b) knows, or has reasonable cause to believe, that that conduct is likely to cause the tenant or sub-tenant-

(i) to give up occupation of the premises; or

(ii) to refrain from exercising any right or pursuing any remedy in respect of the premises,

commits an offence and is liable on conviction on indictment by the court-

(i) on a first conviction, to a fine of $500000 and to imprisonment for 12 months;

(ii) on a second or subsequent conviction, to a fine of $1000000 and to imprisonment for 3 years.

General tort of harassment

1110. At the time the LRC wrote its report, it acknowledged that even if a tort of harassment had developed at common law, "the scope, requirements and defences to such a tort have never been argued before the courts. The ingredients of the tort and the extent to which the courts are prepared to provide relief to victims of harassment remain unclear."[981] This situation has been changing over the years. The following cases illustrate that the tort of harassment in Hong Kong has been developing, mainly in the context of debt-collection activities.

1111. The Court of Appeal in ***Wong Wai Hing v. Hui Wei Lee***[982] pointed out that "whilst the use of debt-collection agencies is not in itself illegal, debt-collection activities very often involve the use of illegitimate means and that has tended to overshadow legitimate operations."[983] Harassment[984] was named as one of the illegitimate means used by the debt-collection agency engaged by the Defendant female doctor to collect a debt on her behalf. However, she had asked the agency to use only lawful means.[985] The judge at first instance held that the Defendant was not liable for the torts of the debt collection agency's staff, E1 and E2. In reversing the trial judge, the Court of Appeal held that the Defendant was liable as she had asked the agency to represent her. In acting as a debt-collector, the agency was empowered to collect the debt. Therefore, E1 and E2 were representing D when they approached and spoke to the Plaintiffs. As to the undertaking that only legal means were to

[981] LCR,para 4.30.
[982] [2001] 1 HKLRD 736.
[983] [2001] 1 HKLRD 736, at 765.
[984] The judgment does not include the type of harassment behaviour used.
[985] There was no evidence of the specific methods used. The case reveals that D, a doctor, believed that she was entitled to be repaid C$150,000 by P1. X, one of her patients, volunteered to speak to P1 on her behalf. X went to Ps' office and uttered threats that constituted an assault and intimidation against Ps. The debt remained unpaid and D then engaged the services of a debt-collection agency (the agency). The contract provided that the agency would use only lawful means to collect the debt. In the event, two employees of the agency, E1 and E2, visited Ps' office and E1 uttered threats and engaged in conduct that constituted assault and intimidation against Ps. At first instance, it was held that X, E1 and E2, had committed torts, but that D was not liable for the torts. Ps appealed. At issue was whether a person who employed an agent with whom there was no "master and servant" relationship, was liable for tortious acts committed by the agent.

be used, it did not limit the debt-collection activities but merely regulated the conduct in which those acts could be done.[986]

1112. Relying on the above case, the Court of First Instance in ***Etacol (Hong Kong) Ltd v. Sinomast Ltd***,[987] also in the context of debt collection activities, found that on the facts, a tort of harassment was made out. Carlson DJ said:

> The Plaintiffs' cases are set out in the witness statements of the 2nd and 3rd Plaintiffs, Mr and Mrs Frey. This evidence is contained in the hearing bundle and is there to be read. It tells of threatening and unpleasant visits (some 10 of them) to the offices of the 1st Plaintiff at Tsimshatsui, the purpose of which were to frighten the Freys into paying up. These visits were supplemented by attending the Frey's home and backed up by threatening and abusive calls to the Freys themselves and their domestic helper and their younger daughter Andrea. All of this intended to cause them to fear for their well-being and to persuade Mr and Mrs Frey to pay up on behalf of their company, the 1st Plaintiff.
>
> There is no doubt that this behaviour amounts to harassment of the crudest type which, quite apart from being unlawful to amount to a crime, also amounts to the tort of harassment and, subject to some further remarks that I need to make, also to the tort of nuisance.[988]

1113. On behalf of the Defendant, it was contended that harassment, being an intentional tort, it must be shown that a deliberate intention existed to cause actual bodily harm or inflict

[986] However, D was not liable for X's actions. X only volunteered to speak to Ps. He was not asked to act on D's behalf to collect any money or to enter into any negotiations.
An interesting obiter comment was made by the Court of Appeal for another avenue to find the Defendant liable for the actions of the debt collection agency. Had the Plaintiffs pleaded negligence, D could have owed the Plaintiffs a duty of care to exercise reasonable care in selecting and appointing a debt-collection agency which she failed to discharge. In determining the existence of a notional duty of care, a threefold test of foreseeability of damage, proximity and fairness had to be applied. Given the fine line between legitimate and illegitimate means of recovering debts by debt-collection agencies, the fact that the majority of such agencies in Hong Kong were poorly managed and unscrupulous, the notoriety of the illegal means the more unscrupulous of the agencies resorted to, coupled with the financial inducement to the agency to produce results, the threefold test could easily have been satisfied.
[987] HCA 3126/2003 (15 September 2006).
[988] HCA 3126/2003 (15 September 2006), para 10.

some form of recognised psychiatric illness. The judge was not persuaded but did not elaborate on his reasons. In granting summary judgment to the Plaintiffs, the judge held that:

> The acts in this case, conclusively proved on the evidence, are precisely the sort of acts, with their intended consequence, which the tort of harassment seeks to prevent and compensate a victim for by damages and/or injunction.[989]

1114. An injunction as sought by the Plaintiffs was granted. With regard to damages for harassment, the judge allowed $45,000 as, among others, "the matters did not get seriously out of hand and the debt collection agency was called off and desisted in reasonably short order."[990] The Plaintiffs had asked for $80,000.

1115. The recent case of ***Lau Tat Wai v. Yip Lai Kuen Joey***[991] involving almost six years of harassment by the female Defendant against the male Plaintiff was mentioned earlier. Anthony Chan J dealt with four causes of action: tort of intimidation, private nuisance, trespass to goods and the tort of harassment.[992] There had been an attempt to settle the case out of court.[993]

1116. At the hearing, the Plaintiff was legally represented (on Legal Aid) while the Defendant was not, neither was she present. Lau was successful on the first and fourth claims (i.e. based on the torts of intimidation and harassment) but failed on the second and third ones.

1117. On the claim based on the tort of harassment, Chan J closely followed Lee JC's reasoning in the 2001 leading Singaporean High Court case of *Malcomson Bertram & Anr v. Naresh Mehta*[994] where recognition was given to this common law tort for the first time.

1118. Chan J formulated what the parameters of the tort of harassment should be. Because the Defendant was unrepresented, no argument can be found in the judgment. Since the judge adopted most of the Singaporean judgment's reasoning, we complement the discussion with passages of Lee JC's ruling.

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[989] HCA 3126/2003 (15 September 2006), para 19.
[990] HCA 3126/2003 (19 January 2007), para 46.
[991] HCA 1466/2011 (24 April 2013).
[992] Tort of intimidation (paras 43-47), Private nuisance (paras. 48-52), Trespass to goods (paras. 53-55) and Tort of harassment (paras 56-70).
[993] See Joyce Ng, "Man told to settle stalking claims with ex-lover", *South China Morning Post*, 15 April 2013.
[994] [2001] 4 SLR 454.

1119. In *Malcolmson*, Lee JC mentioned two dictionary definitions of the term harassment. He said:

> Before considering the law, it is necessary to define the meaning of the term `harassment`. The ***Shorter Oxford English Dictionary*** (3rd Ed) defines `harass` as follows:
>
> > *1. To wear out, or exhaust with fatigue, care, trouble, etc ... 3. To trouble or vex by repeated attacks ... 4. To worry, distress with annoying labour, care, importunity, misfortune, etc ...*
>
> ***Black`s Law Dictionary*** (7th Ed) gives the meaning of `harassment` as follows:
>
> > *Words, conduct, or action (usually repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.*

1120. Lee JC then formulated what harassment should be based on the facts of the case. In *Malcomson*, Metha (the Defendant) resigned after three months of having been hired by a company called Zerity which provided financial services. Metha then embarked on harassing behaviour consisting of: sending e-mails to Malcomson, the Chief Executive of Zerity (one of the Plaintiffs); obtaining confidential mobile phone number of Malcomson and made calls to that number which Malcomson received outside the residence; and sending numerous e-mails and SMS messages via mobile phone to Malcomson and various employees and directors of Zerity, some of which were received outside the premises. The plaintiffs claimed damages for (2) trespass at Malcomson`s residence; (2) nuisance by telephone at Malcomson`s residence as well as at Zerity`s office; and (3) harassment of Malcomson. The plaintiffs also sought injunctions to restrain Mehta from further committing such acts.

1121. Based on those facts, Lee JC stated, which Chan J adopted:

> For the purposes of this application, I shall take the term 'harassment' to mean a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another

person. This is not intended to be an exhaustive definition of the term but rather one that sufficiently encompasses the facts of the present case in order to proceed with a consideration of the law.

1122. Chan J, in ***Yip Lai Kuen Joey***, then ruled that a mental requirement of the wrongdoer as well as damage to the victim should be established in order to constitute the tort of harassment. In respect of the mental requirement, he was of the opinion that showing intention on the part of the wrongdoer to cause injury to the victim was not necessary. He rather favoured the lower threshold of recklessness as to whether the victim would suffer injury from the wrongdoer's act. The lower threshold would be justified when physical or mental harm was involved.

1123. In respect of "the kind of injury or damage which may ground an action in tort of harassment, one can envisage that the harassment can result, at one end of the scale, physical injury and, at the other end, mere humiliation."[995] As to the correct balance between the two ends of the scales, he draw a comparison with the UK PHA 1997 and noted that on a claim under the civil tort of harassment in section 3, damages may be awarded for (among other things) any anxiety caused by the harassment. Although anxiety remains undefined in the PHA 1997, the judge thought that the PHA had struck the right balance. Thus anxiety on the part of the victim would satisfy the threshold under the tort of harassment in Hong Kong, as well as financial loss.

1124. On the facts of the case, Chan J had no doubt that Lau suffered far worse than anxiety from the 6 years of harassment by Yip. Such harassment conduct included the sending of malicious emails, sending of SMS messages, making telephone calls, hiring a private detective to conduct surveillance on Lau, and the uses of debt collectors' tactics such as the splashing of paint on the iron grill of Laus's home. Thus the judge held that the tort of harassment had been established.

1125. In order to compare among the different torts, we also include the reasoning of the judge for his findings on the other claims. The claim based on the tort of intimidation also succeeded. This tort ""involves the defendant using unlawful threat successfully to compel

[995] HCA 1466/2011, para 66.

another to act (or refrain from acting) in a particular manner that will cause harm" (see Street on Torts, 13th edn, p 408). There are 3 elements of this tort – unlawful threat, intention to cause harm to the claimant with the threat and damage to the claimant."[996] The judge had no difficulty in finding that this cause of action was established in respect of the following acts: (i) Yip demanded that Lau should visit Japan with her, promising that she would terminate their relationship and cease further harassment after the trip. With reluctance, Lau acceded to Yip's demand but she failed to live up to her promise;(ii) three of the four paint splashing incidents; (iii) the threats to the safety of Lau's parents and the creation of the derogatory posters; and (iv) Lau's continuing answering unwelcomed phone calls from Yip because if he failed to do so she would be ringing his colleagues.

1126. The claim based on private nuisance failed because it was not shown that the Plaintiff had any sufficient interest in the relevant premises; i.e. either as owner, tenant, reversioner or licensee under exclusive possession or occupation. Chan J held that "the incessant phone calls made to Lau's offices and home and the splashing of paint at his home amounted to interference with the enjoyment of those premises by Lau. However, I must reject this cause of action because it has not been demonstrated that Lau has any or any sufficient interest in those premises."[997]

1127. The trespass to goods claim was in connection with the paint splashing incidents whereby the iron grille of Lau's home was damaged. This claim failed on the ground that in trespass, possession of the goods in question at the time of the interference must be established. The evidence was that "the flat where Lau was residing with his parents was jointly owned by the latter. At the highest, Lau was a licensee. I do not see how he was in possession of the iron grille at the material times."[998]

1128. With respect to remedies, Chan J granted special damages (including the costs of four sessions of psychological counseling) and general aggravated and exemplary damages. In order to compensate Lau for his suffering in his feelings, dignity and pride, for his mental discomfort and distress, the judge awarded $600,000 as sought under aggravated damages. The Judge was also satisfied that exemplary damages were justified as they are punitive in

[996] HCA 1466/2011, para 43.
[997] HCA 1466/2011, para 51.
[998] HCA 1466/2011, para 55.

nature and are awarded to teach the culprit that 'tort does not pay' and to deter Yip and others from similar conduct. Although he expressed his sympathy for Yip as her actions showed she was in need of help, Lau was awarded $200,000 in exemplary damages, as sought.

1129. Chan J also granted an injunction to restrain Yip from any further harassment of Lau, which would protect Lau's family members as well.

1130. Before the injunction hearing, Yip had pleaded guilty to two charges of intimidation for which Magistrate Anthony Yuen Wai-ming sentenced her to a $5,000 fine, noting that while her offences were serious, she had been under psychological strain and "'the offence was committed out of a momentary loss of control on two different occasions." He recommended Yip to undergo counseling. The psychiatric report showed that Yip suffered from a personality disorder which affected her judgment and that she was receiving medication for insomnia and to help her control her emotions.[999]

1131. Thus ***Yip Lai Kuen Joey*** shows the Court of First Instance's full recognition of the tort of harassment. The implications of this development for reform will be discussed below.

8.2.3. Non-interference with fundamental freedoms

1132. Hong Kong's Article 27 of the Basic Law (BL) recognises freedom of speech, of the press and of publications; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike. Other rights and freedoms safeguarded by the laws of the HKSAR are included in Article 38 of the BL. Under section 8 of the Hong Kong Bill of Rights Ordinance, Cap 383 (BORO), the rights and freedoms of opinion and expression, peaceful assembly, and association are protected by Articles 16, 17 and 18 respectively.

1133. The right to hold opinions without interference provided in Article 16 (1) of the BORO is subject to no restrictions. The right to freedom of expression in Article 16(2), which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of the media chosen, is subject to restrictions as provided by law and which are necessary for the respect of the rights or reputations of others; or for the protection of national security or of public order (*ordre public*), or of public health or morals.

[999] See Diane Lee, "Nurse fined over threats to ex-lover's family", *South China Morning Post*, 13 April 2013.

1134. The right of peaceful assembly in Article 17 and the right to freedom of association with others in Article 18 of the BORO may only be restricted in conformity with the law (Article 17) or as prescribed by law (Article 18) and if necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

1135. The above-mentioned rights have competing rights; most notably the protection of private life; i.e. privacy, family, home, correspondence, honour and reputation under Article 14 of the BORO. Article 14 provides that (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; and (2) Everyone has the right to the protection of the law against such interference or attacks.

1136. The balance between the above rights has always been hard to achieve. "Public interest" has been at the heart of the matter but its interpretation has proved that the issue is a very complex one, for law-makers, judges and other stakeholders. In promoting both, freedom of expression and privacy on the Internet, UNESCO has recently commented that:

> The right to privacy is not definitively elaborated and continues to be debated. However, conceived as an individual's reasonable expectation of privacy, it can both facilitate and constrain other rights and freedoms, including freedom of expression, association and belief. The ability to communicate anonymously, for instance, has played an important role in safeguarding free expression and strengthening political accountability. At the same time, as in cases of investigative journalism into corruption, the right to privacy can also be used to block the right to freedom of expression. Violations of privacy for the purposes of tabloid journalism, however, are generally regarded as abuses of privacy rather than legitimate claims to freedom of expression.[1000]

1137. Appendix E provides an overview of the law concerning press freedom, protests and demonstrations in Hong Kong. For present purposes, two decisions from the Court of Final

[1000] See UNESCO, "Promoting Freedom of Expression and Privacy on the Internet"- UNESCO Special Internet Event, 26 February 2013, accessible at http://www.unesco-ci.org/cmscore/events/5-promoting-freedom-expression-and-privacy-internet.

Appeal will be highlighted to demonstrate how Hong Kong courts invoke constitutional freedoms to shape common law tort law and to interpret and apply criminal offences.

1138. The first case concerns the common law tort of defamation and the defence of fair comment in response to a claim of defamation. Lord Nicholls NPJ said in ***Cheng Albert v. Tse Wai Chun***[1001] that the defence of fair comment is broadly interpreted in favour of the protection of freedom of expression, while Li CJ, in a separate concurring opinion, indicated that the court should adopt a generous approach to the "right of fair comment" on matters of public interest and express it in its full vigour as it is a most important element in the freedom of speech. The significance of this decision is the court's reliance on constitutional human rights norms to restrict the scope of malice that can defeat the fair comment defence.

1139. The second case concerns the summary offence of public obstruction. One of the express elements of the offence is that the obstruction was "without lawful authority or excuse". In ***Yeung May Wan v. HKSAR***, the Court held that the "reasonableness" of the obstruction was relevant to determining if the defendant had a defence of lawful excuse.[1002] Where the obstruction resulted from a peaceful demonstration, it was "essential that the protection given by the Basic Law to [the right to demonstrate] is recognized and given substantial weight when assessing the reasonableness of the obstruction".[1003] Further it was held that the bounds of what was reasonable in the circumstances "must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right".[1004] This case illustrates how Hong Kong courts are prepared to read in protections for fundamental freedoms into elements of offences, such as lawful excuse, where there is a potential for an offence when applied to certain situations to interfere with such freedoms.

8.2.4. Exemption for peaceful news gathering and discussion of public affairs

1140. One approach to fundamental freedoms and law reform is to enact vague defences, such as "reasonableness" or "lawful excuse", and to leave it to the courts to elaborate an approach to balancing fundamental rights with competing interests. This appears to have been the approach proposed by the LRC in 2000. However, in general, we do not recommend this approach mostly because it leaves the legal position too uncertain and misses

[1001] (2001) 4 HKCFAR 26.
[1002] (2005) 8 HKCFAR 137, para 42.
[1003] *Ibid.*, para 44.
[1004] *Ibid.*

an opportunity for a particular policy position on balancing to be reflected in the legislative scheme.

1141. In respect of anti-stalking laws and their potential to stifle free expression, we propose that the balance should be struck based on the magnitude of the harm caused by the stalking behaviour. The current criminal law is sufficient to address the more serious forms of stalking that involve violence, the threat of violence, intimidation or other illegal means. No special defences or exemptions exist for the media, protesters or others exercising the freedom of expression. For example, if a person commits the offence of assault or criminal intimidation, the law should treat that person the same (subject to prosecutorial discretion which depends greatly on the circumstances) irrespective of whether the offence arose out of news activities or a public protest.

1142. With the enactment of a new stalking offence, which protects persons more generally from persistent harassment, the net of criminal liability is cast wider, and it is necessary to be concerned about overreaching, i.e. the potential for unintended interference with fundamental freedoms, directly or indirectly by having a chilling effect on free expression. As reflected in many of the countries we have studied for this report, it is accepted that legitimate peaceful news-gathering activities and protest activities in a free society may at times cause persons to feel annoyed or harassed. It is further accepted that the benefits from having such activities (e.g. making government more accountable, enhancing the public's right to know, furthering political debate on important issues) will generally outweigh the harm that may result (i.e. harm short of violence, threat of violence or intimidation). A new stalking offence should not be aimed at those who engage in peaceful news, protest or discussion activities and should have safeguards to prevent the interference with such constitutionally protected activities. The new offence should target those individuals who persistently harass another typically following a relationship breakdown (intimate or non-intimate relationships) or resulting from an unhealthy fixation on the other person.

1143. The same could be said for new forms of civil liability against stalking. Indeed civil liability is not controlled or mediated by governmental discretion, such as with prosecution decisions. Individuals or companies can freely bring civil law suits and interlocutory injunctions that could well have a chilling effect if routinely brought against the media or protesters. Positive protections for constitutionally protected activities should also be

introduced in the civil context but only where the harm involved is below a certain threshold, e.g. where no violence or the threat of violence has been used.

1144. The idea of exempting news and protests activities from the strict application of the law is not a new idea to Hong Kong. As outlined below, there are numerous examples of such exemptions when it comes to laws that have the potential to overreach.

1145. The Personal Data (Privacy) Ordinance, Cap 486 (PDPO) exempts "news activities" from complying with certain provisions of the PDPO, as long as the collection of data had been lawful and fair. The United Nations (Anti-Terrorism Measures) Ordinance, Cap.575 (UNATMO) recognizes an individual's freedom of expression, freedom of protest and freedom of industrial action as not forming part of specified violent forms of terrorism. Similar to the UNATMO's exemption is one found in the Interception of Communications and Surveillance Ordinance, Cap 589 (ICSO) which provides that advocacy, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is not of itself regarded as a threat to public security, which is a ground for obtaining an interception or surveillance authorization. All of these exemptions are described in greater detail below.

<u>News activities exempted under the Personal Data (Privacy) Ordinance</u>

1146. The PDPO contains a number of provisions under which personal data is exempt from the PDPO by virtue of Part VIII. This means that in respect of the data and to the extent of the exemption, the provisions neither confer any right nor impose any requirement on any person.

1147. The exemption provisions that protect news activities are contained in section 61 of the PDPO. This section means that as long as data collection was lawful and fair, news activities are exempted from complying with certain provisions of the PDPO. For the ease of reference, section 61 is reproduced:

> (1) Personal data held by a data user-
>
> (a) whose business, or part of whose business, consists of a news activity; and
>
> (b) solely for the purpose of that activity (or any directly related activity),
>
> is exempt from the provisions of- (Amended 18 of 2012 s. 2)

(i) data protection principle 6 [DPP 6][1005] and sections 18(1)(b)[1006] and 38(i)[1007] unless and until the data is published or broadcast (wherever and by whatever means); (Amended 18 of 2012 s. 2)

(ii) sections 36[1008] and 38(b).[1009]

(2) Personal data is exempt from the provisions of data protection principle 3 [DPP 3][1010] in any case in which- (Amended 18 of 2012 s. 2)

(a) the use of the data consists of disclosing the data to a data user referred to in subsection (1); and

(b) such disclosure is made by a person who has reasonable grounds to believe (and reasonably believes) that the publishing or broadcasting (wherever and by whatever means) of the data (and whether or not it is published or broadcast) is in the public interest. (Amended 18 of 2012 s. 2)

(3) In this section-

"**news activity**" (新聞活動) means any journalistic activity and includes-

(a) the-

(i) gathering of news;

(ii) preparation or compiling of articles or programmes concerning news; or

(iii) observations on news or current affairs,

for the purpose of dissemination to the public; or

(b) the dissemination to the public of-

(i) any article or programme of or concerning news; or

(ii) observations on news or current affairs.

1148. The meaning of section 61 of the PDPO has been explained by Robin McLeish.[1011] Under section 61(1), a data user (i.e. the person who controls the collection, holding,

[1005] Principle 6 'access to personal data' basically gives the right to a data subject (i.e. the individual who is the subject of personal data) to access his personal data and its correction.
[1006] Under section 18(1) (b) an individual may make a request for personal data if the data user (i.e. the person who controls the collection, holding, processing or use of personal data) holds such data, and the data user may supply that data.
[1007] Under section 38(i) the Privacy Commissioner, upon receiving a complaint, shall carry out an investigation.
[1008] Under section 36 the Privacy Commissioner may carry out an inspection of personal data systems.
[1009] Section 38 deals with investigations by the Privacy Commissioner under different circumstances.
[1010] Principle 3 'use of personal data' provides that unless the data subject gives prescribed consent, personal data must only be used for the purpose for which it was collected.
[1011] R. McLeish is a Hong Kong barrister who has given a number of lectures on privacy issues.

processing or use of personal data) involved in a news activity has to comply with a personal data access request once the personal data is published or broadcast, but not if it remains unpublished or yet to be broadcasted. Thus a data subject (i.e. the individual who is the subject of personal data) has no right of access to his personal data contained in a journalists' notes or other unpublished or yet to be broadcasted material held by a data user engaged in, and solely for carrying out, a news activity.

1149. Section 61(2) allows a data user carrying out a news activity to disclose personal data where the disclosing party reasonably believes that it is in the public interest.

1150. Under section 61(1), the Privacy Commissioner cannot investigate complaints on his own initiative when those complaints relate to data users engaged in news activities.

1151. The PDPO contains both criminal and civil liabilities for breaches of the Ordinance. In relation to criminal liability, section 64 stipulates the offences for disclosing personal data obtained without consent from data users. Section 64(4) provides for the following defences, including a defence based on news activity or a directly related activity:

> In any proceedings for an offence under subsection (1)[1012] or (2),[1013] it is a defence for the person charged to prove that—
>
> (a) the person reasonably believed that the disclosure was necessary for the purpose of preventing or detecting crime;
>
> (b) the disclosure was required or authorized by or under any enactment, by any rule of law or by an order of a court;
>
> (c) the person reasonably believed that the data user had consented to the disclosure; or
>
> (d) the person—
>
> (i) disclosed the personal data for the purpose of a **news activity** as defined by section 61(3) **or a directly related activity**; and

[1012] Section 64(1) provides "A person commits an offence if the person discloses any personal data of a data subject which was obtained from a data user without the data user's consent, with an intent- (a) to obtain gain in money or other property, whether for the benefit of the person or another person; or (b) to cause loss in money or other property to the data subject."

[1013] Section 64(2) provides " A person commits an offence if –(a) the person discloses any personal data of a data subject which was obtained from a data user without the data user's consent; and (b) the disclosure causes psychological harm to the data subject."

(ii) had reasonable grounds to believe that the publishing or broadcasting of the personal data was in the public interest.

(Enacted 1995. Replaced 18 of 2012 s. 36).

1152. Thus although the data protection offence in question is of a different nature from the stalking offence, they are not totally dissimilar from one another. Disclosed personal data can be used in more than one occasion by different users or by the same user (stalking behaviour would occur on more than one occasion) and such disclosure may cause psychological harm to the data subject (stalking behaviour would have to cause fear for safety).

1153. To illustrate the exemption under section 61(1), we include one case where the Privacy Commissioner dealt with a complaint on data access request (DAR) when such data was not used for publication.[1014]

1154. A newspaper published an article containing a person (i.e. Mr. X)'s comments on the complainant. The complainant made a DAR to the newspaper requesting for her personal data contained in the emails that was sent by X to the newspaper that the newspaper had received around the publication date of the article.

1155. The newspaper refused to comply with the request on the ground that the requested personal data were held by it for news activity and, therefore, exempted under section 61(1) of the Ordinance. The complainant claimed that the newspaper had wrongfully refused to comply with the DAR and complained to the Privacy Commissioner.

1156. Having considered that (i) the business of the newspaper consists of news activity; (ii) the newspaper received X's email in the course of carrying out journalistic function, hence for news activity purpose; and (iii) the requested personal data were not published, the Privacy Commissioner took the view that the newspaper was entitled to claim the section 61(1) exemption to refuse compliance with the DAR.

1157. The complainant appealed to the Administrative Appeals Board which agreed with the Privacy Commissioner. The appeal was therefore dismissed.

[1014] [2007] HKPCPD 14.

Advocacy, protest, dissent or industrial action exempted from terrorists acts

1158. The United Nations (Anti-Terrorism Measures) Ordinance, Cap.575 (UNATMO) was implemented in Hong Kong to prevent terrorist activities. However, it recognizes an individual's freedom of expression, freedom of protest and freedom of industrial action as not forming part of specified violent forms of terrorism.

1159. Section 2 of the UNATMO defines a terrorist act in the following terms:

> (a) subject to paragraph (b), means the use or threat of action where-
>
> (i) the action is carried out with the intention of, or the threat is made with the intention of using action that would have the effect of- (Amended 21 of 2004 s. 3)
>
> (A) causing serious violence against a person;
>
> (B) causing serious damage to property;
>
> (C) endangering a person's life, other than that of the person committing the action;
>
> (D) creating a serious risk to the health or safety of the public or a section of the public;
>
> (E) seriously interfering with or seriously disrupting an electronic system; or
>
> (F) seriously interfering with or seriously disrupting an essential service, facility or system, whether public or private; and (Amended 21 of 2004 s. 3)
>
> (ii) the use or threat is-
>
> (A) intended to compel the Government or an international organization or to intimidate the public or a section of the public; and (Amended 20 of 2012 s. 3)
>
> (B) made for the purpose of advancing a political, religious or ideological cause;
>
> (b) in the case of paragraph (a)(i)(D), (E) or (F), does not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action.

1160. Thus when the acts specified in section 2, paragraph (b) (which remains unmodified since the enactment of the UNATMO in 2002) relate to advocacy, protest, dissent or industrial action, a person will not be liable under the UNATMO. In this way, an individual's rights to freedom of expression, freedom of protest and freedom of industrial action are protected.

1161. The inclusion of the exemption clause in paragraph (b) has been said to give recognition to the importance of protests as a substitute for direct democracy.[1015] It should also be noted that paragraph (a) (i) (D) "creating a serious risk to the… safety of the public or a section of the public" is not too dissimilar from the stalking behaviour that causes fear for safety, albeit the former is envisaged for an act to occur to larger groups of the society.

Advocacy, protest or dissent not a threat to public security

1162. An exemption similar to the one in the UNATMO is the one found in the Interception of Communications and Surveillance Ordinance, Cap 589 (ICSO). The ICSO provides a statutory scheme for authorizing interception of communication and covert surveillance for specific purposes. One of those purposes is to detect activity which constitutes or would constitute a threat to public security (section 3(b)). However, section 2(7) of the ICSO provides that:

> For the purposes of this Ordinance, advocacy, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is not of itself regarded as a threat to public security.

1163. It is also noted that covert surveillance in section 2(1) of the ICSO means any surveillance carried out for the purpose of a specific investigation or operation (paragraph (a)) if, among others, carried out where any person subject to the surveillance is entitled to a reasonable expectation of privacy (paragraph (a)(i)), and the surveillance is likely to result in the obtaining of any private information about the person (paragraph (a)(iii)). Covert surveillance does not include any spontaneous reaction to unforeseen events or circumstances.

[1015] Roach, K., "The post-9/11 migration of Britain's Terrorism Act 2000" in Choudhry, Sujit (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press: 2006), p.391.

1164. As to who is entitled to a reasonable expectation of privacy, section 2(2) of the ICSO states that:

> For the purposes of this Ordinance, a person is not regarded as being entitled to a reasonable expectation of privacy within the meaning of paragraph (a)(i) of the definition of "covert surveillance" in subsection (1) in relation to any activity carried out by him in a public place, but nothing in this subsection affects any such entitlement of the person in relation to words spoken, written or read by him in a public place.

1165. In other words, a reasonable expectation of privacy does not arise if the person carries out an activity in a public place. Hence he can be the target of covert surveillance in such situation. However, even if the person carries out an activity in a public place, he will still be entitled to his privacy in relation to words spoken, written or read by him, which cannot be the subject of covert surveillance.

1166. While ICSO binds public officers, the stalking offence would not bind public officers who carried out activities in the normal course of their duties.

1167. In conclusion, while privacy is protected through legislation under the PDPO, the statute recognizes legitimate news activities and hence freedom of the press. The UNATMO and ICSO recognise activities such as advocacy, protest, dissent and industrial action and hence the rights to freedom of expression, assembly and association. These legal safeguards have their limitations and restrictions. So do the relevant rights.

<u>Exempting news gathering and expressive activities related to public affairs</u>

1168. We recommend that any new liability for stalking should exempt constitutionally protected activities, such as news activities and discussion of public affairs, that fall below a threshold of safety, e.g. violence, threat of violence or intimidation. The reasons for this recommendation include the following:

> 1. Case law shows that the UK PHA has been used against the media and peaceful demonstrations, and that the vague reasonableness defence in section

1(3)(c) has not protected the media or peaceful demonstrators.[1016] It makes no difference that the majority of cases identified involve injunctions. The PHA's provisions apply to both criminal and civil harassment.

2. Targeted interviewees, who do not want to be held responsible to the public, could stop the media from reporting with the threat of prosecution for a stalking offence similar to that under the PHA. As pointed out by the HKJA, a chilling effect exists without cases even going to court, where a reasonableness defence might be invoked.[1017] For example, in the UK, an "allegation of harassment form" setting out the allegation of harassment may be served by the police on a person against whom a complaint has been lodged, warning him, without making any assessment of the allegation, that such conduct as specified in the form can constitute a criminal offence.[1018] This would prevent a journalist from further engaging in his legitimate activities even if his conduct does not constitute a criminal offence, because the police has not made any assessment and is only relying on the complainant's allegation. All the complainant might wish to do is to intimidate the journalist. In this way, the stalking offence becomes a useful tool to deter journalists from carrying out their work in the public interest.

3. If legislation expressly provides an exemption for news activities, the police would have to make an assessment of the allegation before they decide whether to issue an "allegation of harassment form." This principle can also apply to other legitimate activities such as peaceful assembly and demonstrations. In this way, such activities could be effectively protected, and the freedoms of speech, the press and expression and the right to peaceful protest effectively safeguarded. Furthermore, this would also avoid bringing unmeritorious cases to court and having to justify legitimate behaviour.

[1016] See Parts 4 and 5 above.
[1017] Submission of the HKJA, LC Paper No. CB(2)1290/11-12(01), 2 March 2012.
[1018] See *Crawford v. Crown Prosecution Services*, para 38

4. The LRC mentioned at least seven factors would have to be weighed by the court before a journalist's activities can be said not to amount to stalking.[1019] As we have seen through case law, Hong Kong courts have tended to protect private property and private life over freedom of expression (see Appendix E). Given that a stalking offence addresses interference with private life,[1020] it is fair to say that courts would maintain their approach. Thus as long as legitimate activities carried out in the public interest do not interfere with the private life of a person (including a public figure's, influential figure's, celebrity's private life), there is no reason not to provide for an exemption to that extent, so that all parties involved will have a clear and precise understanding of the scope of the offence and would not need to go to court to justify their activities. If, as pointed out by the LRC, the majority of stalking victims in Hong Kong would be ordinary citizens[1021](although there has been no stalking survey in Hong Kong to confirm that), certainty of the extent of the law will be beneficial to them. The law should be designed to protect the primary victims of stalking, not to provide a tool that can inhibit constitutionally protected activities; and certainly not to provide a tool to those who commit corruption and other crimes, hide information that could help prevent crimes, or silence popular voices expressing opinions respectfully and peacefully.

5. Given people's dissatisfaction as manifested in the increase of the number of protests in recent years (see Appendix E), not allowing for specific defences that would show the Government's commitment to protect peaceful assembly and demonstration, would tend to attract public criticisms.

6. The LRC's comments on the civil court's inherent jurisdiction to stay proceedings if they are frivolous or vexatious or an abuse of process to counter argue the HKJA's argument that many of those who wish to escape media attention are not victims, but "victimizers" who can afford the legal costs of

[1019] See paras 7.24 and following of the LRC's report.
[1020] We note the LRC's comments on the extent of the meaning of private life.
[1021] See for example, paras 1.40 and 9.70 of the LRC's report.

proceedings,[1022] implies that a journalist would have to go through all those channels in order to show that his activities were legitimate. This also implies that there is a potential for bringing unmeritorious cases to court. Much of this could be avoided by introducing defences that exempt specific categories of activities.

7. The dissatisfaction rate of 36 per cent to the proposed "reasonable pursuit" defence,[1023]as well as all the media organizations / journalists groups' objecting to the proposed anti-staling legislation, should not be disregarded.

Recommendation 2

We recommend that any new criminal or civil liability based on the stalking of another person 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.

8.3. Criminal liability and punishment for stalking

1169. The LRC pointed out that the criminal law was ineffective with regard to stalking behaviour. For example, the LRC indicated that conduct such as following, watching, making silent phone calls, when pursued repeatedly was not covered by existing criminal law. This remains the case in the year 2013.

8.3.1. New offence of stalking

1170. As indicated in the above policy discussion, we recommend the introduction of a new criminal offence of 'stalking' be proposed and enacted. There are two options as to how this could be done: by amendment and incorporation within existing legislation, or by introducing new anti-stalking legislation. We recommend that the new offence be added to existing legislation, specifically the Crimes Ordinance, Cap 200 (CO). The CO already embodies a variety of penal offences under one single statute. Stalking could be inserted after the offence of Intimidation (Part IV) in a new Part known as "Part IVA". The approach of inserting anti-

[1022] See para 9.70 of the LRC's report.

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), as examined in Part 1 above.

Recommendation 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).

8.3.2. Not following the UK model

1171. As a threshold question, there needs to be consideration as to whether the UK model, which was originally recommended by the LRC, should continue to be the proposed model of reform. Based on the research done for this project, we do not recommend this model. A formulation of the criminal offence of harassment based on the UK model has deficiencies, which Hong Kong should avoid. The post-enactment experience shows that the formulation in the PHA did not strike the proper balance of the relevant competing interests. Thus we do not recommend the UK approach for the following reasons:

1. A broad and vague formulation of what amounts to harassment carries the risk of over inclusiveness and could lead to abuse. The definition of harassment under the UK PHA does not provide any clear or precise definition of harassment, which means that it applies to all types of conduct (which includes speech). This creates a climate of uncertainty for defendants, lawyers and the police.[1024]

[1024] It has been commented that: "A broadly worded criminal offence can have a chilling effect on speakers, if it is not clear whether a prosecution is likely or not. The prospect of being subject to an investigation, even where no prosecution follows, can have a chilling effect in itself." See Jacob Rowbottom, "To rant, vent and converse: protecting low level digital speech" (2012) Cambridge Law Journal 355, at 379. This is illustrated in Part 4.1.8 where the police warned a blogger that his conduct of posting photographs would be deemed an offence under the UK PHA. Under the interpretation section of the PHA, a course of conduct must involve, in the case of conduct in relation to a single person, conduct on at least two occasions in relation to that person (section 7(3)(a)). Thus if the photographs were posted on more than one occasion, there is a possibility of a section 2 offence arising, other elements being present. It would have to be shown that the posting on more than one occasion and not the mere presence of the photographs was calculated to produce alarm or distress (section 7 (2)) and that the responsible person knew or ought to have known such conduct amounted to harassment (section 1(1) (b)).

2. The UK Court of Appeal has noted the broadness of the PHA: "All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress: section 7(2). But conduct might be harassment even if no alarm or distress were in fact caused."[1025]

3. When dealing with what amounts to harassment, UK courts have referred to other statutes where harassment is defined, as there is no definition of harassment in the PHA. For example, in the criminal case of *Lincoln Crawford v. Crown Prosecution Service* [1026] the trial judge referred to section 3A of the Race Relations Act 1976.[1027] It should be seen as a shortcoming of the PHA when judges need to borrow definitions from other laws to interpret PHA provisions, which Parliament could and should have made clearer.

4. The concept of reasonableness is used in the PHA. This is done in two ways. One is through section 1(2), which requires a finder of fact to answer whether the defendant ought to have known that what he was doing amounts to harassment by the objective test of what a reasonable person would think. The other is through section 1(3)(c) (reasonableness defence), which also poses an objective test, namely whether the conduct is in the judgment of the finder of fact reasonable. "There is no warrant for attaching to the word 'reasonable'; or via the words 'particular circumstances' the standards or characteristics of the defendant himself."[1028] By not taking into account the defendant's standards, a defendant such as the one in *Lincoln Crawford* has

[1025] *Majrowski v. Guys and St. Thomas's NHS Trust* [2007] AC 224, at [30] as cited in *Lisa Maria Angela Ferguson v. British Gas Trading Ltd.* [2009] EWCA Civ 46.
[1026] [2008] EWHC 148 (Admin). This case involved Mr B. Jenkins, a barrister, convicted after a 9-day trial at the Magistrates' Court, of two offences of harassment under sections 1 and 2 of the PHA. The victim was his wife, a solicitor. The harassment behaviour consisted of writing letters, observing, following and taking of photographs. Mr Jenkins appealed to the Crown Court in an 11-day hearing after which his appeal was dismissed. He then applied to appeal by way of cases stated. This was such hearing where the appellant's appeal was dismissed.
[1027] Section 3A of the Race Relations Act 1976 reads: "(1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1 (1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of – (a) violating that other person's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him."
[1028] *R v. Colohan* [2001] EWCA Crim 1251. The Supreme Court has recently ruled that for the purpose of section 1(3) (a) defence (preventing or detecting crime), a test of reasonableness does not form part of the defence in section 1(3)(a), as such test was in other sections of the PHA 1997, and it would also render the general defence of reasonableness in section 1(3)(c) otiose, *Hayes (FC) v. Willoughhby*, discussed in Part 4.1.9 above.

almost all doors closed to justify his behaviour. In this case, the harassment behaviour of sending letters, observing, following and taking of photographs by the defendant of his wife was, as he explained and which was not disputed, for the purpose of gathering evidence for matrimonial proceedings. This evidence could have been used to show that his wife was telling lies in those proceedings. In other words, the husband himself was doing what most likely a private investigator would do. Those were circumstances taken into account by the court but were separate from the concept of whether the conduct was reasonable, which was not, judged from the objective reasonable person's viewpoint. The combination of the broadness of the PHA and the objective reasonable person element led to the result of a criminal conviction on a man of otherwise impeccable conduct (as described by the court).

5. The main objective of introducing anti-stalking legislation in the UK was the problem of stalking of a person fixating upon another. It was realized more than 10 years later, after a survey on stalking was conducted, that the PHA had not properly addressed the main problem, which is stalking affecting mostly women, as revealed in the survey. While two stalking offences were later introduced which contain a list of examples, these offences are entrenched in the PHA model.[1029]

6. A precise definition of stalking can ensure that stalking is applied only in deserving and clear cases of stalking and not to all types of human behaviour.

7. A precise and clear definition of stalking would avoid overloading of the courts with unnecessary challenges on the grounds of vagueness or overbroad terms.

8. For one single instance of conduct there are already other offences available, as shown above.

[1029] This has been discussed in Parts 1 and Part 6 above.

Recommendation 4

We do not recommend following the UK approach in formulating the statutory terms of the new criminal offence of stalking.

8.3.3. Elements of the new offence of stalking

1172. A statutory offence typically has the following components: (a) *actus reus* elements; (b) *mens rea* elements; and (c) defences. As a new stalking offence would be truly criminal in character and thus require proof of moral culpability, there is no need to consider the issue of strict or absolute liability. In drafting criminal offences in Hong Kong's constitutional context, there are certain basic principles that should be kept in mind. Our proposals are informed by the following three principles:

> **1. Presumption of innocence.** The Basic Law and Bill of Rights protects the presumption of innocence, which requires that the prosecution prove all the elements of the offence beyond a reasonable doubt.[1030] The legislature may derogate from the presumption but only if justification can be demonstrated based on the two prong tests of rationality and proportionality. There must be evidence to support the legitimacy of the aim, the rational connection between the derogation and the achievement of the aim, and the necessity for the derogation to achieve the aim. Legislation should clearly indicate whether the burden to prove a particular element, such as defences and exemptions, is imposed on the defendant.

[1030] The basic rule in criminal cases is that the legal burden of proof (also called persuasive or probative burden) is placed on the Prosecution to prove all the elements of the offence and the standard is beyond reasonable doubt. The exceptions to this rule (i.e. where the legal burden is placed on the defendant on the balance of probabilities) include the reliance by the defendant on insanity, diminished responsibility or where statute expressly or impliedly so provides. There must be a policy justification for imposing a legal burden on the defendant, as without such there would be an inroad into the presumption of innocence. Thus without justification, such presumption is open to challenge. On the other hand, the evidential burden (also called a rule of common sense), while requiring some proper evidence, the burden is not to such an extent as requiring a standard of proof. Once the judge decides there is enough evidence to raise the issue, the prosecution must then negative the issue beyond a reasonable doubt if it is to prove its case. Examples of where the defendant will have the evidential burden include the defences of duress, self defence and provocation. The Court of Final Appeal has considered five challenges to reverse onus provisions and in only one of them (the most recent decision) did it uphold the justification for the reverse onus. See *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614; *HKSAR v Ng Po On* (2008) 11 HKCFAR 91; *Lee To Nei v HKSAR* (2012) 15 HKCFAR 162; *Fu Kor Kuen Patrick v HKSAR*, unreported, FACC4/2011, 24 May 2012, CFA.

2. Principle of legal certainty. "A criminal offence must be so clearly defined in law that it is accessible and formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, whether his course of conduct is lawful or unlawful. It is, however, accepted that absolute certainty is unattainable and would entail excessive rigidity. Hence it is recognised that a prescription by law inevitably may involve some degree of vagueness in the prescription which may require clarification by the courts."[1031]

3. Proof of a culpable state of mind. It "is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable ... The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if ... one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment."[1032]

1173. The LRC recommended a new criminal offence with the following features:

1. *Actus reus* elements of "course of conduct amounting to harassment of another" which causes the person "alarm or distress". The meaning of "harassment" would not be defined.

2. *Mens rea* elements of "knowing or ought to know" that conduct amounts to harassment. The objective standard would be met if "a reasonable person in

[1031] *Mo Yuk Ping v. HKSAR* (2007) 10 HKCFAR 386, para 61.
[1032] *R v. G* [2004] 1 AC 1034, 1055CD, per Lord Bingham, followed by the Court of Final Appeal in *Sin Kam Wah v. HKSAR* (2005) 8 HKCFAR 192, paras 42-44, where it was held that the objective form of recklessness set down in *R v. Caldwell* [1982] AC 341 should no longer be followed in Hong Kong.

possession of the same information would think that the course of conduct amounted to harassment of the other".

3. Defences. If the defendant can show (a) the conduct was pursued for the purpose of preventing or detecting crime; (b) the conduct was pursued under lawful authority; or (c) the pursuit of the course of conduct was reasonable in the particular circumstances.

1174. As explained further below, we recommend the new offence of stalking have the following features:

1. Provision of an exhaustive list of acts that can constitute a course of conduct amounting to harassment when done on at least two occasions, either the same kind of act or multiple acts of different kind.

2. The impact on the victim will be the causing on him or her reasonably, in all circumstances, to fear for his or her safety or that of a person known to him or her.

3. The defendant must either intend to cause fear for safety to a person, or be reckless as to whether his or her acts might cause such fear for safety to a person. Reckless means either the defendant was aware of a risk that fear for safety might be caused to a person, or the defendant did not care if such fear for safety might be caused to a person.

4. Exemptions provided for legitimate or constitutionally protected conduct such as activities pursuant to news gathering, lawful employment and discussion of public affairs. The defendant will have an evidential burden to raise an exemption defence, but once that is done it will be for the prosecution to negative the defence beyond a reasonable doubt.

Actus Reus

1175. Our proposal on *actus reus* differs from the LRC proposal primarily by our recommendation to include an exhaustive definition of harassment in the form of a list of acts done in relation to another person. Our comparative law research for this project shows that

the 'list approach' is the modern trend, and, other than the original UK legislation, none of the other jurisdictions studied had a criminal offence for which courts were left to define a vague term such as 'harassment'. The reason for this is most likely because the provision of an exhaustive list of specific prohibited conduct gives full effect to the principle of legal certainty. People should be able to ascertain clearly what conduct is and is not punishable as stalking as distinct from other offences. It also serves to keep the reach of the criminal offence within recognizable boundaries. We repeat here the reasons above for not following the UK approach.

1176. As to what should come within the list, no two jurisdictions have exactly the same list. We are of the view that a list of prohibited stalking acts drawn from overseas jurisdictions should reflect the incidents of stalking in Hong Kong and the perceived inadequacies of the current laws to cover stalking behaviour when it is carried out repeatedly so that it constitutes a 'course of conduct'[1033] 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. In this way, the impact of the prohibited conduct on the victim is a necessary element.

1177. The fear for safety requirement demarcates the line that justifies a criminal law response. It is used in all the jurisdictions considered in this study: UK for aggravated offences ("fear of violence"); Scotland ("suffer fear or alarm"); Queensland, Australia ("fear, reasonably arising in all the circumstances, of violence"); Victoria, Australia ("fear in the victim for his or her own safety"); New Zealand ("fear for his or her safety"); Canada ("fear for their safety"); Manitoba, Canada ("fear for his or her own safety"); California ("reasonably fear for his or her safety"); Nevada ("places the person receiving the threat in reasonable fear that the threat will be carried out"); South Africa ("fear of harm to a complainant"). It is not any fear in the complainant that will satisfy the element. It must be reasonable in the sense that a reasonable person in the same circumstances of the defendant's course of conduct would also experience fear for his or her safety. This reasonableness qualifier is also used in the Queensland, Victoria, New Zealand, Canada, Manitoba, California and Nevada legislation. The reasonableness requirement will help to avoid trivial cases, complaints made by extra-sensitive complainants, and other cases best left for alternative dispute resolution measures.

[1033] A course of conduct is a term used in jurisdictions such as Victoria, California and Nevada.

1178. We recommend the following list of prohibited acts:

(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 and messages, or packages or other objects to a person;

(d) following, pursuing or accosting a person.[1034]

1179. We recommend that a course of conduct should consist of at least two acts (either the same or different acts) within the list. Hence a person who engages in say, a category (c) act once and a category (d) act once, or in any category (d) act twice would commit the *actus reus*. To constitute a course of conduct, there must be at least two occasions of prohibited conduct. This approach is adopted in Canada,[1035] New Zealand and California and also follows the LRC's position in that the concept of persistence be included in the *actus reus*.

1180. We do not propose a catch-all prohibited act which would be too broad and have the potential of covering all types of behaviour, including behaviour under existing legislation. For example, conduct that consists of threats with injury or with any illegal act and which is carried out with intent to alarm amounts to intimidation (section 24 of the Crimes Ordinance). A recent illustration where such conduct may be seem to overlap with stalking is the case of a former teaching assistant (H. Yu) at Chinese University's law school who sent 50 threatening phone messages within a period of six months to her ex-colleague over allegedly

[1034] Similar provisions appear in section 264 (2) of the CCC "(*a*) repeatedly following from place to place the other person or anyone known to them; (*b*) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be"; section 1 of the South African Domestic Violence Act: "(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be; (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;" ""stalking" means repeatedly following, pursuing, or accosting the complainant repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be."

[1035] While section 264(1) of the Canadian Criminal Code uses the term 'repeatedly', there is case law indicating that conduct can be repeated only if it occurs on two occasions.

unsatisfactory working arrangements.[1036] Yu's conduct was found to be persistent and repetitive and caused the victim alarm. Yu was found guilty of one count of criminal intimidation by a magistrates' court in September 2013. While the intimidation offence will overlap with the proposed stalking offence, there remain many differences. The key element in section 24 is 'threats', which is absent from the proposed stalking offence. More specifically, section 24 requires proof of a threat to a person with any injury to a person, reputation or property, or with an illegal act. The proposed stalking offence has a different focus and will probably capture a broader range of behaviour. It focuses on the causation of fear for safety in the complainant from certain conduct of the defendant. Another difference is in the *mens rea* (discussed further below) in that the intimidation offence can only be satisfied with proof of a specific intent.

1181. Another already criminalized behaviour is that of loitering in a public place or in the common parts of any building and which causes fear for safety or well-being (section 160 of the Crimes Ordinance). While this offence is restricted to public places or common parts of a building, loitering in the proposed category (a) can occur in any place. The same principle applies to behaving in a noisy or disorderly manner under section 17B(2) of the Public Order Ordinance, which requires at least threatened violence occurring in a public place.

1182. Furthermore, it is useful to apply the proposition (which we accept) that speech alone should not be the focus in a stalking offence, as what amounts to stalking should be content-neutral. As pointed out by the LRC, "the emphasis would not be on the message, but rather on the conduct of an individual or the manner in which his speech is directed."[1037] This is consistent with our view that legitimate expressive activity should be exempt from the offence. In this regard, acts of 'publishing' will not be appropriate to be included in the list of prohibited acts

1183. Specific language that refers to electronic technology can signal to law enforcement the application of stalking laws to behaviour that occurs in the virtual world. Even without such express language, courts will often interpret provisions to apply to new technological

[1036] See Tomas Chan, "Chinese University teacher threatened to 'chop off' ex colleague breasts", *South China Morning Post*, 3 September 2013.
[1037] See para 7.58 of the LCR's report.

contexts on the basis of the interpretive principle that the 'law is always speaking'.[1038] The Internet, twitter or other electronic technology are means by which one person contacts another person and proposal (b) will capture these new methods of communication. Also proposal (c) captures the harm that can flow from the sending and receipt of electronic mail and messages and their attachments.

1184. Conduct such as the posting of comments on the Internet, Twitter or other electronic media which are directed at a specified person or spread through rumors about the specified person (i.e. contacting directly or indirectly respectively), with the requisite *mens rea*, would fall under categories (b) or (c)[1039] of stalking conduct. This would include bullying.

1185. With respect to the cyber bullying phenomenon, the preventive measures undertaken by the Social Welfare Department in 2011 which commissioned three non-governmental organisations to each launch a three-year pilot cyber youth outreaching project,[1040] seems to be a very good initiative to tackle the roots of the problem as cyber bullying tends to occur among children and teenagers.[1041]

1186. With respect to what could be perceived as an invasion of privacy infringement, such as when someone repeatedly watches over his neighbour's premises, again, it would only constitute stalking if it reasonably causes fear for safety and meets the *mens rea* requirements. A Canadian case is apposite. A person who was a stranger to the alleged victim stood in front of the alleged victim's house and watched the children play for about 15 minutes, wearing a camera over his shoulder. He knocked on the door and said he wanted to make friends. He was told to leave and did so. While his conduct was odd and suspicious, it did not constitute criminal harassment under the Canadian legislation.[1042] The use of CCTV cameras installed at homes to monitor the performance of domestic helpers is common in Hong Kong. Domestic helpers are advised that they would be monitored for the purposes of assessing their

[1038] *R v Ireland; R v Burstow* [1998] AC 147 (HL). Section 264 of CCC is not restricted to any specific method of communication and the provisions have been applied to cyber stalking. See examples in "A Handbook for Police and Crown Prosecutors on Criminal Harassment" Part 3.6, accessible at http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/har/part3.html
[1039] (b) "Contacting a person, either directly or indirectly, for example by telephone, mail, fax, email or through the use of any technology."
[1040] See for example LC Paper No. CB (2) 1585/11-12(03), April 2012.
[1041] In this connection see for example, The Hong Kong Federation of Youth Groups, "A study on cyber-bullying among Hong Kong secondary students", September 2010, accessible at http://yrc.hkfyg.org.hk/news.aspx?id=ba972e77-cfa2-4d64-9598-6ec3bb4a780d&corpname=yrc&i=2527
[1042] *R v. Zorogole* [2004] N.S.J. No. 102; 2004 NSPC 16.

performance and ensuring the safety of children in the home. Such use of CCTV will not cause a person to fear for their safety and thus will not be caught by the stalking offence.

1187. Regarding persistent complaints by disgruntled clients of private organizations or public bodies, they could only amount to stalking if they caused fear for safety and met the *mens rea* requirements. Cases like *Beadle v. Allen* in New Zealand (discussed in Part 5.3) where the conduct (which involved complaints related to medical services) only caused concern, annoyance or anger, will not meet the *actus reus* definition of the proposed offence.

Recommendation 5

A. The new offence of stalking should be based on the criminalisation of a course of conduct, consisting of at least two of the following acts (either the same or different acts) 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:

(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 and messages, or packages or other objects to a person;

(d) following, pursuing or accosting a person.

Mens Rea

1188. The most significant difference in our proposal from the LRC's recommendation is that we recommend that only a subjective form of *mens rea* will suffice before a person can be convicted of the new stalking offence. However the subjective standard will be defined broadly to include three different states of mind:[1043] (a) intention; (b) subjective foresight of an unreasonable risk; and (c) not caring about an unforeseen risk. All three states of mind are

[1043] Intent is used in various provisions of the California' s Penal Code. § 646.9 Stalking; recklessness is used in section 264(1) of the CCC.

accepted and applied *mens rea* elements in Hong Kong, and the Court of Final Appeal has held that the last two states of mind are forms of 'recklessness' of equivalent moral culpability.[1044]

1189. Having this standard of *mens rea* is consistent with the principle that crimes should involve the proof of a culpable state of mind. It will also constrain the reach of the criminal law, thereby attracting greater support for this reform. The mental element of recklessness is broader than intention. Nevertheless, the element is subjective in that the defendant must be aware that his conduct might cause fear for safety and despite this awareness persists with his conduct. Thus if the defendant without closing his mind genuinely did not give any thought to the possibility of there being any risk, he would not be reckless. This is because there might be many reasons for why a person did not give any thought to the possibility of risk. In some cases, the circumstances may be understandable, e.g. immaturity, impaired mental development, mental disability, etc. However if the defendant deliberately closed his mind to the consequences of his actions because he did not care what the consequences might be then this is a subjective state of mind that should be treated as culpable as taking a known risk. It is incorrect to believe that the 'could not care less' test for recklessness involves an objective test. One should not confuse the application of this standard with the evidential proof of the standard using circumstantial evidence. See further discussion of proof below.

1190. This proposal constrains the reach of the criminal law more so than the objective standard proposed by the LRC. All objective *mens rea* standards require individuals to live up to the standards of the fictitious 'reasonable man'. Inevitably there will be cases where an individual (for whatever reason including age, immaturity, mental disability) did not in fact see the risk of harm, but a reasonable man in the circumstances would have seen the risk. The individual would be convicted on the objective standard even though he or she could not be said to be morally culpable in their mind. Serious offences that have objective *mens rea* as the basis of liability, such as the money laundering offence, have often been described as 'draconian', subjected to numerous legal challenges in the courts, and criticized for being unjust.

[1044] *Kwan Chi Wing v. HKSAR*, unreported, FAMC44/2009, 9 Sept 2009 (CFA AC).

1191. There is no reason to believe that the offence with the proposed *mens rea* requirement will be any more difficult to prove in cases of genuine stalking. Where it has been made clear that the offender's conduct is unwanted, whether by the words or conduct of the victim or simply by virtue of the background of their relationship, it will normally be reasonable to infer that the offender was at least reckless in relation to causing fear for safety to the victim or a person known to the victim. The element of the subjective can be inferred from the actions and words of the defendant, by virtue of the relationship and all the circumstances of the case. The critical factual question will be whether the defendant knew that his course of conduct might cause the complainant to fear for her safety. And in some cases, the critical question will be whether the defendant did not know that the complainant might fear for her safety because he did not care one way or another.

1192. Delusional stalkers who act out of "love" for the victim may still act recklessly because the victim would in most cases hint (if not directly convey) to them that the behaviour is unwanted. Again, inferences can be made from the victim's reaction to conclude that the defendant was reckless, that he was aware of the risk. This is how recklessness is in most cases proved by the prosecution, i.e. through inferences. If the delusional stalker is fit to plead and stand trial, the court will proceed with the case as any other case.

1193. By way of comparison, the Canadian courts have given the following meaning to recklessness, which is one of the *mens rea* requirements for the offence in section 264 of the CCC: "recklessness involves knowledge of the danger or risk and persistence in the course of conduct bringing about a result prohibited by criminal law, that is the person is conscious of the risk and proceeds in the face of it."[1045] The courts have emphasized that they may make reasonable inferences of the defendant's state of mind.[1046] This definition of recklessness is similar to the first form of recklessness in our proposal.

1194. Thus, in *R v. Saloio*,[1047] the Ontario Court of Justice followed *Holmes* in that "where there is no evidence from the accused, whether or not he had the requisite *mens rea* depends

[1045] *R v. Sansregret*, [1985] 1 SCR 570, quoted by the Supreme Court in *R v. Briscoe*, 2010 SCC 13, and relied on in *R v. Frohlich*, [2010] ABQB 260, the Alberta Court of Queen's Bench.
[1046] R v. *Holmes*, 2008 ONCA 604; [2008] O.J. No. 3415. For a number of examples on how the courts have interpreted the mental elements in section 264 of the CCC, see "A Handbook for Police and Crown Prosecutors on Criminal Harassment" Part 3.4.3 onwards, accessible at http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/har/part3.html
[1047] *R v. Saloio* 2010 ONCJ 164.

on the inferences to be drawn from the proven facts."[1048] Ms. Saloio made it clear to the defendant on several occasions that she did not want any unsolicited contact with him, that she was not interested in reconciling and that she did not want to return to the marriage. When she confronted the defendant about following her, he admitted that he was following her and said he was doing it because he missed her. The court said: "in persisting to follow her and demanding she return to the marriage, he must have known the impact his conduct would have on her. The defendant must have known that his pursuit of Ms. Saloio and stalking her was not welcome. I find that the defendant knew that she would feel harassed by his unwanted contact with her or was reckless as to whether she was harassed."[1049]

Recommendation 6

Before a person can be convicted of the new stalking offence, it must be proven that he or she carried out the prohibited course of conduct either with the 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.

Exemptions

1195. As pointed out earlier, the definition of stalking should exempt legitimate and constitutionally protected activities. To be clear, the aim of our proposal is not to exempt journalists, demonstrators or other types of groups of people per se, but the legitimate activities these persons engage in so long as they do not involve violence, the threat of violence, intimidation or other illegal means. As outlined in our reasons above for rejecting the UK model, we do not believe a vague defence of "pursuit…was reasonable" provides sufficient certainty and clarity to protect constitutionally protected freedoms in Hong Kong.

1196. Exempting legitimate activities is not unknown to the Hong Kong legislature, as it has done so under the PDPO, UNATMO and ICSO, as discussed earlier. We note the specific exemptions found in the United States legislation (especially Nevada, Illinois and California),

[1048] *R v. Saloio* 2010 ONCJ 164, at para 59.
[1049] *Ibid*, at para 60.

Australia (Queensland and Victoria), Canada (in relation partly to intimidation), and the defence of "lawful purpose" in New Zealand for civil liability.

1197. After a review of the relevant enactments, we conclude that the Nevada and Victoria anti-stalking legislation are the ones, which, with appropriate adaptations, are most suitable for Hong Kong in terms of exemptions as they capture in clearer terms what other overseas legislation do not. Therefore, it would send a clear message as to what kind of activities should not be the target of stalking prosecution.

1198. We propose that the following categories of activities be exempt from the new stalking offence. Exemptions (a) to (c) are drawn from the Nevada legislation while exemption (d) from the Victoria legislation:[1050]

(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.

(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.

1199. We do not recommend including an express restriction on the availability of exemptions where there is violence, threat of violence, intimidation or other illegal means, although such a restriction would reflect the policy we have adopted. Where stalking behaviour involves these more harmful acts, we expect the relevant authorities to proceed on the basis of existing criminal offences, which do not provide any exemption for protected activities. To include an express restriction in the new stalking offence would only invite unnecessary litigation over the meaning and scope of each exemption.

[1050] Section 21A (4A) (c) of the Victoria Crimes Act 1958 provides "(c) for the purpose of engaging in political activities or discussion or communicating with respect to public affairs."

1200. Before elaborating upon each of the four categories of exemptions, we address the issue of terminology and the significance, if any, of referring to these exceptions from criminal liability as 'exemptions'. Exemption is being used here to signify that a category of activities is being excluded from the ambit of the criminal offence. This is somewhat different from defences that look to specific conditions or circumstances occurring, e.g. duress or provocation. However, when it comes to legal interpretation and analysis in criminal law, the label of 'exemption' means very little. This is because the courts, particularly in its constitutional jurisprudence, have repeatedly held that it is substance and not form that matters in interpretation.[1051] These 'exemptions' will be treated like any other defence in criminal law. Section 94A(4) of the Criminal Procedure Ordinance, Cap 221, gives "exemption" as an example of a negative averment which ordinarily a defendant would have the legal burden to prove. But this section is not relevant for our purposes because we intend to provide expressly (thereby overriding section 94A) that only an evidential burden will be placed on the defendant to invoke the exemptions. Furthermore the Court of Final Appeal has also held that section 94A is not to be applied mechanically without regard to the substance of the provision.[1052]

1201. We have considered whether the legal burden of proving the exemptions should be on the prosecution or the defence. We see arguments in favour of both positions. Defendants are obviously in the best position to prove the nature and purpose of their conduct at the relevant time. To do so, however, may require that they waive their right not to testify and give evidence of their purpose. Moreover, it could be said that since the aim of the new offence is not to target journalists and protesters, if there is some evidence suggesting that they are being targeted then the prosecution have the burden to negative such position beyond a reasonable doubt. Without having any experience with such an offence, there is no reason to believe that the prosecution will have any great difficulty in negativing such evidence to the criminal law standard. Thus it is hard to see the case for reversing the burden on the defendant. Instead the defendant should only have an evidential burden to raise the issue and once that is done, the prosecution should have to disprove the matter beyond a reasonable doubt, failing which the defendant would be acquitted. Such a position would help to lend greater public confidence in these reforms.

[1051] See *Lee Kwong Kut v Attorney General of Hong Kong* [1993] AC 951 (PC); *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574.
[1052] See *Lam Yuk Fai, Steve v HKSAR* (2006) 9 HKCFAR 281.

1202. Category (a) – 'lawful authority':[1053] The intention behind having category (a) is to make clear that conduct authorized by law will not be caught by the new offence. In the absence of this provision, it might be thought that the new legislation was intended to operate notwithstanding the effect of previous laws. Category (a) has the effect of ensuring that law enforcement acting pursuant to lawful authority can continue to act without fear of being in violation of this new offence. Another example is public assemblies lawfully authorized under the Public Order Ordinance, Cap. 245. Any person acting pursuant to the crime prevention provision in section 101A of the Criminal Procedure Ordinance, Cap. 221, would be exempted. A final example is peaceful picketing pursuant to section 46 of the Trade Unions Ordinance, Cap. 332.[1054]

1203. The term "without lawful authority" is commonly used in Hong Kong enactments.[1055] Its scope has always been left to judicial interpretation depending on the context of the relevant legislation.[1056] For example, in the context of the offence of public obstruction, the Court of Final Appeal noted English law's treatment of the meaning of 'lawful authority' to include "statutory permits or licences for market and street traders, and the like".[1057] While the Nevada legislation uses the term "without lawful authority", it goes on to define what lawful authority is and is not (including the exemptions).[1058] Reference to "without lawful authority" can also be found in section 264 of the Canadian Criminal Code.

[1053] See LRC, Recomm. 3(b).
[1054] This protection was interpreted broadly in *Turbo Top Ltd v Lee Cheuk Yan* [2013] 3 HKLRD 41 (CFI).
[1055] Search results from the database of the Bilingual Laws Information System (BLIS) shows 153 provisions within various Hong Kong pieces of legislation which rely on such term. For example, one such provision is section 17A (3) (a) of the Public Order Ordinance (Cap 245) which provides that "Where any public meeting, public procession or public gathering, or other meeting, procession or gathering of persons, is an unauthorized assembly by virtue of subsection (2)- (a) every person who, without lawful authority or reasonable excuse, knowingly takes or continues to take part in or forms part of any such unauthorized assembly…shall be guilty of an offence…"
[1056] For example, see section 64 (4) (b) of the PDPO: "the disclosure was required or authorized by or under any enactment, by any rule of law or by an order of a court".
[1057] See *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137, [41].
[1058] Section 1 of the Nev.Rev.Stat. § 200.575.provides "A person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, and that actually causes the victim to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, commits the crime of stalking."
Section 6(g) provides " "Without lawful authority" includes acts which are initiated or continued without the victim's consent. The term does not include acts which are otherwise protected or authorized by constitutional or statutory law, regulation or order of a court of competent jurisdiction, including, but not limited to:
(1) Picketing which occurs during a strike, work stoppage or any other labor dispute.

1204. Category (b) – news gathering: The text of this category is based on the exemption for journalists in the Nevada legislation which sets two conditions that have to be met before the exemption can apply. The first one is that the relevant person must be employed or engaged by or have contracted with a newspaper, periodical, press association or radio or television station. The second condition is that the relevant person must be acting solely within that professional capacity (i.e. that of a reporter, photographer, camera operator or other person while gathering information for communication to the public). Thus the activities of gathering information for communication to the public by a blogger for example would not be exempted. However, the activities of a blogger might be covered by the proposed category (d) exemption as discussed below.

1205. We have redrafted the Nevada provision with a view to greater simplicity and to avoid terms, such as "reporter", "employed or engaged by", "professional capacity", that could give rise to difficult interpretive issues. The proposed category (b) exempts anyone who is "gathering information for communication to the public" and is doing so "pursuant to a contractual arrangement" with a media organization. "Contractual arrangement" rather than contractual obligation is used so as to include freelance authors who have less formal engagements with a media company.

1206. This proposal helps to remove any chilling effect that the new offence would have for media organizations and those who work for them. It however does not exempt all forms of expressive activity. To provide such blanket exemption would open the door to abuse because harassment of a particular individual could be characterized as an expression of a viewpoint or protest directed to that person. To exempt such a wide scope of expressive activity could well defeat the policy behind the reform. Exemptions should be restricted to genuine efforts to communicate information to the public arising from journalistic duty or, as recognized in exemptions (c) and (d), conduct done pursuant to employment duty or for genuine discussion of public affairs, as opposed to personal affairs.

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(2) The activities of a reporter, photographer, camera operator or other person while gathering information for communication to the public if that person is employed or engaged by or has contracted with a newspaper, periodical, press association or radio or television station and is acting solely within that professional capacity.
(3) The activities of a person that are carried out in the normal course of his or her lawful employment.
(4) Any activities carried out in the exercise of the constitutionally protected rights of freedom of speech and assembly."

1207. Category (c) – normal course of employment: It is not the intention of the reform to criminalise conduct done in the normal course of one's lawful employment. Indeed it is difficult to think of any kind of lawful employment that would ordinarily involve courses of conduct (not otherwise authorized by law) causing people reasonably to fear for their safety. Perhaps aggressive salespeople, such as property agents contacting potential clients to buy/sell properties, debt collectors, or private detectives could on occasion find themselves caught by the proposed offence. Following the example of the Nevada legislation, the proposed category (c) exemption provides an assurance to ordinary people that simply doing one's lawful job, even where it may sometimes result in distress or even fear for other persons, will not result in prosecution under the new stalking offence. Those who in the course of their occupation engage in violence, threats of violence, intimidation or other unlawful acts will be dealt with by existing laws.

1208. No doubt there will be overlap between the activities covered by categories (b) and (c). However, category (c) would not cover non-employment relationships such as independent contractors or freelance writers. Having a specific exemption for journalists also helps to ensure confidence in the proposal from the media sector as a whole.

1209. Category (d) – discussion of public affairs: The proposed category (d) exemption covers activities carried out for the sole purpose of discussing or communicating matters concerning public affairs. For example a news blogger, who engages in discussion or communicating with respect to public affairs, may successfully rely on this exemption. On the other hand, if a person is trying to use this exemption for his or her own personal agenda even if he or she has other political objectives, such as in the Victorian case of *R v. Abbot* (discussed in Part 5.2.2), he or she will not succeed in relying upon this exemption. This is because communication of public affairs could not be said to be the "sole" purpose. A political activist organizing a demonstration outside the home of a person because the activist has a personal grudge against the person could not successfully rely on the exemption. Likewise a person dissatisfied with his landlord resuming his premises (or raising his rent) and resorting to stalking the landlord would not be protected under this exemption. In these two examples, it could not be said that the person in question was communicating matters that concerned "public affairs"; they were personal affairs and thus not protected by the exemption.

1210. The Victorian legislation also exempts conduct for the purpose of "engaging in political activities". We do not propose including these terms in the category (d) exemption primarily because they invite unnecessary litigation over the meaning of "political activities". Our chosen formulation of "discussing or communicating matters that concern public affairs" is clear and should cover most political activities intended for exemption.

1211. We illustrate the application of our proposed new offence with reference to the facts of the UK case ***Thomas v. News Group Newspapers Ltd & Simon Hughes***. *Thomas* dealt with civil harassment, an interlocutory appeal to strike out a claim. As noted earlier, in *Thomas*, the parties agreed that under the definitions of the PHA, publication of press articles calculated to incite racial hatred of an individual provided an example of conduct which was capable of amounting to harassment under the PHA.

1212. Unlike the PHA, our proposed prohibited behaviour of stalking does not include speech or acts of publishing. As pointed out by the LRC, stalking is content-neutral.[1059] Thus publication of press articles calculated to incite racial hatred would not be capable of amounting to the *actus reus* of stalking. Without proof of the *actus reus*, there would be no need to consider the exemptions, which in any case would likely apply to preclude liability, e.g. category (b) exemption.

1213. However, such behaviour would likely be covered under the civil law in our existing section 7 (racial harassment) of the Race Discrimination Ordinance, Cap 602, discussed above. We do not consider that the behaviour in *Thomas* should attract criminal liability. In fact, Thomas did not pursue that line of redress.

1214. In general, we consider that self-regulation of the press can better address possible problems connected with news activities. This will also avoid any perception that the Government is trying to censor the media. For example, the following principles of the HKJA's Code of Ethics state that:

> (5) A journalist shall obtain information, photographs and illustrations only by straight forward means. The use of other means can be justified only by over-

[1059] This has been discussed earlier in this Part.

> riding considerations of the public interest. The journalist is entitled to exercise a personal conscientious objection to the use of such means.
>
> (6) Subject to justification by over-riding considerations of the public interest, a journalist shall do nothing which entails intrusion into private grief and distress.
>
> …
>
> (10) A journalist shall not originate material which encourages discrimination on grounds of race, colour, creed, gender or sexual orientation.[1060]

1215. These guidelines show that journalists themselves recognize limits to their news gathering activities.[1061]

1216. Paparazzi activities would likely fall within our proposed list of prohibited conduct (e.g. following, pursuing or accosting). Whether individual paparazzis could rely on the news gathering exemption in category (b) would depend on the facts of each case. It should also be remarked that the targets of paparazzi are not ordinary people but mostly celebrities, who can afford legal fees to seek injunctions under different causes of action such as trespass, breach of confidence, breach of contract, nuisance, defamation, and even an action seeking compensation for injury to feelings under the PDPO in relation to breach of personal data (which can include a photograph). In most cases, the celebrities involved would rather avoid criminal proceedings, which could expose them to the public, something that they would likely wish to avoid. In this connection, it has been commented that:

> The paparazzi tend to target celebrities who fascinate the public. The public's obsession further encourages the paparazzi in their pursuit and effectively endorses the paparazzi's invasive antics as accepted practice. It is only when

[1060] Hong Kong Journalists Association, accessible at http://www.hkja.org.hk/site/portal/Site.aspx?id=A1-502&lang=en-US

[1061] There is also The Journalists' Code of Professional Ethics which was jointly drafted and promulgated in June 2000 by four major journalist bodies, namely, the Hong Kong Journalists Association, the Hong Kong Federation of Journalists, the Hong Kong News Executives' Association and the Hong Kong Press Photographers Association.

harm or the near threat of harm occurs that the public becomes outraged enough to criticize the newsgathering techniques of the paparazzi.[1062]

1217. Where harm or near harm results from paparazzi behaviour then the existing criminal offences will apply to sanction and deter such behaviour. The introduction of this new offence should not in any way chill existing legitimate paparazzi behaviour.

Recommendation 7

A. The new stalking offence should exempt from criminal liability conduct that comes within one or more of the following categories:

(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.

(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.

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

Penalty

1218. Without proposing any recommendation, we share our views on the aspect of penalty for a new stalking offence.

[1062] Jamie E. Nordhaus, "Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?"(1999) The University of Texas at Austin School of Law Publication – 18 *The Review of Litigation 285*, 286.

1219. The LRC recommended maximum imprisonment terms ranging from 12 months to two years for their two proposed offences. The current offence of intimidation is punishable on summary conviction for a fine of $2000 and to imprisonment for two years and upon indictment to imprisonment for five years. The current offence of loitering is punishable by a fine of $10000 and to imprisonment for six months, and to imprisonment for two years where there is cause for concern for a person's safety or well-being.

1220. Having regard to the maximum terms in other jurisdictions (see Appendix F),[1063] it might be advisable to consider a similar term of maximum imprisonment as with the intimidation offence. However, we feel that the $2000 fine limit for the intimidation and for a new stalking offence is too low.

1221. We agree with the LRC's recommendation to give powers in criminal courts to issue restraining orders against the convicted defendant as part of the sentencing disposition.[1064]

Pros and Cons

1222. We conclude this section by highlighting the pros and cons of our proposed reforms. The advantages of the proposed stalking offence include:

1. It is clear that stalking involves repeated acts that interfere with a person's private life;

2. It does not overlap with other existing provisions;

3. It attempts to ensure clarity and precision of what conduct amounts to stalking, by providing a list of prohibited behaviour with a familiar mental element;

[1063] The imprisonment terms are within the usual range of custodial penalties in the jurisdictions overviewed. The imprisonment term can be higher, such as in Queensland (e.g. because of the use of arms at the time of the commission of the stalking offence) and Victoria (up to 7 or 10 years'), or in Canada (up to 10 years'), or California (up to 15 years' for aggravated stalking).

[1064] A sentencing court may make a restraining order against a defendant under the anti-stalking legislation of the following jurisdictions in the circumstances specified: UK – upon conviction (section 5, PHA) or acquittal (section 5A, PHA); Queensland – upon conviction or acquittal (section 359F, The Criminal Code Act 1899); California – upon conviction (subdivision k(1) and (2), Penal Code § 646.9 Stalking).

4. In relation to speech, it focuses on conduct and the manner in which a perpetrator's speech is directed at a particular individual, rather than on the content of the speech itself;

5. It provides safeguards for constitutionally protected and other legitimate activities thereby avoiding inhibiting such activities;

6. It attempts to avoid the stalking offence being used as a tool that protects those who, commit corruption and other crimes, hide information that could help prevent crimes, attempt to silence popular voices expressing opinions respectfully and peacefully. For example, a person who has committed a crime might attempt to complain to the police that he or she is being stalked by a journalist, while the latter is just carrying out investigative journalism. The availability of the exemptions does not permit such abuse;

7. It avoids the use of vague terms which in combination with the lack of clear defences would threaten the right to free speech and impose a chilling effect on free expression, such as criticizing government policies, judicial rulings, or publishing interviews with adverse comments to the government. If this becomes objectionable speech, it should be best met with contrary speech so as to avoid any perception of censorship;[1065]

8. With regard to public procession, assembly and demonstration, when violence erupts during such activities, the police have an obligation to re-establish order in accordance with the law and at the same time respect the rights of both protesters and non-protesters. Case law (see Appendix E) confirms that those who breach the law are held accountable. Thus there should be no concerns that granting an exemption as above proposed would exempt violent or threatening protests activities.

1223. If any disadvantage should be advanced against the above proposals relating to criminal stalking, it is perhaps the lack of a study on the phenomenon of stalking in Hong Kong which could serve as clearer guidance in relation to the most prevalent types of stalking

[1065] See "Peru: Reject Terrorism Denial Law- Proposed legislation undermines free speech", Human Rights Watch, 9 April 2013, accessible at http://www.hrw.org/news/2013/04/09/peru-reject-terrorism-denial-law.

behaviour that affect Hong Kong people. Thus we have had to base the list of prohibited conduct on the stalking legislation in other jurisdictions and the limited Hong Kong case law and instances of stalking, mentioned above and in the LRC report.

8.4. Civil liability and remedies for stalking

1224. Without proposing any recommendation, we express our views on the aspect of civil liability and remedies for stalking. The recognition of the common law tort of harassment, albeit slow and only in lower courts, has been the most significant change since the LRC report. It has removed the argument for reform based on the inadequacy of the existing law. The common law tort has now been recognized in several judgments and served to provide damages and relief for victims of stalking. Even cases of injunctions and breaches of injunctions have been reported.

1225. It is possible to think of three reasons why reform of civil liability for stalking may still be considered. First, there is the concern with legal certainty and definition of the law. The Court of Final Appeal (CFA) has yet to affirm the existence of a tort of harassment in Hong Kong. It is theoretically possible that they may reject the tort or disagree with the lower courts on the elements of the tort. It may take a long time for the CFA to consider the issue. However, this is true with many aspects of the common law and simply because the CFA has yet to consider the issue is not a sufficient reason for legislative reform. One should wait for additional reasons for intervention, such as inconsistencies in legal authorities, or judge-made doctrine that may be inconsistent with underlying policies.

1226. A second reason for possible reform is those mentioned by the LRC report to make the enforcement of injunctions more effective, e.g. authority for the police to arrest and detain. The difficulty with this reform is that it starts to make the civil law look like criminal law, but without all the same safeguards. If there is to be a new offence of stalking, it will not be necessary to have greater facilitation in the enforcement of injunctions. The police will be involved through the usual criminal process. Having examined the UK experience, the greater ease of obtaining and enforcing injunctions may not necessarily be a good thing, especially when it comes to safeguarding constitutionally protected activities. ***Ng Yiu Ki v. Chan Yuk Fung***,[1066] discussed earlier, is an example of a case in which a victim of stalking

[1066] DCMP3254/2009, 6 May 2010, DC.

obtained an injunction under existing law and enforced the breach of the injunction in the District Court. The defendant was ordered to pay a $10,000 fine and the costs of the proceedings. Thus it awaits to be seen if the existing procedures require reform to achieve the underlying policy more effectively.

1227. The third reason would be to introduce an exemption from civil liability in order to parallel the exemption that is proposed for the new stalking offence. However, there is an important difference here between criminal and civil law. As pointed out above, we propose a new stalking offence of relatively moderate seriousness, accompanied with exemptions. In serious cases of stalking however we expect the police to use existing offences that include some serious offences (up to and including the homicide offences), for which there would be no media/protest related exemption. When it comes to civil law, the difference is that a newly recognized tort of harassment does not distinguish between more or less serious forms of harassment. The seriousness of the harassment will affect the relief but not liability. Assuming we would like to maintain the same policy position as applied to criminal liability (i.e. allowing the exemption for less serious harassment and not for more serious harassment), in practice it will be difficult to draw a clear line in legislation to separate the two categories. For example, should the line depend on the degree of harm caused to the victim or on the nature of the harassment conduct? How should the threshold be defined and might ambiguous statutory language create uncertainty and invite litigation?

1228. It is also likely that the courts themselves in developing the common law will admit defences or develop the law in such a way as to take into account fundamental freedoms, such as in the law of defamation.[1067] In doing so, the courts will have concrete sets of facts to refer to when trying to balance competing rights and interests, and not have to strike a balance in the abstract.

1229. Thus at this stage, it is our view that reforms to address the civil liability and remedies for stalking should not be introduced. The reasons for this opinion are summarized as follows:

1. If the main purpose of a stalking civil remedy is to apply for an injunction to restrain the stalker from harassing his or her target (as suggested by the

[1067] To give effect to the right of freedom of expression "is an important consideration to any court when considering whether an offence or civil tort has been committed contrary to the 1997 Act." See *Thomas* above.

LRC), such remedy already exists in different contexts, as shown in current legislation and case law discussed above.

2. In the context of domestic violence, the DCRVO does not expressly include harassment or stalking. However, the number of injunctions applied for under the DCRVO is very low since the statute was amended and came into force in 2010. The reasons for these results are unclear and further surveys may be required in this context.[1068] There is research suggesting that if harassment in a domestic context arises, the best way to deal with it is via statutes dealing with domestic relationships.[1069] This is independently of whether general anti-stalking legislation is introduced.

3. The tort of harassment has been recently expressly recognised in the case of ***Lau Tat Wai and Yip Lai Kuen Joey***[1070] and such tort is capable of capturing "the full extent and degree of a stalker's behaviour".[1071]

4. While it usually requires giving the other party notice of a restraining injunction application, such an injunction can be obtained fast and without giving notice to the other party (i.e. *ex parte*) where the injunction is sought on an urgent basis. The system of civil procedures under which injunctions can be sought guarantees that only applicants with meritorious claims are granted such injunctions. Disobedience of an injunction order leads to a fine or a writ of sequestration issued against the defaulting party's property, or to committal proceedings to establish contempt of court for which an imprisonment term may be imposed. Given the recognition of the tort of harassment, approaching the court for injunction orders would be more effective for victims who chose this civil avenue, and for whom Legal Aid is available.

[1068] Note for example, the study by Lawyers Collective (Women's Rights Initiative), *Staying Alive: Evaluating Court Orders* -Sixth Monitoring & Evaluation Report 2013 on the Protection of Women from Domestic Violence Act, 2005, January 2013, New Dheli; accessible at http://www.lawyerscollective.org/wp-content/uploads/2012/07/Staying-Alive-Evaluating-Court-Orders.pdf.
[1069] Douglas.
[1070] HCA 1466/2011 (24 April 2013).
[1071] The LRC had pointed out that this was one of the disadvantages of not having a tort of harassment. See LRC, para 4.81.

5. Should there be any perceived deficiency in obtaining an injunction, this should be applicable not only in relation to the common law tort of harassment but also in relation to other common law causes of action. The issue then arises, why should anti-stalking injunctions be granted preferential treatment in the absence of any supporting study.

6. Under the UK PHA, injunctions have been used as a tactic to deter behaviour that does not necessarily amount to harassment under proceedings that are discontinued later.[1072] Also, under the PHA, "there are a number of cases where interim injunctions have been granted against journalists and photographers to prohibit them from door-stepping, or besetting, the home of a person they wished to photograph or interview".[1073]

7. The use of injunctions under the UK PHA on freedom of assembly came to the attention of the United Nations Special Rapporteur in its 2013 visit to the United Kingdom. In its news release, he noted that,

> …another area of concern to me is the use by private companies of civil injunctions, under the Protection from Harassment Act 1997, to stop peaceful protests. Such injunctions are reportedly difficult to challenge.[1074]

8. A civil remedy that builds a criminal offence on that civil remedy disregards the nature of the different standards of proof; the criminal standard being beyond reasonable doubt and the lesser civil standard on the balance of probabilities. This is for example the UK PHA approach, where breach of an injunction leads to an imprisonment term, "an unwarranted and potentially dangerous extension of the law."[1075]

[1072] See for example *Stone & Anor v. WXY (Person Or Persons Unknown)*, discussed in Part 4 above.
[1073] Tugendhat J in *Trimingham*, as discussed in Part 4 above.
[1074] As cited in Part 7 above
[1075] See Part 1 above. At the time, this provision was proposed, the Bar Council called it "an unwarranted and potentially dangerous extension of the law." See *Stalking - The Solutions: response to the consultation paper* September 1996, as cited in Research Paper 96/115, p 40.

9. Imposing a right to damages may be fruitless as stalkers may lack financial resources to satisfy any judgment.[1076]

10. Precisely because the common law of the tort of harassment has been developing slowly and there is lack of a detailed analysis of its legal principles, it should be left to develop further in order to ensure that a body of law exists that can offer guidance on matters such as what the common grounds are that inflict anxiety on stalking victims, what type of relief suits the victims best, whether conciliation proceedings are effective in the context of stalking, etc.

11. There is a statutory criminal offence of intimidation complemented by the common law tort of intimidation. Creating a statutory tort of harassment will raise the issue of whether creating the statutory tort of intimidation should also be considered. Both torts were successful in *Lau v. Yip*.

12. Should the need later arise, a civil regime can be introduced through separate enactment, such as the approach followed in South Africa for example.

1230. If any disadvantage should be advanced against this opinion, it is perhaps that developing the common law of the tort of harassment would normally take longer than if legislation is enacted. However, this is a common feature of the common law. Another common feature that has been used to favour legislation is that it will bring certainty and policy makers will be able to address specific aspects of the tort, including issues of remedies and procedures. On balance we believe the advantages of non-intervention outweigh the disadvantages at this point in time. The fact that one Court of First Instance judge has expressed concerns about a piecemeal development of the law and hopes to see a codified body of the law should not be interpreted as putting pressure on such course to be taken immediately.

[1076] In fact, the Legal Aid Department made this comment, which is found at para 9.33 of the LRC's report. The LRC responded that "We would expect that the primary concern of most plaintiffs in actions for harassment is to apply for an injunction to restrain the stalker from harassing his target, not to seek monetary compensation by way of damages." However, the LRC had stated earlier, at para 9.24 that some victims would prefer civil remedies that are designed to compensate for their losses.