

**THE LAW REFORM COMMISSION  
OF HONG KONG  
REPORT**

**STALKING**

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***Mr Godfrey K F Kan, Senior Government Counsel, was principally responsible for the writing of this Commission report.***

October 2000

The Law Reform Commission was established by His Excellency the Governor in Council in January 1980. The Commission considers such reforms of the laws of Hong Kong as may be referred to it by the Secretary for Justice or the Chief Justice.

The members of the Commission as at September 2000 were:

***The Hon Ms Elsie Leung Oi-Sie, JP,  
Secretary for Justice (Chairman)  
The Hon Mr Justice Andrew Li, Chief Justice  
Mr Tony Yen, SBS, JP, Law Draftsman  
Mr Payson Cha, JP  
Mr Victor Chu Lap-lik  
Mr Alan Hoo, SC  
Mr Kwong Chi Kin  
Dr Lawrence Lai, JP  
The Hon Mrs Sophie Leung, SBS, JP  
Professor Felice Lieh Mak, JP  
Mr David Smith  
Professor Raymond Wacks***

The Secretary of the Commission is **Mr Stuart M I Stoker** and its offices are at:

***20/F Harcourt House  
39 Gloucester Road  
Wanchai  
Hong Kong***

***Telephone: 2528 0472  
Fax: 2865 2902  
E-mail: [hklrc@hkreform.gcn.gov.hk](mailto:hklrc@hkreform.gcn.gov.hk)  
Website: <http://www.info.gov.hk/hkreform>***

# THE LAW REFORM COMMISSION OF HONG KONG

## Report

## Stalking

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# Preface

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1. On 11 October 1989, under powers granted by the Governor-in-Council on 15 January 1980, the Attorney General and the Chief Justice referred to the Law Reform Commission for consideration the subject of “privacy”. The Commission’s terms of reference are as follows:

*“To examine existing Hong Kong laws affecting privacy and to report on whether legislative or other measures are required to provide protection against, and to provide remedies in respect of, undue interference with the privacy of the individual with particular reference to the following matters:*

- (a) the acquisition, collection, recording and storage of information and opinions pertaining to individuals by any persons or bodies, including Government departments, public bodies, persons or corporations;*
- (b) the disclosure or communication of the information or opinions referred to in paragraph (a) to any person or body including any Government department, public body, person or corporation in or out of Hong Kong;*
- (c) intrusion (by electronic or other means) into private premises; and*
- (d) the interception of communications, whether oral or recorded;*

*but excluding inquiries on matters falling within the Terms of Reference of the Law Reform Commission on either Arrest or Breach of Confidence.”*

2. The Law Reform Commission appointed a sub-committee to examine the current state of law and to make recommendations. The members of the sub-committee are:

**Prof Raymond Wacks  
(Chairman)**

Professor of Law and Legal Theory,  
The University of Hong Kong

**Dr John Bacon-Shone**

Director, Social Sciences Research Centre,  
The University of Hong Kong

<b>Mr Don Brech</b>	Principal Consultant, Records Management International Limited (Former Director, Government Records Service)
<b>Mrs Patricia Chu, BBS, JP</b>	Deputy Director of Social Welfare (Services), Social Welfare Department
<b>Mr A F M Conway</b>	Chairman, Great River Corporation Limited
<b>Mr Edwin Lau</b>	Assistant General Manager, Head of Strategic Implementation Asia Pacific, HSBC
<b>Mr Robin McLeish</b> (from February 2000)	Barrister-at-law (Former Deputy Privacy Commissioner, Office of the Privacy Commissioner for Personal Data)
<b>The Hon Mr Justice Appeal Mortimer, GBS</b>	Non-Permanent Judge, Court of Final (Former Vice-President, Court of Appeal) (Chairman of sub-committee till August 1999)
<b>Mr James O' Neil</b>	Deputy Solicitor General (Constitutional), Department of Justice
<b>Mr Peter So Lai-yin</b>	Former General Manager, Hong Kong Note Printing Limited
<b>Mr Wong Kwok-wah</b>	Chinese Language Editor, Asia 2000 Limited

The secretary to the sub-committee is Mr Godfrey K F Kan, Senior Government Counsel.

3. Matters arising from items (a) and (b) of the terms of reference were addressed in the Law Reform Commission report on *Reform of the Law Relating to the Protection of Personal Data* published in August 1994. The Commission report on the *Interception of Communications* was published in December 1996.

4. The Privacy sub-committee published a consultation paper on *Stalking* in May 1998. The consultation period expired in September 1998. More than 50 submissions were received. The respondents fall into the following categories: the legal profession, government departments, public bodies, welfare organisations, women's groups, journalists' associations, media organisations, financial institutions and private individuals. The list of respondents is at the Annex. We are grateful to all those who have commented on the consultation paper.

5. We examine in Chapter 1 why stalking is a menace to society. Chapter 2 then gives an overview of the responses to the Consultation Paper published by the sub-committee. An account of the incidence of stalking in Hong Kong is given in Chapter 3. The extent to which existing law can afford protection to victims of stalking is examined in Chapter 4. Chapter 5 describes the legislative measures taken by other common law jurisdictions to tackle the problem of stalking. Chapters 6 to 9 outline the conclusions and recommendations of the Commission.

# Chapter 1

## The menace of stalking

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### What is stalking?<sup>1</sup>

1.1 Stalking, like shoplifting and vandalism, is a description rather than a legal concept.<sup>2</sup> Stalking is not a new phenomenon<sup>3</sup> but it is only recently that such behaviour has been labelled a separate and distinct class of anti-social behaviour. Celia Wells describes “stalking” as “the pursuit by one person of what appears to be a campaign of harassment or molestation of another, usually with an undertone of sexual attraction or infatuation.”<sup>4</sup> Similarly, Tim Lawson-Cruttenden defines stalking as “behaviour which subjects another to a course of persistent conduct, whether active or passive, which taken together over a period of time amounts to harassment or pestering.”<sup>5</sup>

1.2 Behaviour which amounts to harassment or molestation includes “persistent pestering and intimidation through shouting, denigration, threats or argument, nuisance telephone calls, damaging property, following the [victim] about and repeatedly calling at her home or place of work.”<sup>6</sup> In its report on domestic violence, the English Law Commission stated that:

*“The degree of severity of such behaviour depends less upon its intrinsic nature than upon it being part of a pattern and upon its effect on the victim. Acts of molestation often follow upon previous behaviour which has been violent or otherwise offensive. Calling at the applicant’s house on one occasion may not be objectionable. Calling frequently and unexpectedly at unsocial hours when the victim is known to be afraid certainly is. Such forms of abuse may in some circumstances be just as harmful, vicious and distressing as physical injuries.”<sup>7</sup>*

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<sup>1</sup> See generally: J R Meloy (ed), *The Psychology of Stalking: Clinical and Forensic Perspectives* (Academic Press, 1998); D Orion, *I Know You Really Love Me: A Psychiatrist’s Account of Erotomania, Stalking and Obsessive Love* (Dell Pub Co, 1998).

<sup>2</sup> “Stalk” has the following meaning in *The New Shorter Oxford English Dictionary*: (a) Walk cautiously or stealthily. (b) Pursue a quarry or game by stealthy approach, especially under cover. (c) Pursue (game, an enemy, etc) stealthily. Also, track down in this way.

<sup>3</sup> Eg *Davis v Lane* 87 Eng Rep 887 (QB 1704); *R v Dunn* 113 Eng Rep 939 (QB 1840).

<sup>4</sup> C Wells, “Stalking: The Criminal Law Response” [1997] Crim LR 463.

<sup>5</sup> T Lawson-Cruttenden, “Is There a Law against Stalking?” [1996] NLJ 418.

<sup>6</sup> The Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home* (LAW COM No 207) (London: HMSO, 1992), para 2.3.

<sup>7</sup> Above.



1.3 “Harass” and “molest” have the following meanings in *The New Shorter Oxford English Dictionary*:

“**harass** 1. Trouble by repeated attacks. Now freq., subject to constant molesting or persecution. 2. Lay waste, devastate. 3. Tire out, exhaust. ...”

“**molest** 1. Cause trouble to; vex, annoy, inconvenience. b. Of disease: afflict, affect. 2. Interfere or meddle with (a person) injuriously or with hostile intent. Now esp. attack or abuse sexually. b. Tamper with (a thing).”

“**molestation** 1. The action of molesting someone or ... something; the condition of being molested; intentional annoyance, hostile interference; (esp. sexual) assault. Formerly also, vexation, distress. ...”

1.4 Richard Lingg suggests that “harass” means “a pattern of conduct, purposely committed, comprising two or more acts evidencing a continuity of purpose, directed at a specific person, which reasonably causes substantial emotional distress to the person.”<sup>8</sup> The Penal Code of California defines “harasses” as “a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serve no legitimate purpose.”<sup>9</sup> Such definitions accord with the ordinary meaning of the word “harassment”. It will be seen that the concept of “harassment” is an adequate description of both the activities engaged in by stalkers and the impact which such behaviour would have on victims of stalking.

## Methods employed by stalkers<sup>10</sup>

1.5 Stalking involves “a series of discrete, individual acts, each one building upon the next”.<sup>11</sup> It is not a single occurrence but involves a course of conduct that extends over a period of time. A typical stalker would engage in a series of acts that, viewed collectively, present a pattern of behaviour that annoys or alarms the target. Occasionally, a stalker may become more threatening and violent as time passes. The stalking activity may escalate from what may initially

<sup>8</sup> R A Lingg, “Stopping Stalkers : A Critical Examination of Anti-Stalking Statutes” (1993) 67 *St John’s Law Review* 347 at 375.

<sup>9</sup> The National Victim Center, “California, Penal Code 646.9. Stalking. 1990. Amended 1994” at <<http://www.nvc.org/hdir/stlkca.htm>>, (17.10.97).

<sup>10</sup> All the examples of stalking behaviour given in this chapter are taken from studies carried out by psychologists and psychiatrists on the subject of stalking. Eg M Pathé & P E Mullen, “The impact of stalkers on their victims” (1997) 170 *British Journal of Psychiatry* 12; L Sheridan, R Gillett & G Davies, “‘Stalking’ – Seeking the Victim’s Perspective” (University of Leicester, Department of Psychology, 1998). Stories written by persons who had been stalked can be found in the True Accounts page at <<http://francieweb.com/stalked/>>.

<sup>11</sup> K L Walsh, “Safe and Sound at last? Federalized Anti-Stalking Legislation in the United States and Canada” (1996) 14:2 *Dickinson Journal of International Law*, 373 at 381.

be annoying, alarming but lawful behaviour to the level of dangerous, violent and potentially fatal acts. Stalking may therefore be a precursor to crimes such as assault, wounding, criminal intimidation, sexual offences and even murder.

1.6 The National Victim Center in the US describes the following behavioural pattern as typical of a stalker:

*“The stalker may attempt to woo their victim into a relationship by sending flowers, candy and love letters, in an attempt to ‘prove their love.’ However, when the victim spurns their unwelcome advances, the stalker often turns to intimidation. Such attempts at intimidation often begin in the form of an unjustified, jealous and inappropriate intrusion into the victim’s life. Often these contacts become more numerous and intrusive over time, until such collective conduct becomes a persistent pattern of harassment. Many times, harassing behavior escalates to threatening behavior. ... Stalkers, unable to establish or re-establish a relationship of power and control over their victims, turn to violence as a means of reasserting their domination over the victim. In some cases, offenders are even willing to kill their victims and themselves in a last, desperate attempt to assert their domination over the victim.”<sup>12</sup>*

1.7 Victims of stalking are commonly subjected to multiple forms of harassment. Their stalkers seek to make contacts with them by various means. Many stalkers therefore make excessive telephone calls to their victims. These unsolicited calls may be made at inconvenient times, especially in the early morning hours or at the workplace. In some instances, the stalker hangs up immediately or remains silent on the phone. If a stalker is obsessed with the victim, declarations of love, obscenities or threats may be made over the phone. Where an answering machine is used, it may be crammed with the stalker’s declarations of love or abusive messages.

1.8 If the victim is accessible by e-mail, the stalker may repeatedly send unwanted electronic messages to him or her. The volume of such messages can be so high that the victim’s use of his or her computer for communication is disrupted. Stalkers who know that their victims have a facsimile machine at their workplace may send facsimile transmissions containing abusive or insulting remarks. The victims would be embarrassed if their colleagues picked up the facsimiles for them. Some stalkers use post cards instead so that the victims’ family members can read the messages written on the back.

1.9 Direct approaches to a victim at his or her home, school or workplace are common. These approaches may be accompanied with verbal

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<sup>12</sup> The National Victim Center, “Stalking - Questions and Answers” (No 43, 1995), at <<http://www.nvc.org/ddir/info43.htm>>, p 4.

abuse containing scurrilous remarks. The victims would be embarrassed and insulted if these remarks were made in the presence of their acquaintances or colleagues. Where the victim refuses the stalker entry to the former's property, the latter might force his way into the property and refuse to leave.

1.10 Another means employed by stalkers is to follow the victim in the street or keep him or her under surveillance. Surveillance takes a number of forms. The stalker may watch or spy on the victim, but he may simply loiter or lie in wait outside the victim's home, school, or place of work or recreation regularly. In some instances, the stalker conveyed his knowledge of the details of the victim's movement so as to let the victim know that he or she is being watched.

1.11 In order to please or harass the victim, the stalker may persistently send, or leave at the doorstep, unwanted gifts or bizarre articles such as pubic hair, used condoms and used sanitary napkins. In some instances, the stalker may deliver a dead or mutilated pet or animal, a doll without a head, or other sinister objects to the victim's home or workplace.

1.12 It is not infrequent that a stalker uses threats to force his victim to succumb to his demands. A stalker may threaten suicide, or go so far as to attempt suicide in order to achieve his object. In one case, the stalker told his ex-partner that he had AIDS but had "forgotten" to inform her previously. It was a false claim but the victim was distressed as a result.

1.13 Some stalkers repeatedly threaten to harm the victims or their new partners, children or pets. Those showing a violent disposition may even sexually or physically assault their victims. Damage to property is also common for these stalkers. They may slash tyres, daub paint, scratch paintwork or vandalise property. This behaviour may be directed both at the victim and third parties.

1.14 The above behaviour may be associated with other forms of harassment such as disclosing the intimate facts about the victim to his or her friends or colleagues, making false accusations, intercepting the victim's mail, ordering goods on behalf of the victim without the latter's consent, and bringing spurious legal actions.

1.15 Stalkers may employ unlawful means to harass their victim. For example, a stalker may make telephone calls that are of an obscene or menacing character, threaten his victim with injury to his person or property, or inflict violence on him or his family members. Such conduct can be restrained and penalised by existing criminal law. However, stalkers may seek to stay within the bounds of criminal law in order to avoid arrest and prosecution. They may therefore engage in behaviour which is apparently harmless and entirely lawful when viewed in isolation. But seemingly innocuous behaviour, such as sending gifts, following someone down the street, or watching or besetting the access to premises, can be threatening and distressing if done persistently and



against the will of the victim.<sup>13</sup> Some stalkers behave in ways that induce fear even though they do not always make threats against their victims.

1.16 The same kind of stalking behaviour may be motivated by an extreme dislike of the victim or by an intense affection for the victim. But it is common that the pursuit begins with non-threatening conduct. For example, a former spouse or rejected suitor may make a telephone call, send a gift, or lie in wait outside the residence or place of work of his victim in an attempt to make amends. Although such conduct may cause the victim no more than mere annoyance or irritation, it can escalate into relentless and unwanted contact. Stalkers who use the victim's fear to achieve their object might resort to behaviour which can be threatening, dangerous or even fatal when their victim refuses to have any contact with them.

1.17 The difficulty of predicting what and when a stalker might do to his victim poses a problem in developing an effective response to the menace of stalking:

*"Some stalkers may never escalate past the first stage. Others jump from the first stage to the last stage with little warning. Still others regress to previous stages before advancing to the next. It is not uncommon to see stalkers intersperse episodes of threats and violence with flowers and love letters. ... A few stalkers will progress to later stages in only a few weeks or even days. In other cases, stalkers who have engaged in some of the most serious stalking behaviors may go months or even years without attempting a subsequent contact."*<sup>14</sup>

1.18 Since various psychobiologic, environmental, intrapsychic, and psychiatric factors contribute to the development of a violent individual, mental health professionals have not been able to predict, with a high degree of certainty, which stalkers will commit violence and which will not.<sup>15</sup> Stalking behaviour should therefore be restrained at an early stage so as to prevent it from escalating into violence.

## **Profile of stalkers<sup>16</sup>**

1.19 Stalking is gender neutral behaviour, with both male and female perpetrators and victims. However, women are the primary victims and men are the primary perpetrators. In the US, 75-80% of all stalking cases involve men

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<sup>13</sup> Home Office, *Stalking - The Solutions : A Consultation Paper* (July 1996), para 1.6.

<sup>14</sup> K L Walsh, above.

<sup>15</sup> K G McAnaney, A C Laura and C E Abeyta-Price, "From Imprudence to Crime: Anti-Stalking Laws" (1993) 68 *Notre Dame Law Review* 819, 850.

<sup>16</sup> M A Zona, R E Palarea, & J C Lane, "Psychiatric Diagnosis and the Offender - Victim Typology of Stalking" in J R Meloy (ed), above, ch 4; K K Kienlen, "Developmental and Social Antecedents of Stalking" in J R Meloy (ed), above, ch 3.

stalking women.<sup>17</sup> The underlying cause of stalking varies depending on the context in which it arises. It is, however, worth bearing in mind that not all stalkers are mentally ill. Stalkers may or may not have mental problems.

1.20 It has been said that stalkers range from cold-blooded killers to lovesick teens, exhibiting a variety of psychological syndromes such as paranoia, erotomania, schizophrenia and manic depression.<sup>18</sup> While some have a small degree of mental and emotional illness, others are suffering from a serious psychological syndrome or mental breakdown. They come from all walks of life and socio-economic backgrounds. A stalker can be an ex-lover, ex-spouse, rejected suitor, colleague, ex-employee, neighbour, gang member, disgruntled defendant or aggrieved customer of his or her victim. Even lawyers and judges can be stalkers.<sup>19</sup>

1.21 Sometimes, the victim has no idea who his or her stalker is. This would be the case if the stalker does not reveal his identity or he is a complete stranger. The stalker may make repeated calls to the victim's home or office and tell her how beautiful she is, or leave a message saying "I adore you and I'm watching you." In these cases, the victim does not even know whether she is being followed or spied upon because she does not know what he looks like.

1.22 The motivation of a stalker ranges from obsession, jealousy, and desires for contact and control. According to a comprehensive survey on stalking conducted in the US in 1997, the typical female victim thought she had been stalked because the stalker wanted to control her, scare her, or keep her in a relationship. Male victims cited intimidation or control as possible motivations of stalkers.<sup>20</sup>

1.23 Zona and others point out that the more difficult type of stalker may exhibit a personality disorder (such as obsessive-compulsive behaviour) that could interfere with the stalker's ability to maintain a normal routine, such as holding a steady job or maintaining a stable relationship. These stalkers spend much time following their targets and writing notes and letters to them.<sup>21</sup> Tom Newman, a licensed marriage and family therapist, observes that stalkers experience low self-esteem, are usually jealous of their partner, lack constructive expression of feelings, have a negative outlook on life, are insecure and have a perceived lack of control in their own lives.<sup>22</sup>

<sup>17</sup> The National Victim Center, "Stalking - Questions and Answers" (No 43, 1995) at <<http://www.nvc.org/ddir/info43.htm>>, p 2.

<sup>18</sup> M Tharp, "In the Mind of a Stalker", *US News & World Rep*, Feb 17, 1992, at 28, referred to in R A Lingg, above, at 351, n 25.

<sup>19</sup> The former chief judge of the State of New York stalked his former girlfriend after she ended their relationship. See C A 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 at 473, n 24.

<sup>20</sup> P Tjaden, "The Crime of Stalking: How Big Is the Problem?" (US National Institute of Justice, November 1997), at <<http://www.ncjrs.org/txtfiles/fs000186.txt>> pp 3-4.

<sup>21</sup> M A Zona, K K Kaushal & J Lane, "Comparative Study of Erotomania and Obsessional Subjects in a Forensic Sample", *Journal of Forensic Sciences* (1993) 38(4):894, 903.

<sup>22</sup> Referred to in S Frederick, "Victims face a life of fear", *Newsworks*, at <<http://www.n-jcenter.com/97/nov/26/front03.htm>> (7.12.98), p 3.

1.24 A review of the literature on stalking reveals that there are at least five different categories of stalkers, namely, delusional erotomanics, borderline erotomanics, "former intimate" stalkers, sociopathic stalkers, and stalkers with false victimisation syndromes.

1.25 **Delusional erotomanics** - The American Psychiatric Association describes "erotomania" as a delusional disorder in which the individual truly believes that he is loved by another who may not even know of his existence. The erotomaniac typically fantasizes the existence of an idyllic romantic love with someone who is of a higher social status or in a position of authority relative to him. It is common that an erotomaniac seeks to establish an intimate relationship with his object of fantasy.<sup>23</sup> The erotomaniac believes that his object will return the affection if given the chance - despite the absence of any actual relationship or emotional reciprocity.<sup>24</sup> As a consequence, the stalker may not intend to cause fear; he may simply intend to establish a relationship with the victim.

1.26 **Borderline erotomanics** - "Borderline erotomanics" (or "love obsessives") are individuals who have developed intense emotional feelings towards other individuals who they know do not reciprocate their feelings, as opposed to delusional erotomanics who do believe their feelings are reciprocated. They usually have some history of emotional engagement with the object of fantasy and are profoundly vulnerable to the victim's trivial expressions of warmth and openness.<sup>25</sup> Borderline erotomanics also tend to vacillate between feelings of love and hate towards their victims. They exhibit a pattern of unstable and intense interpersonal relationship in which the individual alternately overidealises and devalues another.<sup>26</sup> They may express significant narcissistic or abandonment rage when their victims do not return their affection.

1.27 **Former intimate stalkers** - About 70 to 80% of stalking cases involve "former intimate" stalkers (or "simple obsessives"). Unlike erotomanics and borderline erotomanics, former intimate stalkers have had some personal or romantic relationship with the victim. They engage in stalking behaviour when the relationship breaks down or when they feel mistreated by the

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<sup>23</sup> See K G McAnaney and others, "From Imprudence to Crime: Anti-Stalking Laws", (1993) 68 *Notre Dame Law Review* 819, 832-3 (referring to American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn, 1987), 199). In an empirical study of inappropriate communications sent to celebrities by 214 subjects, Park Dietz and others report that 27% of the subjects misperceived the celebrity to be their spouse, potential spouse, or suitor. An additional 26% of the subjects projected the celebrity into the role of lover, potential lover, or "would-be" lover. These subjects then placed themselves in the complementary role, i.e. as the one being pursued rather than as the pursuer. Above, at 833.

<sup>24</sup> Above, at 834.

<sup>25</sup> J R Meloy, "Unrequited Love and the Wish to Kill" (1989) 53 *Bull Menninger Clinic*, 477 at 480-481, cited in K G McAnaney and others, 835-836. Even a friendly, but innocuous glance may result in the development of borderline erotomania. Above.

<sup>26</sup> K G McAnaney and others, at 837.



victim. They stalk their victim in an attempt to resurrect the broken relationship or to seek revenge.<sup>27</sup>

1.28 Former intimate stalkers are extremely insecure about themselves and suffer from low self-esteem.<sup>28</sup> They are often emotionally dependent on their partner and may treat them as personal possessions. Many are jealous of real or imagined infidelities. As a consequence, they demonstrate a strong urge to control their former partners. They may target the current lover or spouse of their victim in an attempt to remove what they perceive to be the obstacle to reunion, or may even seek to apply force to exert control over their victim. In extreme cases, the stalker is so dependent on the victim that he would rather kill the victim than live without him or her. The Los Angeles Police Department therefore characterized these stalkers as individuals who “refuse to let go” after a sexual or emotional relationship ends. But a more accurate description might be that they “refuse to be rejected”.<sup>29</sup> Since approximately 30% of former intimate stalkers who make threats follow through with them and end up in what are commonly called domestic violence cases, this category of stalkers poses the greatest potential threat of violence to the victim.<sup>30</sup>

1.29 **Sociopathic stalkers** - Stalking behaviour is a common characteristic of serial murderers and serial rapists. Sociopathic stalkers are distinguished by the fact that they do not seek to initiate or maintain an interpersonal relationship with their victim. They first formulate the characteristics of the “ideal victim” and then seek out individuals who fit the criteria.<sup>31</sup> They stalk one victim after another in a serial fashion. Sociopathic stalkers were usually abused or rejected during their childhood. When they find themselves unable to control their environment and experience rejection again as an adult, they displace their anger onto their victims.<sup>32</sup>

1.30 **Persons with false victimisation syndromes**<sup>33</sup> - This kind of stalker greatly admires his victim and may go to great lengths to imitate his or her habits and life style. He has low self-esteem and feels inferior to the individual who is the object of his attentions. When the stalker feels that he does not measure up to this individual and believes that he is wronged or rejected by him or her, he takes revenge by harassment. When confronted with the facts, he would try to rationalize his behaviour by claiming that he is the victim and that it is

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<sup>27</sup> N Diacovo, “California’s Anti-Stalking Statute: Deterrent or False Sense of Security?” (1995) 24 *Southwestern University Law Review* 389 at 396.

<sup>28</sup> See The National Victim Center, “Stalking - Questions and Answers” (No 43, 1995), p 3.

<sup>29</sup> K G McAnaney and others, 839 - 840.

<sup>30</sup> M A Zona and others, “A Comparative Study of Erotomantic and Obsessional Subjects in a Forensic Sample”, *J of Forensic Sci*, July 1993, at 902, cited in N Diacovo, above, at 396.

<sup>31</sup> C Laird, “Stalking Laws Confront Obsession that Turns Fears into Terror and Brings Nightmares to Life”, *Hous Chronicle*, May 17, 1992, cited in K G McAnaney and others, above, at 842, n 100.

<sup>32</sup> F H Leibman, “Serial Murderers: Four Case Histories”, (1989) 53 *Fed Probation* 41, 42, cited in K G McAnaney and others, 843, n 101.

<sup>33</sup> For a review of the literature on false victimisation syndromes, see K Mohandie, C Hatcher & D Raymond, “False Victimization Syndromes in Stalking” in J R Meloy (ed), *The Psychology of Stalking*, above, ch 12.

the individual targeted by him who is at fault. Such stalkers are usually of the same sex as their victims.

## Other categories of stalkers

**1.31 Disgruntled clients of private organisations or public bodies** - Some private organisations and public bodies have extensive contacts with members of the public. On occasions, their clients take exception to their policies or decisions, or are dissatisfied with the type or level of service delivered by them. These clients may choose to express their anger or dissatisfaction by stalking or harassment. The usual tactics employed by these disgruntled clients include the following:

- (a) repeated telephone or personal calls to the office, complaining and insisting that his demands be met, or questioning the organisation's policy or decision with abusive, insulting and humiliating remarks;
- (b) lodging repeated oral and written complaints on frivolous or vexatious matters which are without substance or even malicious;
- (c) following the responsible officer or his staff;
- (d) visiting the home of the officer after finding out his address by following him home; and
- (e) intercepting or threatening to intercept the officer or his staff near their place of work or on the street.

These contacts may develop into heated arguments and escalate into violence. But unless the client becomes violent or has done something unlawful, the officer concerned has to put up with such persistent harassment. To express their dissatisfaction or outrage, disgruntled clients may harass other members of the staff within the same organisation even though the latter are not responsible for the particular policy or decision.

**1.32** These stalkers are vengeful over some real or imagined grievance. Some of them may be psychopaths who feel no remorse for their actions. Some are delusional, often paranoid, who believe that it is they who are the victims. They all stalk to "get even".<sup>34</sup>

**1.33 Clients of counselling staff<sup>35</sup>** - A survey of 178 staff members at counselling centres in the US revealed that 6% of the respondents have been stalked by a current or former client at least once.<sup>36</sup> Ten per cent reported that they had supervised an intern or practicum student who had been the victim of a

<sup>34</sup> The Antistalking Web Site, "Stalkers & Stalking" at <<http://www.antistalking.com/aboutstalkers.htm>>, at 3.

<sup>35</sup> See generally, J R Lion & J A Herschler, "The Stalking of Clinicians by Their Patients" in J R Meloy (ed), *The Psychology of Stalking*, above, ch 8.

<sup>36</sup> J S C Romans, J R Hays and T K White, "Stalking and Related Behaviors Experienced by Counseling Center Staff Members From Current or Former Clients", *Professional Psychology: Research and Practice*, vol 27 no 6, p 595.

client' s stalking. An important finding is the potential risk that is placed on family members of counselling centre professionals. Nearly 8% of the sample reported a family member or someone close to them had been stalked or harassed by a current or former client. "Stalking" was defined in the survey as "willfully, maliciously, and repeatedly following or harassing another person and making a credible threat". Although the incidence of stalking of counselling staff was not high, the incidence of harassment, defined as a "wilful course of conduct directed at a specific person which seriously alarms or annoys the person, and which serves no legitimate purpose", by a current or former client was as high as 63%.

1.34 **Cyberstalkers** - Internet users may be subjected to a campaign of electronic harassment.<sup>37</sup> To protect his activities from detection, the cyberstalker can forge an e-mail header so as to create an online digital persona. Online harassment may take the following forms:<sup>38</sup>

- sending unwanted e-mails which are abusive, threatening or obscene;
- sending hundreds or thousands of junk e-mail messages ("spamming");
- sending computer viruses;
- impersonating the victim online and sending abusive e-mails or fraudulent spams in the victim' s name;
- subscribing in the name of the victim to a number of mailing lists without the victim' s permission with the result that the latter receives hundreds of unwanted e-mails everyday;
- putting the victim' s name on sex newsgroups inviting persons of the opposite sex to call the victim or come to his or her home; and
- posting bogus advertisements to a Usenet discussion group offering the victim' s services as a prostitute and providing her home address and telephone number which lead to more obscene e-mail messages and telephone calls.

1.35 According to CyberAngels,<sup>39</sup> which has established itself as an Internet Safety Organisation since 1995, most cyberstalkers are male and the majority of victims are female. Cyberstalking may also occur with children stalked by adult predators. In some cases, the cyberstalker traces the home address and telephone number of the victim and the online harassment ventures off-line. The typical victim is new online and inexperienced in Internet technology.

1.36 CyberAngels observes that there are four types of online stalking and harassment: sexual harassment, love obsession stalking, hate/revenge

<sup>37</sup> M Griffiths, "Cyberstalking: A Cause for Police Concern?", *Justice of the Peace*, vol 163, p 687. Stories written by persons who had been stalked online can be found at <<http://francieweb.com/stalked/true.html>>.

<sup>38</sup> Louise Ellison, "Cyberstalking: Tackling harassment on the Internet", presented in "Cyberspace 1999: Crime, Criminal Justice and the Internet – an international conference", at <<http://www.bileta.ac.uk/99papers/ellison.htm>> (21.10.99).

<sup>39</sup> At <<http://www.cyberangels.org>>.



vendettas and Power Trips or Ego Trips.<sup>40</sup> Sexual harassment is the most common form of online stalking. As for love obsession stalking, it can start from an online romance, where one person halts the romance but the other party cannot accept that the relationship has ended. It can also start when one person is serious in developing a deep relationship with another user but the latter is merely playing online. When the truth is revealed, the serious user cannot back off. With regard to hate/revenge vendettas, they are basically the result of something a user has said or done online which has offended another user. The harasser in the last category of online stalking is motivated by a desire to show off his computer skills to himself or his friends. He selects his victim at random. He might have a new attack program and wish to test it on someone, or he is merely trying to impress an online group so as to gain status.

**1.37 Members of triad societies** - One respondent to our Consultation Paper alleges that he has been followed by members of a triad society because he refused to provide financial assistance to them. He supports making stalking an offence because he and his family members' private lives, mental health and physical life have been affected and threatened by their behaviour. Although there is inadequate evidence to conclude that stalking by triad societies is pervasive, we cannot discard the possibility that triad members resort to such tactics in order to avoid arrest and prosecution, particularly when they may be recruited by creditors to collect debts.

**1.38 Debt collectors** - Debt collectors may exert pressure on debtors or their referees, friends, relatives and neighbours by using the following tactics:

- frequent calls at the home of the debtor leaving threatening cards;
- pouring black or red paint on the wall of the debtor's premises;
- filling the keyhole of the debtor's main door with gum, tooth-picks or glue;
- sending paper money for the dead by post or by fax to the debtor's residence or place of employment;
- leaving at the doorstep an urn which is used for holding the ashes of a person who has been cremated;
- publicising the indebtedness of the debtor by putting up notices near his home or place of work;
- demanding payment from the debtor in the presence of his employer, customers or family members;

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<sup>40</sup> CyberAngels, "Motivations for Online Stalking and Harassment", at <<http://www.cyberangels.org/safetyandprivacy/stalk5.html>>, (10.3.00).

- sending unsealed debt recovery letters to the debtor's neighbours or place of employment; and
- sending demand letters by facsimile transmission to the debtor's place of employment.

1.39 **Neighbourhood harassment** - The majority of Hong Kong residents live in multi-storey buildings which are closely spaced. Anti-social behaviour of neighbours or gangs may disrupt the peaceful and quiet enjoyment of a neighbourhood. Gangs may gather in the public staircase or playground of housing estates making a nuisance of themselves by taking drugs, drinking alcohol, urinating in staircases, or shouting insults or obscenities at passers-by. If their behaviour persists for a long time, an intimidating atmosphere can be created in the area affecting the private lives of nearby residents. Although the Summary Offences Ordinance (Cap 228) may assist in certain circumstances and the Noise Control Ordinance (Cap 400) may be invoked if the noise produced by the gang is a source of annoyance, their behaviour cannot normally be restrained unless they engage in criminal damage or their behaviour becomes violent. An air of lawlessness in the area may prevail if their behaviour is not such as could call for the intervention of the police.

## **Victims of stalking**

1.40 Stalking affects people ranging from ordinary citizens to celebrities. Although stalking cases involving celebrities attract much media attention, the overwhelming majority of victims of stalking are ordinary people who are harassed at their place of work or in a domestic context. Domestic stalking involves former or current lovers, co-habitees and spouses. This category represents the bulk of stalking cases. Other stalking victims include co-workers, debtors, neighbours, celebrities, political figures<sup>41</sup> and strangers. Sometimes, the family members and co-workers of a stalking victim are also stalked in an attempt to exert power and control over the victim.

1.41 Since stalking is not a criminal offence in Hong Kong and there has never been any study of the phenomenon of stalking in Hong Kong, the statistical prevalence of stalking in the territory is unknown. However, some statistics and projections on the prevalence of stalking in England, Canada and the United States are available.

## **England**

1.42 The Police Federation in England estimated that 3,000 people fell victim to stalkers every year and that the overwhelming majority of victims were

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<sup>41</sup> Members of the Legislative Council in the Hong Kong SAR are protected from molestation. See section 19 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382).



women.<sup>42</sup> The National Anti-Stalking and Harassment Campaign in the UK reported that over 7,000 victims of stalking telephoned their helpline between January 1994 and November 1995. They estimated that about 95% of victims were women.<sup>43</sup> According to Sheridan and Davies, 12,000 complaints were estimated to have arisen in the first year of the Protection from Harassment Act 1997 in operation. About 300 of these have resulted in convictions under the Act.<sup>44</sup>

## **Canada**

1.43 The following are the findings of a survey carried out by the Canadian Centre for Justice Statistics. It represents a sample of 130 police departments (43% of the national volume of police cases) for 1994 and 1995.<sup>45</sup>

- (a) Out of the 7,462 reports of incidents that were classified as stalking,
  - 88% of the accused stalkers were male
  - 12% of the accused stalkers were female
- (b) 80% of the victims were female:
  - 39% were stalked by an ex-husband
  - 24% were stalked by a casual acquaintance - mostly males
  - 17% were stalked by a current or ex-boyfriend
  - 7% were stalked by a stranger
  - 3% were stalked through a work relationship
  - 2% were stalked by a current husband
- (c) 20% of the victims were male:
  - 46% were stalked by a casual acquaintance - mostly males
  - 12% were stalked by a stranger
  - 11% were stalked through a work relationship
  - 9% were stalked by an ex-wife
  - 4% were stalked by an ex-girlfriend
- (d) The majority of victims are likely to be harassed at home:
  - 55% of the incidents occurred at the victim's residence

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<sup>42</sup> *House of Commons Hansard* 17 Dec 1996, col 813.

<sup>43</sup> Home Office, *Stalking - The Solutions: A Consultation Paper* (1996), para 1.8.

<sup>44</sup> L Sheridan & G M Davies, "Stalking: What's the problem?" (University of Leicester, Department of Psychology, 1998), p 7.

<sup>45</sup> Ministry of Women's Equality and Ministry of Attorney General, "Criminal Harassment Information Focuses on Safety" (21.4.97), at <[http://www.weq.gov.bc.ca/press\\_releases/stalking.pr.html](http://www.weq.gov.bc.ca/press_releases/stalking.pr.html)>, pp 2-3. The offence of criminal harassment is defined in section 264 of the Canadian Criminal Code. See ch 5 below.

- 11% of the incidents occurred in a commercial/corporate place
  - 10% of the incidents occurred on the street or public transit
  - 3% occurred at a public institution or a school
  - 2% occurred in a parking lot
- (e) 5% of the victims are physically injured. The survey reveals that the ongoing threat of harm from the stalker leads to severe emotional trauma for the victim. The trauma increases when stalking occurs near the victim's home.

1.44 About 75% of the incidents involved women being stalked by men. The Federal-Provincial/Territorial Ministers Responsible for the Status of Women emphasised that women subject to violence have rights to just, timely, and effective remedies for the harm they have suffered.<sup>46</sup>

1.45 The Manitoba Department of Justice noted the following "disturbing patterns" which have become typical of a stalking scenario: 1) the accused were male, victims were female; 2) the accused and the victim had a prior relationship; 3) in most instances the relationships were ended by the victim; 4) the accused generally maintained a belief in the viability of the relationship; 5) the accused were obsessed with maintaining contact, jealous of their victims' new relationships, and prevented their victims from carrying on with their lives; 6) all victims feared for their lives and those of their children.<sup>47</sup>

## **United States**

1.46 A 1993 Task Force on Stalking reported that most victims were former lovers, former spouses or the current spouse of the perpetrator.<sup>48</sup> A leading forensic psychiatrist and expert on behavioral sciences, Dr Park Dietz, estimated that there were 200,000 stalkers on the street and that 5% of women in the US would be stalked at least once during their lifetimes.<sup>49</sup> According to 1994 statistics provided by the Los Angeles Police Department,<sup>50</sup> one million people in the US had been stalked. The majority of them were ordinary people, mostly women, who were being pursued and threatened by someone with whom they had had a previous relationship. Approximately 80% of cases involved

<sup>46</sup> 13th Annual FPT Conference of MRSW, Regina, Saskatchewan, June 8-9, 1994, cited in K L Walsh, at 397 n 160.

<sup>47</sup> Manitoba Department of Justice, "Brief for Presentation to the Legislative Committee of the House of Commons on Bill C-126", May 1993. See K L Walsh, at 394.

<sup>48</sup> National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States* (Washington, DC: US Department of Justice, National Institute of Justice, 1993), p 40.

<sup>49</sup> See R A Lingg, above, at 350. This estimate was based on a definition of stalking as an "unwanted pursuit of a person to whom one is not related ... , extending over a period of time greater than six months, but not necessarily involving an approach and not necessarily involving malicious intent." Above, n 19.

<sup>50</sup> Los Angeles Police Dept, Fact Sheet No 14, at <<http://www.privacyrights.org/fs/fs14-stk.htm>>, p 1.

women stalked by ex-boyfriends and former husbands.<sup>51</sup> Of all women murdered in the US, one half were killed by their current or former husbands or boyfriends.<sup>52</sup> The co-director of Virginians Against Domestic Violence estimated that as many as 90% of the women killed by (former) husbands or boyfriends were stalked by the killer before a murder occurred.<sup>53</sup>

1.47 In order to understand better the broader context of violence in which stalking occurs, the National Institute of Justice and the Centers for Disease Control and Prevention collaborated in a comprehensive telephone survey of violence against women.<sup>54</sup> “Stalking” was defined in the survey as “a course of conduct directed at a specific person that involves repeated visual or physical proximity, nonconsensual communication, or verbal, written or implied threats, or a combination thereof, that would cause a reasonable person fear.” The survey collected data from 8,000 women and 8,000 men in 1997. The results indicate that stalking is much more prevalent than previously thought and should be treated as a significant problem. The following are the major findings:

- Of those surveyed, 8% of women and 2% of men said they had been stalked at some point in their lives. One percent of all women surveyed and 0.4% of all men surveyed was stalked during the 12 months preceding the survey. Approximately 1 million women and 400,000 men are stalked each year.
- 59% of female victims and 30% of male victims were stalked by intimate partners. Only 23% of female victims and 36% of male victims were stalked by strangers.
- About 87% of stalkers were men.
- About 80% of victims were women. Most victims were between the ages of 18 and 29 when the stalking started.
- Out of the female victims who had been stalked by former husbands or partners, 21% said the stalking occurred before the relationship ended. 43% said it occurred after the relationship ended, and 36% said it occurred both before and after the relationship ended.
- Half of the victims reported their stalking to the police. About one-quarter of the women studied had obtained restraining orders, but 80% of the orders were violated.

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<sup>51</sup> Above.

<sup>52</sup> Council on Scientific Affairs, American Medical Association, “Violence Against Women”, JAMA, June 17, 1992, at 3184, cited in R A Lingg, above, at 355.

<sup>53</sup> J Fahnestock, “All Stalk and No Action: Pending Missouri Stalking Legislation”, *UMKC Law Review* 61 (1993) 783 at 785 (citing M Beck and others, “Murderous Obsession”, *Newsweek*, July 13, 1992, at 60).

<sup>54</sup> Violence Against Women Grants Office, Office of Justice Programs, US Department of Justice, *Stalking and Domestic Violence: The Third Annual Report to Congress under the Violence Against Women Act* (1998) ch 1.



- Stalkers do not always threaten their victim verbally or in writing; more often they engage in a course of conduct that, taken in context, causes a reasonable person to feel fearful.
- It appears that much stalking is motivated by stalkers' desire to control, or instil fear in, their victim.
- The survey dispels the myth that most stalkers are psychotic or delusional. Only 7% of the victims said they were stalked because their stalkers were mentally ill or abusing drugs or alcohol.
- There is a strong link between stalking and domestic violence. Husbands or partners who stalk their partners are four times more likely than husbands or partners in the general population to physically assault their partners, and they are six times more likely than husbands and partners in the general population to sexually assault their partners.
- 81% of the women who were stalked by an intimate partner (either before or after the relationship ended) were also physically assaulted by that partner, and 31% were also sexually assaulted by that partner.
- Over a quarter of the victims said the victimisation caused them to lose time from work. About half of the victims took some type of self-protective measures, including changing address, acquiring a gun, moving out of town, avoiding perpetrator, varying driving habits, moving to a shelter and not going to work or school.
- About two-thirds of all stalking cases last a year or less, about a quarter last 2 to 5 years, and about a tenth last more than 5 years. On average, stalking cases last 1.8 years.

## Impact of stalking behaviour on victims

1.48 As observed by the Manitoba Law Reform Commission, stalking interferes with the following interests of an individual:<sup>55</sup>

- (a) **Interest in privacy** - Privacy includes the notion of being left alone, free of unwanted scrutiny, in our private lives. Stalking interferes with the victim's privacy by following, watching or simply attending at the person's residence or place of work, or by sending unwanted and inappropriate communications to him. As stalkers often follow their victims home, enacting anti-stalking laws can also protect the interest of individual in the well-being and privacy of his home.

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Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997), pp 5 - 6.

- (b) **Interest in emotional or psychological security** - The victim should be protected against unjustifiable conduct which threatens self-esteem, emotional security and mental health.
- (c) **Interest of freedom of action and autonomous decision-making** - The victim should not be subjected to the control, coercion or intimidation of the stalker so as to be compelled to act in a manner inconsistent with the victim's interests and desires.

1.49 According to the American survey conducted in 1997:<sup>56</sup>

- stalking usually stopped within one to two years but victims experienced its social and psychological consequences long after;
- about 30% of the women and 20% of the men said they sought psychological counselling as a result of their stalking victimisation;
- one-fifth lost time from work, and 7% of those said they never returned to work;
- about 20% of the victims said it was because they moved away that the stalking stopped;
- another 15% said that police involvement had been effective in stopping stalking.

1.50 Michele Pathé and Paul Mullen have conducted a survey in Australia to find out the social and psychological impact of stalking on the victims.<sup>57</sup> A group of 100 victims of stalking had been asked to complete a questionnaire on their experiences. Because of the way the sample was drawn, the survey gives a picture of the more distressed and aware victims.<sup>58</sup> The following are the major findings:<sup>59</sup>

- All victims felt that their stalking experience had had a deleterious impact on their psychological, interpersonal and/or occupational functioning.
- 82% had modified their usual activities as a direct consequence of the stalker's harassment, many avoiding any place the stalker might be.
- 70% had curtailed social outings through fear of encountering their pursuer. Many had lost contact with their friends as a consequence.
- 53% reported a decrease or cessation of work or school attendance. In several instances, the victims' greatly diminished productivity cost them their job or their business.

<sup>56</sup> P Tjaden, "The Crime of Stalking: How Big Is the Problem?", above, at 3-4.

<sup>57</sup> M Pathé & P E Mullen, "The impact of stalkers on their victims" (1997) 170 *British Journal of Psychiatry* 12.

<sup>58</sup> The source was drawn from two sources. The first was individuals referred to the clinic of Pathé and Mullen by clinicians, police and lawyers. The second source was individuals who contacted them following a series of articles which appeared in the print media in 1994 and 1995.

<sup>59</sup> Above, at 14.

- 37% had to change their workplace, school or career.
- 39% relocated residence, in some cases overseas.
- 24% seriously considered or attempted suicide.
- 83% reported heightened anxiety levels, which manifested as “jumpiness”, “shakes”, panic attacks, hypervigilance and exaggerated startle response.
- 74% reported chronic sleep disturbance, due to hyperarousal, recurring nightmares or the stalker’s repeated telephone calls.
- 55% reported excessive tiredness or weakness as a persistent problem.
- 47% were troubled by increased frequency and severity of headaches.
- Most victims reported post-traumatic stress symptoms; 37% fulfilling the criteria for a diagnosis of Post-Traumatic Stress Disorder.
- Harassment by following or surveillance has a very strong influence on the development of Post-Traumatic Stress Disorder symptoms.

1.51 In *R v Ireland*,<sup>60</sup> the defendant made numerous telephone calls to three women and remained silent when they answered. Evidence was given at the trial that the victims suffered significant adverse psychological symptoms as a result. These symptoms included palpitations, difficulty in breathing, stress, anxiety, inability to sleep, tearfulness, headaches, dizziness, tingling in the fingers, a skin condition brought about by nervousness, and a constant feeling of being on edge.

1.52 As victims of stalking can be subjected to constant harassment at home, place of work and in public places, they are placed in constant fear and terror. Stalking has therefore been described as a form of “physical and psychological terrorism”. The victims often feel that they are no longer in control of their lives. Some would forever be looking over their shoulder and would never be able to trust anyone again.<sup>61</sup> As Celia Brayfield, a novelist who had been stalked for six years, puts it:

*“stalkers murder sleep. They destroy your sense of trust, your security and your peace of mind. They destroy your relationships and leave you feeling alone and stranded in an uncomprehending world”.*<sup>62</sup>

1.53 The harassment may increase in magnitude and frequency so as to substantially interfere with the victim’s private life. In an attempt to avoid the stalker and to find safety, many victims are forced to change their lifestyles. They

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<sup>60</sup> [1997] 1 All ER 112.

<sup>61</sup> K L Attinello, “Anti-Stalking Legislation: A Comparison of Traditional Remedies Available for Victims of Harassment Versus California Penal Code Section 646.9” (1993) 24 *Pacific Law Journal*, 1945 at 1947-1950 (illustrating the problems and the inadequacy of traditional remedies by three stalking cases).

<sup>62</sup> Quoted in *House of Lords Hansard*, 24 Jan 1997, col 922.



may change their telephone number, move to another district, quit their job or even refuse to go outside. A former Los Angeles County District Attorney said:<sup>63</sup>

*"This is terrorism, pure and simple. ... Somebody's life is destroyed by it, somebody's life becomes enveloped by it. Everything that they do - when they are asleep, when they are awake - is somehow connected to it. ... There is somebody constantly focused on them with an obsession."*

1.54 The Police Federation in England made a similar observation:<sup>64</sup>

*"it is frightening enough knowing that your every move is being watched, that you are being followed. But what if you are being trailed day after day, bombarded with unwanted letters, flowers and gifts, plagued with telephone calls and even go to collect your child from school to find a stranger has beaten you to it. It can ruin your life and that is what is happening now to ordinary people, mainly women."*

1.55 As mentioned above, a worrying characteristic of stalking is that it can escalate into violence. The National Victim Assistance Academy in the US reports that there is a correlation between stalkers whose behaviour escalates and those who eventually physically assault their victims.<sup>65</sup> A critical point in escalation appears when the stalker begins to make visits to the victim's residence or cause property damage.

1.56 Since the behaviour of many stalkers is unpredictable, a victim who does not fear for his or her physical safety may nevertheless fear for not knowing what the stalker would do next. It is unpredictability that generates the most fear, coupled with the knowledge that, in some cases, the stalker's behaviour may suddenly become violent without any warning or reason.<sup>66</sup>

1.57 The more aggressive stalkers put the victim in fear of violence in an attempt to exercise control and domination over their victim. The stalker may or may not intend to carry out their threat. But if the stalker does carry out his threat, the effect on the victim or his family can be serious. Non-violent harassment can also be devastating. The unrelenting and unremitting pursuit and a presence in the victim's daily life at every turn can disrupt or destroy the whole life of the victim. As the emotional and practical effects of the stalking experience are substantial and may last for many years, the law should afford protection to individuals who are harassed by stalkers.

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<sup>63</sup> C A 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 at 475 n 50.

<sup>64</sup> *House of Commons Hansard*, 17 Dec 1996, col 788.

<sup>65</sup> National Victim Assistance Academy, "Self Examination Chapter 21 Section 2: Stalking" (1996), at <<http://www.ojp.usdoj.gov/ovc/assist/nvaa/ch21-2st.htm>> (7.12.98), p 2.

<sup>66</sup> B A MacFarlane, "People who stalk people: Part I", (1999) 57:2 *The Advocate* 201, 204.

## Effect of stalking behaviour on privacy

1.58 There is a divergence of opinion within the Privacy sub-committee as to whether stalking falls within the remit of the privacy reference. Professor Wacks holds the view that stalking behaviour does not lead to a loss of privacy. He argues that the objection to stalking is not that the privacy of the victim has been invaded, but that it has resulted in the victim not being able to move freely and lead a normal life. These are issues that are peripheral to the privacy concerns of an individual. This view is best represented by the following passage written by Professor Wacks in his book on personal information:

*“To claim that whenever an individual is the subject of attention or when access to him is gained he necessarily loses ‘privacy’ is ... to divest our concern for ‘privacy’ of much of its intuitive meaning. Having attention focused upon us or being subjected to uninvited intrusions upon our solitude are objectionable in their own right, but our concern for the individual’s ‘privacy’ in these circumstances is strongest when he or she is engaged in activities which we would normally consider ‘private’. The Peeping Tom is more likely to affront our conception of what is ‘private’ than someone who follows an individual in public.”<sup>67</sup>*

1.59 Professor Wacks points out that the main concern of “privacy” is the acquisition or use of personal information about an individual. All the proposals made by the Privacy sub-committee on data protection, interception of communications, surveillance, intrusion upon seclusion, and public disclosure of private facts, revolve around the idea of personal information. By following or observing another in public, the person being followed or observed cannot claim that intimate or sensitive information about him has been wrongfully obtained. Even if it is accepted that personal information of an intimate or sensitive nature could be obtained in such circumstances, the information cannot be reasonably withheld by him; it is he who put the relevant data in the public domain, and such data are accessible to anyone who happens to be on the streets. If the stalker has unlawfully collected personal data about his object, he may be liable under the Personal Data (Privacy) Ordinance. And if he has intruded upon the privacy of his object by unlawful surveillance, he would be liable for the new tort of invasion of privacy or charged with a surveillance offence, such as will be proposed in our reports on *Civil Liability for Invasion of Privacy* and *Criminal Sanctions for Unlawful Surveillance*. Stalking activities overlap with surveillance but some activities which amount to harassment cannot properly be considered as surveillance. Professor Wacks agrees that stalking is a social problem and that legislation prohibiting it is necessary. However, he doubts whether proposals on stalking could properly be dealt with under the rubric of privacy.

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<sup>67</sup> R Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989), p 18.



Although there is an element of privacy in stalking cases, stalking is an issue that goes beyond the remit of the sub-committee.

1.60 The sub-committee recognises that it is not easy to see at first sight the relationship between stalking and privacy. By following and observing his victim in the streets or other places which are accessible to the public, the stalker is unlikely to obtain any personal information about his victim which the latter would want to keep to himself. Similarly, it is difficult to imagine how the privacy of an individual can be invaded when a stalker seeks to maintain contact with him by making telephone calls or sending letters or gifts to him. The stalker has not intruded into his victim's premises nor has he obtained any personal information about his victim which the latter is unwilling to disclose. This raises the question whether stalking has anything to do with privacy.

1.61 Many stalkers have no intention to obtain or disclose personal data about their victims. They can often harass their victims without intruding into their private premises or intercepting their communications. However, the fact that none of the four topics listed in our terms of reference refers to the harassing behaviour of stalkers does not preclude us from embarking on a study of the legal issues involved in stalking.

1.62 Whether stalking can be considered as a privacy concern depends on how the concept of privacy is or should be perceived. Different people have different perceptions about the content of the right of privacy. Some see it as the right to be let alone while others see it as a complex of different interests. For example, the Australian Law Reform Commission considered that privacy is comprised of three privacy interests, namely, territorial privacy, privacy of the person and information privacy. Ruth Gavison, on the other hand, suggests that the concept of privacy consists of a complex of three elements, namely, secrecy, anonymity and solitude.<sup>68</sup> No matter which definition we adopt, it seems that stalking does not fit well within the meaning of privacy. However, the conclusion is different if the concept of "private life" is used in considering whether stalking amounts to an interference with privacy. In this connection, we note that the equivalent of "privacy" in the Chinese text of both the International Covenant on Civil and Political Rights (ICCPR) and the Hong Kong Bill of Rights Ordinance (Cap 383) is "private life" and not "privacy". Since the right of privacy in Article 8 of the European Convention on Human Rights is described as the right to respect for an individual's "private life", we have consulted the relevant jurisprudence on the European Convention in order to ascertain the scope of the protected interest under Article 17 of the ICCPR. It is generally accepted that decisions of the European Court of Human Rights are of assistance when interpreting the provisions of the ICCPR.<sup>69</sup>

1.63 The European Court of Human Rights has not given an exhaustive definition of the notion of "private life" under Article 8. However, it has given

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<sup>68</sup> R Gavison, "Privacy and the Limits of Law" (1980) 89:3 *Yale Law Journal* 421, 428 *et seq.*  
<sup>69</sup> Eg *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 1 HKLRD 514.

some guidance as to its meaning for the purposes of the Article. In *Niemietz v Germany*, the Court held that:<sup>70</sup>

*“it would be too restrictive to limit the notion [of private life] to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.*

*There appears, furthermore, to be no reason of principle why this understanding of the notion of ‘private life’ should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that ... it is not always possible to distinguish clearly which of an individual’s activities form part of his professional or business life and which do not.”*

1.64 According to Harris and others, the European Court in that case endorsed “a long practice of the [European Commission of Human Rights] in which it had sought to extend the concept of private life beyond the narrower confines of the Anglo-American idea of privacy, with its emphasis on the secrecy of personal information and seclusion.”<sup>71</sup>

1.65 Indeed the Nordic Conference on the Right of Privacy defined the right to privacy as covering such activities as (a) “harassing a person (eg watching and besetting him or subjecting him to nuisance calls on the telephone)” ; and (b) “importuning by the Press or by agents of other mass media”.<sup>72</sup> The Conference also declared that “intrusion upon a person’s solitude, seclusion or privacy” is a form of invasion of privacy. Paragraph 13(a) of the Declaration makes it clear that stalking behaviour, as now understood, should fall within the scope of the law of privacy:<sup>73</sup>

<sup>70</sup> Series A, No 251-B, para 29 (1992).

<sup>71</sup> D J Harris, M O Boyle & C Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), 305. In *McFeeley v UK*, App No 8317/78, 20 DR 44 at 91 (1980), the European Commission established that freedom to associate with another is an aspect of private life. The European Court of Human Rights also used a purposive approach to interpret “private life” as encompassing the “physical and moral integrity of the person” in *X and Y v The Netherlands* (1985) 8 EHRR 235 and *Costello Roberts v UK* (1995) 19 EHRR 112. The Law Reform Commission of Ireland argues that the notion of “moral integrity” would appear to support the enactment of anti-harassment legislation since harassment intrudes on the inner space or ease of a person which is so necessary to enable persons to function normally: *The Law Reform Commission Report on Privacy – Surveillance and the Interception of Communications* (1998), Annex I, para 1.32.

<sup>72</sup> Para 3 (ix) and (xii); reproduced in JUSTICE, *Privacy and the Law* (London: Stevens and Sons, 1970), Appendix B.

<sup>73</sup> Quoted in JUSTICE, *Privacy and the Law* (London: Stevens and Sons, 1970), Appendix B, at 49. Recently, the Parliamentary Assembly of the Council of Europe calls upon the



*“An unreasonable intrusion upon a person’s solitude, seclusion or privacy which the intruder can foresee will cause serious annoyance, whether by the intruder’s watching and besetting him, following him, prying on him or continually telephoning him or writing to him or by any other means, should be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.” (emphasis added)*

1.66 In the US, public and persistent following of another might be actionable as an invasion of privacy. These cases would arise in circumstances where the defendant in a personal injury action hires a private detective to investigate the validity of the claim against him. Where the person being investigated notices that he is under surveillance and the surveillance, shadowing, or trailing is conducted in an unreasonable and obtrusive manner intent on disturbing the sensibilities of an ordinary person, the American courts have held that there is an actionable invasion of the right of privacy.<sup>74</sup>

1.67 One of the many aspects of privacy is freedom from interference with an individual’s private space. The traditional view is that “private space” covers home, hotel rooms and other premises in which an individual is said to have a reasonable expectation of privacy. In the light of the European Court decision in *Niemietz v Germany*, which extended the concept of private life to include the establishment and development of personal relationships, it is arguable that the idea of private space is no longer confined to those areas in which the person has some exclusive rights of occupancy where secrecy or confidentiality can be maintained.<sup>75</sup>

1.68 One of the basic states of privacy described by Alan Westin is that of “anonymity”. He explains that:

*“[this state of privacy] occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance. He may be riding a*

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governments of the member states to pass legislation, if no such legislation yet exists, guaranteeing the right to privacy. One of the guidelines laid down by the Assembly is that “following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited”. See Resolution 1165 (1998) on Right to Privacy, para 14 (v).

74 “Investigations and surveillance, shadowing and trailing, as violation of right of privacy” 13 ALR3d 1025. The “open, public, and persistent following of the plaintiff, without any attempt at secrecy and in such manner as to make obvious to the public that the plaintiff was being followed and watched” was held to be an actionable tort for which the plaintiff was entitled to recover damages: *Schultz v Frankfort M. Acci & P G Ins Co* (1913) 151 Wis 537, 139 NW 386; cited in 13 ALR3d 1025, at 1026.

75 D J Harris and others, above, p 308-9. The 8th Privacy Principle in the Australian Privacy Charter 1995 provides that the “right to private space” in which people could conduct their personal affairs applies not only in a person’s home, “but also, to varying degrees, in the workplace, the use of recreational facilities and public places.”

*subway, attending a ball game, or walking the streets; he is among people and knows that he is being observed; but unless he is a well known celebrity, he does not expect to be personally identified and held to the full rules of behavior and role that would operate if he were known to those observing him. In this state the individual is able to merge into the 'situational landscape'. Knowledge or fear that one is under systematic observation in public places destroys the sense of relaxation and freedom that men seek in open spaces and public arenas."*<sup>76</sup>

1.69 Following or observing another in a public place is a form of surveillance even though it is done overtly and without the assistance of technical aids. It has a restrictive influence over the private life of the subject. The subject has no way of knowing when and where he will be put under surveillance.

1.70 Even brief observations may infringe a person's privacy. For instance, a person who takes pictures of women entering an abortion clinic or takes pictures of persons entering a health centre for AIDS or HIV patients captures an intimate fact about the private lives of the persons filmed. Andrew McClurg observes that in the US, legal actions against anti-abortion protesters filming women entering abortion clinics have resulted in injunctions prohibiting the activity. He further suggests that there is at least limited recognition of the concept of "public privacy" under the state constitutional law of the US.<sup>77</sup>

1.71 Attention alone can cause a loss of privacy to the subject even though no new personal information about him becomes known.<sup>78</sup> The state of being alone does not exist merely in a secluded place. A person can wander in solitude in the streets or on a beach, but he cannot enjoy peace of mind if he believes that he might be followed by a stranger or someone he dislikes. Persons who know they are being watched or followed (or that there is a possibility that they are being watched or followed) are often forced to modify or curtail their behaviour.<sup>79</sup>

1.72 We consider that the traditional notions of "solitude" and "seclusion" are insufficient to describe that aspect of private life which involves interaction with other people. The development of human relationships forms part of an individual's private life. Whether such interaction takes place in a secluded environment is immaterial. There is an interference with an individual's private life as long as he has reason to believe that his movements

<sup>76</sup> A F Westin, *Privacy and Freedom* (New York: Atheneum, 1968), at 31. Commercial Radio Hong Kong argues that the above passage suggests that if the subject is a "well known celebrity", then he cannot expect these standards apply to him. We consider that although Commercial Radio Hong Kong may be correct in saying that the above passage does not apply to celebrities, it does not lead to the conclusion that celebrities do not have the right to a private life. The fact that the victim is a celebrity only suggests that he is expected to be more tolerant of press activities, particularly if it is he himself who has sought public attention or has put his private life to public scrutiny.

<sup>77</sup> A J McClurg, "Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 *North Carolina Law Review* 989 at 1033.

<sup>78</sup> R Gavison, "Privacy and the Limits of Law" (1980) 89:3 *Yale Law Journal*, 421 at 432.

<sup>79</sup> A J McClurg, above, at 1035.

may be observed or tracked by another.<sup>80</sup> It would be deplorable if the law did not offer any protection in circumstances where the stalking activities do not involve an intrusion upon the solitude or seclusion of the object. The Law Reform Commission and the majority of the sub-committee therefore believe that stalking constitutes an undue interference with an individual's private life even though it may not be a privacy issue as such.

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<sup>80</sup> A telephone poll conducted by *Apple Daily* found that 88 percent of the 340 respondents believed that it was a violation of individual privacy for reporters to trail public figures: Government Information Services, *Media Summary*, 2.9.97, para 3.



## Chapter 2

### Overview of responses to the Consultation Paper

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2.1 The Consultation Paper proposed that a person who, without lawful authority or reasonable excuse, pursues a course of conduct which amounts to harassment of another should be guilty of an offence and liable in tort. This chapter gives an overview of the comments made by the respondents on the proposals stated in the Consultation Paper. The Privacy sub-committee received a total of 54 submissions. The vast majority of the submissions support the introduction of anti-stalking legislation, with or without qualifications. Putting aside the submissions from private individuals, only two respondents have reservations or object to the introduction of such legislation; namely, the Hong Kong Journalists Association and the Hong Kong section of the International Commission of Jurists (JUSTICE).

#### Submissions expressing support

2.2 The **Hong Kong Bar Association** can see no legal policy objection to introducing anti-stalking legislation along the lines set out in the Consultation Paper. The Criminal Law and Procedure Committee of the **Law Society of Hong Kong** supports the proposals in principle. The **Hong Kong Young Legal Professionals Association** supports the spirit of the proposals as they would bring the laws of Hong Kong more in line with other jurisdictions. The **Hong Kong Federation of Women Lawyers** supports anti-stalking legislation. They hope that such legislation would deter stalkers from harassing their victims and apprehend the stalker before his conduct reaches a serious level. Both the Prosecutions Division and the Civil Division of the **Department of Justice** lend their support to the proposals.

2.3 The **Hong Kong Police Force** and **Security Bureau** also support the proposals in principle. The police agree that stalking is a problem in Hong Kong. They confirm that stalking often precedes a report of domestic violence or blackmail. They think that if an offence of stalking were introduced, it may reduce the number of serious offences which are committed after a period of harassment. The **Social Welfare Department** supports anti-stalking legislation and criminal sanctions to protect victims before the stalkers take violent action. The **Working Group on Battered Spouses**, which comprises representatives from various government departments, the Hospital Authority

and Health & Welfare Bureau, agrees that stalking should be a criminal offence. The **Office of the Ombudsman** welcomes the proposal to make harassment an offence.

2.4 The **Hong Kong Family Welfare Society**, which employs about 150 professional social workers, generally supports the recommendations. **Harmony House**, which provides a refuge for women and their children who are in immediate danger of domestic violence, generally concurs with the views stated in the Consultation Paper. They believe that early intervention in stalking cases would prevent escalation into violence which results in further damage to the victims and sometimes the stalkers themselves. **Safetalk Domestic Violence Support Group**, a domestic violence support group affiliated to the Hong Kong Federation of Women's Centres,<sup>1</sup> welcomes the introduction of civil and criminal measures that address stalking. They consider that these measures are essential to protect women from serious and long-term harassment by abusive husbands or partners. The member agencies of the **Hong Kong Council of Social Service** generally support the proposal to provide more comprehensive and effective protection for victims of stalking by legislating for civil and criminal sanctions.

2.5 The **Hong Kong Federation of Women** agrees that victims of stalking ought to be protected by law. They comment that stalking should be criminalised so that complaints about stalking can be dealt with swiftly by the police before the stalker commits another crime. The **Zonta Club of Victoria**, a service organisation of executive women in business and profession, also supports the introduction of anti-stalking legislation. The **Association for the Advancement of Feminism** and the **Anti-Sexual Harassment Alliance** comment that criminalising stalking behaviour can protect the privacy and personal safety of women. They point out that the proposed legislation would close a loophole in the law and supplement existing legislation such as the Sex Discrimination Ordinance. **Lingnan College** supported the proposals making harassment an offence and a tort.

2.6 It goes without saying that some of these respondents also comment on the details of the proposals. These comments are discussed in Chapters 6 to 9 below.

## **Submissions expressing qualified support**

2.7 The **Legal Aid Department** agrees that existing legislation appears to have failed to provide adequate protection to individuals in certain situations involving persistently anti-social and troublesome behaviour which causes unwarranted interference with the health, comfort or rights of individuals. They comment that there is a *prima facie* need to introduce legislation to prevent

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<sup>1</sup> The Federation of Women's Centres runs a free legal advice clinic staffed by volunteer lawyers, as well as many other services and programmes for women.

the harm caused by stalking conduct. However, the Department qualifies its support with comments on the ingredients and penalty of the proposed offence.

2.8       The **Hong Kong News Executives' Association** welcomes any legislation to deal with stalking. They are, however, concerned that the proposed legislation may be misused to curb the activities of journalists, thereby limiting free speech. They think that criminal law should not provide a means to threaten press freedom. The **Hong Kong Press Photographers Association** is pleased to see that genuine stalking behaviour would be subject to legal sanctions so that innocent citizens would not be harassed by stalkers. But they hope that press freedom would not be infringed because of uncertainties in the legislation.

2.9       **Asia Television Ltd** supports the spirit of reforming the law to protect stalking victims. They generally agree with the proposals in the Consultation Paper. They are, however, anxious to see that legitimate journalistic activities would be covered by the defences. **Hong Kong Commercial Broadcasting Co Ltd** believes that stalking is a social problem which requires legislation. Their only concern is that legislation in this area may offer an opportunity for unwarranted curbs on press freedom and free speech. **Metro Broadcast Corporation Ltd** does not object to the introduction of an offence of stalking. However, they stress that the freedom presently enjoyed by the media in news gathering and news reporting activities should not be affected by the proposals.<sup>2</sup>

2.10       The **Hong Kong Human Rights Commission**, which is a coalition of 11 non-governmental organisations, agrees that simple, swift and effective procedures should be in place to protect victims of stalking at an early stage. But they qualify their support by commenting that the Consultation Paper failed to give full consideration to the possible conflict between the operation of the proposed legislation and the exercise of press freedom.

## **Submissions commenting on certain aspects of the paper**

2.11       The **Hong Kong Democratic Foundation** suggests that a comprehensive study of the prevalence of stalking in Hong Kong be commissioned by the Government without delay. The **Hong Kong Association of Banks** comments that the threshold for the initiation of criminal and civil proceedings under the proposal is too low. It also expresses its preference for self-regulation to address the problem of abusive debt collection practices. **Professor Kenneth W Y Leung** of the Chinese University of Hong Kong suggests that news-gathering activities of *bona fide* news organisations be exempted by way of a specific defence. The **Judiciary Administrator's Office** comments that implementing the proposals would increase the workload of the courts.

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<sup>2</sup>       Television Broadcasts Ltd advises that they do not have any specific comments.



2.12 The submissions from the following respondents are focused entirely on the problems arising from harassment by debt collection agencies: **Office of the Privacy Commissioner for Personal Data**, the **Hong Kong Monetary Authority**, the **DTC Association**, **Standard Chartered Bank**, **Citibank NA**, and a **debt collection agency** in Hong Kong, which prefers to remain anonymous in its submission.

## **Submissions raising objection or having reservations**

2.13 The **Hong Kong Journalists Association** has “strong reservations” about the proposals. It urges the Law Reform Commission to consider how ordinary reporting could be safeguarded from legal sanctions. The **Hong Kong section of the International Commission of Jurists (JUSTICE)**<sup>3</sup> is the only respondent who expressly objects to the introduction of anti-stalking legislation. It holds the view that the main proposals are not justified and should not be adopted. It believes that if existing law is enforced with vigour, most stalking activities can be put in check. It argues that the police ought to be aware of the magnitude of the issue and be sensitive to such complaints, and that the police should know the law better and enforce the law with more concern and vigour. It points out that in any event, an obsessed and determined stalker will never be in a position to understand the demands of civil and criminal justice, such as bail conditions, restraint orders, or injunctions, whether because of his psychiatric condition or otherwise. JUSTICE therefore concludes that the need for anti-stalking legislation, particularly the need to create a new criminal offence, has not been demonstrated.

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<sup>3</sup> The Chairman and Vice-Chairman of JUSTICE in 1998 were Gladys Li SC and Margaret Ng respectively.

## Chapter 3

### Incidence of stalking in Hong Kong

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3.1 The Hong Kong Democratic Foundation submits that anecdotal evidence and overseas statistics are a very poor basis for public policy-making. They think that the case for stalking legislation has not been made out. They suggest that comprehensive and independent studies of the stalking problem in Hong Kong be commissioned by the Government without delay. In the event that the legislation is enacted without the backing of such study, they think that a review should be carried out after a period of, say, five years.

3.2 The Hong Kong Journalists Association argues that studies in the Western world may have little relevance in a Chinese society such as Hong Kong because stalking is “an activity that emerges from cultural attitudes”. They think that a study should be carried out to assess the extent of stalking in Hong Kong before any steps are taken.

3.3 The English Law Commission noted in 1992 that incidents of domestic violence were infrequently reported to the police.<sup>1</sup> There was a tendency for victims to try to conceal attacks for as long as possible through either a misguided sense of shame, fear of reprisals or distrust of the authorities. Official criminal statistics in England had been challenged as unreliable and inaccurate in their reflection of the number of cases actually reported. There was also evidence that many of the cases that had been reported to the police had gone unrecorded. And incidents that were recorded might later be omitted from criminal statistics because of the unwillingness of the complainant to prosecute.<sup>2</sup>

3.4 The position in Hong Kong is similar. Many victims in Hong Kong who are physically, mentally or sexually abused by their partners are unwilling to lodge a complaint with the police for fear that their plight would be made known to their friends and relatives. According to Harmony House, about 70% of the victims admitted to their sheltered premises have been subjected to psychological abuse,<sup>3</sup> and 50.3% of their residents tolerated abusive behaviour for five years or more.<sup>4</sup> Many victims of domestic abuse are also unaware of their right to be protected from abuse.

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<sup>1</sup> The Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home* (LAW COM No 207) (London: HMSO, 1992), para 2.4.

<sup>2</sup> Above.

<sup>3</sup> *Harmony House Annual Report 1995-96*, p 48.

<sup>4</sup> Letter from Harmony House to the Chief Secretary dated 23.9.99.

3.5 Whilst the Hong Kong Police Force maintains statistics on the types and numbers of offences committed, they do not keep any statistics in relation to stalking as stalking is not an offence under existing law. Police stations regularly receive complaints from people who claim that they have been followed or harassed. But since following or harassing someone is not an offence, these complaints are merely entered in the station's Miscellaneous Report Book as opposed to its Crime Complaint Register. The police do not have any procedure flagging or tracking cases involving stalking as they are received or accepted for prosecution. The retrospective identification of these cases would necessitate a review of all cases recorded or handled by the police over a period of time. Ascertaining the magnitude of the problem from the data collected by the police would therefore be a costly and labour intensive exercise, namely examining by hand, each individual crime report as recorded in the Miscellaneous Report Book.

3.6 Harmony House remarks that some of their ex-residents continue to be disturbed by their former partners after separation or divorce. These ex-residents, all of whom are women, have experienced various forms of stalking by their ex-partners, such as verbal threats through repeated telephone calls, loitering near the new residence, waiting at the office and verbal assault in public place. These acts may be symptoms of the ex-partners' unresolved anger towards the women arising from divorce or disputes about children's custody or access. These women experience high levels of stress, anxiety and tension as a result of these disturbances. Harmony House advises that although the women reported the incidents to the police, the police felt unable to help for most of the time.

3.7 We are unaware of any study on the extent to which stalking is a problem in Hong Kong. Indeed, even statistics on domestic violence in Hong Kong are lacking.<sup>5</sup> Despite unprecedented interest in stalking over the past decade in many common law jurisdictions, research on stalking has been limited to studies of small or clinical samples of known stalkers and case studies of individual stalkers. Even in the US where stalking laws have been passed in all 50 States, the first national study on stalking was conducted only in 1997.<sup>6</sup>

3.8 The sub-committee decided not to commission a survey on the magnitude of stalking in Hong Kong for the following reasons:

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<sup>5</sup> Chan Yuk-chung observed that Hong Kong was lacking of systematic data on the intensity and extent of the problem of domestic violence. He wrote: "It is true that the Social Welfare Department does compile child abuse and battered spouse statistics from time to time. These official statistics, however, tend more to reflect governmental concern and are fraught with inconsistencies. Moreover, they are rarely released systematically to the public. As a result, our society responds to individual cases of family violence as isolated incidents rather than as manifestations of a serious social problem." Y C Chan, *News Reporting on Family Violence in Hong Kong: A Case Study* (Hong Kong: Department of Applied Social Studies, Hong Kong Polytechnic University, 1995), p 2.

<sup>6</sup> Violence Against Women Grants Office, Office of Justice Programs, US Department of Justice, *Stalking and Domestic Violence: The Third Annual Report to Congress under the Violence Against Women Act (1998)* footnotes 17 & 19.



- (a) Stalking is not a criminal offence under existing law. The public may not perceive such conduct as a matter for which they are entitled to a legal remedy. They may also have difficulties in relating all the apparently lawful activities of a stalker and viewing them in aggregate.
- (b) Any comprehensive survey on stalking in Hong Kong is best conducted with the input of criminologists, psychiatrists, psychologists, social workers, lawyers and the police.
- (c) In determining whether stalking is a problem in Hong Kong, it is immaterial whether the number of Hong Kong residents affected by stalking behaviour is 100 or 10,000. As long as there are enough cases to show that some people in Hong Kong are being harassed by stalkers, stalking *is* a problem that needs to be addressed – whether these victims account for 1% or 0.01% of the Hong Kong population.
- (d) An opinion poll is not the only way to find out whether stalking is a problem in Hong Kong. The cases and materials provided in the remaining part of this chapter already illustrate that stalking is a problem that needs to be addressed.

## **Stalking-related incidents in Hong Kong**

3.9 This paragraph lists the stalking-related incidents in Hong Kong, which have been drawn to our attention by the respondents to our Consultation Paper or reported in the press in the past two years. Not all cases are of equal gravity; some are more serious than others. Nonetheless, they give a useful indication of the problem in society.

- (1) We have asked an Applications Judge to identify cases involving stalking behaviour and have been provided with a sample of several cases heard in the High Court. The applicants were victims who became so distressed and concerned that they took the trouble to retain a solicitor and apply for an injunction to restrain the stalkers from harassing them. To protect the interests of the victims, the names of the cases are not cited in this Report. In one case, the applicant was followed by a stranger when she was studying at a university. The stalker persisted in following her after she graduated and found a job. He waited outside her home or at the MTR station, then followed her onto the train to her place of work. On occasions, he laid in wait outside her office during office hours. The applicant affirmed that such behaviour continued for about 5 years. The conduct had reached such a pitch that she had to move to another district, fallen ill and become afraid to go out. Both her health and social life had been significantly affected. She approached the police for assistance only to find that they were helpless as no criminal act had taken place. An



interlocutory injunction was granted in her favour but the basis of the order is open to question.

- (2) Stalking is also a problem for social service providers who have contacts with their clients. In a case supplied by the Hong Kong Family Welfare Society, a female staff member of a welfare agency was constantly followed by an ex-client who threatened her with his allegedly triad-associated friends. Having found out her address by following her, that client visited her home during her absence. His actions caused her a great deal of distress. The agency reported the incidents to the police but was told that they could not do anything unless he acted in a way that would constitute assault or serious threat.
- (3) The Association for the Advancement of Feminism cites the case of a man who repeatedly harassed his former wife at her residence but the police refused to intervene. The police even scolded her for wasting their time. The Association points out that these cases are fairly common.
- (4) A manager of a public company informed us of a stalking case which had already been reported to the police but to no avail. In early 1998, a woman gave the manager a call asking if she could speak to a member of his staff. When told that she could not have immediate access to him, she became very angry. She began calling frequently. As days passed, her calls to almost all the telephones in the company kept the lines busy from 8:00 am to well past midnight. In a period of three months, they had registered more than 500,000 calls. It seems that she kept on redialling two separate telephones. Vulgar and abusive language was also used on anyone who answered the phone. Later she found out the home telephone numbers of the manager and a director of the company and began calling them at home. Their telephone caller identity devices recorded that such calls came from various locations, including restaurants and entertainment complexes. Subsequently, she made the situation worse by changing the last digits of the main telephone number and started making abusive calls to dozens of officers in the company who were not responsible to that manager. She was also spotted scratching the car of a person who had connections with the company, and the car next to it. The company hired a private investigator to record the woman's activities. Her activities were videotaped and her calls recorded. She was found driving around from phone to phone just to make calls. The guard at the manager's place of residence reported to him that a woman had on a number of occasions pretended to be from the police or from the company asking for personal information about him. On another occasion, someone threw a plastic bag filled with human excrement onto the public area managed by the company. A few days later, the woman telephoned and asked if they had received the gift she had sent. At the end of 1998, she threatened the manager's personal safety. The company suspected that the entire incident began because she was interested in picking up a young man, who had connections with

the company, as a companion. The police advised that she followed the profile of a person bent on destruction of her original target, and anyone associated with him. Her behaviour had destroyed the successful career of a person who used to work for the company but had since left Hong Kong in order to escape from her pursuit. Before that person left Hong Kong, he noticed that he was not getting any mail. When he called his bank, they told him that a woman had phoned in, given his credit card number and said he was no longer at the address. The manager suggests that it is likely that the woman had followed that person home, and later stolen his mail, including a tax demand note which contained his identity card number. The manager deplores the fact that although the operation of the company and the lives of many people have been affected by the woman, she would only be subject to a maximum penalty of \$1,000 fine and two months' imprisonment if she is convicted of an offence under the Summary Offences Ordinance. He therefore strongly supports making stalking an offence.

- (5) A television documentary reported that a man had harassed a female shop owner by repeatedly depositing used condoms and sanitary napkins at the front gate of her shop before she commenced business in the morning.
- (6) A newspaper reported that a woman, A, had been harassed for a few months by another woman, B, who was suspected to be a lesbian. B professed her love for A and promised that she would look after A for the rest of A's life. B had been to A's office and harassed her there. B also waited outside A's place of work, hoping to see A after she got off work for the day. As a result of this harassment, A was wearied both physically and mentally. She suffered from insomnia and was on the verge of a nervous breakdown. A reported the matter to the police. She was told that it was purely a personal and emotional affair and could not be classified and handled as a dispute. A was upset by the way the police handled this matter. She said it would be too late when a tragedy occurred.<sup>7</sup>
- (7) A newspaper reported that a male teacher, M, who taught Form 4 Chinese language in an evening school, was pursued by a female student, F, who was about 30 years old. When M ignored her approaches, F engaged in a course of conduct to show her affection, including pulling him aside in the teachers' office to talk to him, loitering outside the classroom in which M would lecture, obstructing him from proceeding to the classroom, stopping him from leaving classroom, repeated phone calls to his office during day time, and professed her love for him in public. On one occasion, she hit him in the stomach in the classroom after he had turned down her request for a date. In order to protect M from being pestered by F, a few students escorted M to and from the classroom. Her pursuit had persisted for a few months. In April

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<sup>7</sup> *Oriental Daily News*, 27.7.98.

2000, the Education Department invited both parties to a conference at its offices. When F spotted M, she shouted M's name, rushed forward and held his arms tightly. M tried to escape from her pursuit but F kept pestering him all the way from the Department's office to a park nearby. M called the police for assistance. When F refused to produce her identity card, both F and M were escorted to the police station. F was seen smiling toward M inside the police vehicle.<sup>8</sup>

- (8) A newspaper reported that a middle-aged woman had been harassing the staff at an office of a company for about a year. She frequently called at the office in the afternoon under the pretext of "discussing business" with the staff, often sitting there for three to four hours. She bothered them with trivial matters, sent e-mail to reveal her "deepest thoughts" and other private facts, including the fact that she had affection for a senior officer of the company. Although she displayed no violence, the staff found her behaviour tiresome. On one occasion, she made a scene at the office and had to be removed by security guards. On that same day, the police received a call from a woman who reported that someone in that office was injured. The police discovered that the report was false when they arrived at the office.<sup>9</sup>
- (9) A newspaper reported that a Mr Cheung had been harassed by a 63-year-old woman who had been making telephone calls to his residence for two years. She talked nonsense on the phone most of the time, or simply swore and then put down the phone. Some of the abusive calls came at night. She made as many as 20 calls on one day, causing inconvenience to Mr Cheung and his family. Mr Cheung did not change his telephone number because he had many contacts overseas. After making much effort to trace the woman, Mr Cheung's son reported her to the police after spotting her making a call to his home using a public telephone in a cafe. Mr Cheung said that she was a stranger to his family. The woman was reported as saying that her friends asked her to make the calls to look for her husband. It was suspected that she had mental problems.<sup>10</sup>
- (10) Speaking at a forum organised by the Hong Kong Federation of Women Lawyers in July 1998, a Police Superintendent agreed that stalking was a problem for which the existing criminal justice system failed to provide sufficient redress. He cited the case of a married man who had been harassed by a woman whom he met briefly only once at a bar. The woman kept appearing at his office and followed him on the streets. When reporting the incident to the police, he was advised that the police could do nothing because she had neither said anything threatening nor put him in fear of violence.

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<sup>8</sup> *Apple Daily*, 20.4.00, A19.

<sup>9</sup> *Ming Pao Daily News*, 4.11.98, A12.

<sup>10</sup> *Apple Daily*, 8.11.98.



- (11) A newspaper reported that a family in a housing estate (Family A) had a row with the family opposite to its flat (Family B). The story started when A complained that the barks of B's dog were a nuisance to the occupants in the building. Although B removed their dog on the advice of the Housing Department, A continued to treat B as their enemy. A sprayed pesticides and burned paper clothes and paper money, which were intended for the dead, outside the flat occupied by B. On one occasion, the female householder of A sprayed pesticide on the daughter of the tenant of B. The householder of A was charged with assault but subsequently acquitted. The rift between the two families became even worse thereafter. A put up a board with "eight diagrams", and a wok and a spade on its front door facing that of B. A also banged the door loudly when B's family members returned home. Sometimes, a member from A followed B's member and kept on scolding the latter. As a result, three female members from B had moved out in order to avoid trouble with A. Meanwhile, the loud bangs made by A during the evening kept a baby of a family residing below (Family C) awake and crying. After C complained to A about their conduct, someone threw paper money for the dead out of A's flat so that the paper money would fly into the flat occupied by C. Moreover, A had, on a number of occasions, hung from their balcony to the floor on which C resided, a bamboo brush and a plastic skull with paper money or a piece of paper with runes written on it. On one occasion, a pair of boxer shorts with foul language written on it was lowered down. It appeared that neither the Housing Department nor the police could do anything about such abusive conduct.<sup>11</sup>
- (12) A group of residents in Kwai Shing West Estate complained that for about five years two occupants of one of the flats had been spraying foul smelling liquid from a window facing the street and through the letter box in the main door. A resident alleged that the occupants repeated this conduct at least four or five times a day. The liquid smelled like a mixture of urine and faeces which had undergone a fermentation process. The neighbours had to seal their windows and doors to prevent the unpleasant odour from spreading into their premises. One of the two occupants denied that they had sprayed liquid into the corridor. He counter-claimed that it was the neighbours who had sprayed liquid into his house. The Housing Department told the press that Environmental Protection Officers had been called to investigate but there was no evidence of the tenants breaching the terms of the tenancy.<sup>12</sup>
- (13) A newspaper reported that a policeman embarked on a campaign of harassment when his girlfriend proposed that their relationship should cease. He made telephone calls to her at night-time, called her at her home, and banged at the door when she refused to answer his call. He once pulled her all the way from her workplace to the roof of the office

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<sup>11</sup> *Apple Daily*, 4.11.98.

<sup>12</sup> *Oriental Daily News*, 7.6.00 and 8.6.00. Similar incidents also occurred in Oi Man Estate: *Oriental Daily News*, 13.7.00.

building. He had threatened on a number of occasions to kill himself if she did not succumb. On one occasion, he attempted to commit suicide when she refused to answer the door. He was subsequently taken to hospital.<sup>13</sup>

- (14) A newspaper reported that a jilted lover was suspected to have stabbed his former girlfriend to death when she refused to mend their broken relationship. Prior to that incident, he had been found loitering outside the woman's home. In order to maintain close proximity to her, he moved from Tsuen Wan to Shatin and rented a flat in the same building in which she lived. He repeatedly harassed her and made a nuisance of himself outside her home. He had also vandalised her property that had been put outside her main door, waited outside her office, and followed her on the streets, hoping that she would change her mind. The woman reported the matter to the police. He was arrested and eventually charged with loitering. He was ordered by the court not to harass the woman. He breached the order but was nevertheless admitted to bail pending trial. Three weeks later, before the case was heard, he was arrested for killing the woman. Psychiatrists gave evidence that he was suffering from a major depressive disorder. He was subsequently found guilty of murder.<sup>14</sup>
- (15) The girlfriend of a divorcee applied to the High Court for injunctive relief against the former wife of the divorcee. The applicant alleged that the defendant had sent insulting and defamatory letters by facsimile transmission to her business premises with the intention that these should be read by the applicant and her staff; made unwanted and harassing calls to the applicant and her staff using abusive language; sent a card to the applicant's children which contained derogatory remarks; made unannounced visits to the applicant's business premises, rushed into her room and, in full view of her staff, accused her of being a prostitute in a loud, aggressive and abusive manner.<sup>15</sup>
- (16) A man was stalked by a 34-year-old woman when he rejected her advances. The man alleged that the woman made repeated calls to him, his boss and his colleagues after they had broken up. Some of the calls to his boss and colleagues contained scurrilous remarks about him. Occasionally, she put down the phone as soon as the call was answered. She had also waited outside his office and residence. He told the press that he had reported the incidents to the police but they had not taken any action against her. He described the incidents as a nightmare and said that he might be dismissed by his employer at any time. The only option open to him was to apply to the court for an injunction.<sup>16</sup>

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<sup>13</sup> *Apple Daily*, 28.8.98.

<sup>14</sup> HCC 412/98.

<sup>15</sup> HCA 6888/97.

<sup>16</sup> HCA 5665/2000; *Oriental Daily News*, 9.6.00.

- (17) A columnist revealed, with consent, the case history of one of his clients.<sup>17</sup> He wrote that one of his patients was obsessive and fell in love with a man who used to be her secondary school teacher but who had emigrated to Canada for some 10 years before. She believed that he had also fallen in love with her. She sought to pressurise him into marrying her, but he refused and tried to escape from her pursuit by not taking her calls and hiding. She flew to Canada in order to force him into a settlement. She was eventually prosecuted by the Canadian authorities for stalking on the basis that she had engaged in conduct which had caused him to fear for his safety. She was jailed for two weeks and then repatriated to Hong Kong. The columnist said she felt no remorse for her conduct.
- (18) It was reported that a former “Miss Hong Kong”, Shi Sze-man, was stalked by a middle-aged man who lived in the same building as her. She told the press that he smiled foolishly at her, loitered at the common areas of the building and followed her down the street. She also received harassing calls from a man who professed his admiration without revealing his identity. She said she was so frightened that she seldom went out in the evening and was eventually forced to move out.<sup>18</sup>
- (19) Another former “Miss Hong Kong”, Pauline Yeung, also experienced stalking by obsessive fans. The press reported in 1998 that a fan had loitered outside Metro Radio for a few months when she was a radio show host for the station. On one occasion, the fan even managed to gain access to her studio while she was interviewing a film star. She found it “frightening and spooky”. She told the press that on a separate occasion, a man sat at a table right next to her, staring at her the whole time.<sup>19</sup> A television programme reported in late 1999 that she was still followed by a man who was obsessed with her.
- (20) In *Secretary for Justice v Oriental Press Group Ltd*,<sup>20</sup> *Oriental Daily News* claimed that a judge in a copyright case had wrongly accused a reporter of the newspaper’s political section of being a paparazzi. It therefore commenced a pursuit of the judge by keeping him under surveillance 24 hours a day. The operation and the judge’s daily activities were reported in that newspaper. It declared that the purpose of the pursuit was to educate the judge on the true meaning of paparazzi. The High Court held that “the motive and real purpose behind this operation was to take revenge for the court’s decisions against the Oriental Press Group and to mete out a punishment to the judge for his judgments against the Group.”<sup>21</sup>

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<sup>17</sup> *Hong Kong Economic Journal*, 10.8.98, p 21.

<sup>18</sup> *Wen Wei Po*, 30.11.97.

<sup>19</sup> *SCMP*, 15.1.98.

<sup>20</sup> HCMP 407/1998.

<sup>21</sup> At pp 28-29.



- (21) A television programme reported that a man had, on a number of occasions at night, poured faeces on the stall of an old woman. The reporter told the audience that he could smell the unpleasant odour of the faeces even though the old woman had made an effort to clean the stall. The motive of the man was not known.<sup>22</sup>
- (22) A person living in a building in Tung Choi Street had been throwing plastic bags filled with faeces and urine down the street in recent years. About 20 market stalls along that section of Tung Choi Street between Soy Street and Dundas Street had been affected. A vendor told the press that the suspect used to throw the bags once a month, but had gradually increased the frequency to almost once every two days. The police had been called but the suspect was still at large.<sup>23</sup>
- (23) When reporting the release of the Consultation Paper, a television reporter cited the case of a woman who had been abused by her former husband not only by physical violence but also by harassing phone calls and threatening remarks. The woman reported the incidents to the police and was told that the man had made as many as 1,300 phone calls to her home in four hours. When the woman complained to the police that they had not done enough to protect her, a duty officer at a police station said that the man should be given an opportunity to explain his conduct before the police could take any action. The woman hoped that the police could intervene and stop him from harassing her.<sup>24</sup>
- (24) One submission advises that the employees of a public body have been harassed by disgruntled clients. The officers concerned were personally subject to repeated harassment, humiliation and threats when their clients took exception to their decisions or were dissatisfied with their replies or service.
- (25) The Kowloon Bay Health Centre provides treatment to patients having sexually transmitted diseases and skin diseases and to AIDS and HIV patients. Prior to its operation in May 1999, a small group of residents at Richland Gardens, which is located next to the Centre, put up banners and placards all over the front of the Centre. These banners and placards contained slogans which vilified persons with AIDS or HIV. The group also erected a wooden shed nearby as their command post. When the Centre commenced operation, staff and users of the Centre were subject to verbal insults, physically stopped, interrogated and followed as they walked by or through Richland Gardens to the bus stops, taxi stand and other facilities nearby. The following incidents have also been reported:
- The group crowded outside the entrance of the Centre and jeered at the staff and users.

<sup>22</sup> Asia Television Home, 4.5.99, 8:00 pm.

<sup>23</sup> *Apple Daily*, 20.2.00, A14.

<sup>24</sup> Videotape supplied by Miss Sharon Cheung of *Cable TV News* in June 1998.

- Members of the group shouted from the command post at persons coming out of the Centre.
- The group forced its way into the nursing home at the Centre to “inspect its hygiene condition”.
- When a group of female staff members in the evening shift went off duty and walked towards the wooden shed shortly after 10:00 pm, they were stopped and cornered by the group, which used abusive language to shout at them.

As a result of this campaign of harassment, the operation of the Centre and its management, staff and users, as well as the relatives and carers of the users, all suffered. The staff at the Centre suffered a high wastage rate. Staff in the evening shift, who were mostly female, leaving after 10:00 pm were particularly vulnerable. The Equal Opportunities Commission conducted a survey in September 1999 and found that 71% of the female staff interviewed experienced some form of harassment.<sup>25</sup>

- (26) After the Housing Authority had refused to entertain the requests of a resident, the latter made telephone calls to an office of the Housing Department about 30 to 40 times a day. She was alleged to have used insulting language in the calls and made scurrilous attacks on the staff when she visited the office. The Housing Authority applied for an injunction to stop her from harassing the staff by telephone.<sup>26</sup>
- (27) During a trial in which an unemployed man was charged with blackmail, a female doctor testified that the accused, who used to be her patient, forced his way into her clinic on two occasions after she had refused to develop a relationship with him. On a separate occasion, the accused refused to leave the clinic after the nurse declined to register him. He further threatened to pour corrosive liquid onto her.<sup>27</sup>
- (28) A 25-year-old man in Malaysia met a female university student in Hong Kong via an online chat room. After spending a few days together in Hong Kong, the woman decided to terminate their relationship. To try to win her back, the man came to Hong Kong for a second time and went to her home. He held her family hostage when they refused to tell him where she was. When the police broke into the flat, he injured her mother with a paper cutter. He was convicted of false imprisonment and assault

<sup>25</sup> Equal Opportunities Commission, *Report on the Case Study of Kowloon Bay Health Centre* (November 1999). In another survey conducted by the Chinese University of HK, 51% of the respondents, all of whom were patients of the Centre, said that the banners and placards were a nuisance to patients who were HIV positive or had venereal disease; and 9% said they had been pestered by the protesters. These respondents complained that the protesters blocked their way to the Centre, or hurled abuse at them. 64% of the respondents considered that the protest amounted to harassment of the patients visiting the clinic. Kowloon Bay Health Centre & Nursing Home Community Liaison Group, *Report on the findings of a poll on the opinion of the patients of the clinic at Kowloon Bay Health Centre* (June 1999).

<sup>26</sup> HCA 7547/99.

<sup>27</sup> ESCC 1825/99.

occasioning actual bodily harm. The judge accepted that the defendant did not intend to injure anyone. The mother of the victim was reported as saying that the nine-month sentence would not stop him from returning to terrorise the family when he was released.<sup>28</sup>

- (29) A university student was charged with intimidating the chairperson of an anti-sexual-harassment group in a university by e-mail after the group had expressed concern over sexual harassment in the campus. Evidence was given that the messages were of an indecent and menacing character and had obscene photographs attached to them.<sup>29</sup>
- (30) A person complained to the Privacy Commissioner's Office that his ex-colleague, without his knowledge and consent, had posted his name and mobile phone number in a message on an Internet newsgroup soliciting sexual service. As a result of the ex-colleague's action, he received numerous nuisance calls. After the Office had identified the ex-colleague as the sender of the message, it served an enforcement notice on him directing him to cease such action.<sup>30</sup>
- (31) A disc jockey who had been counselling her audience in an online radio programme was reported to have been harassed by threatening e-mails. One e-mail told her that her photograph had been placed in the lonely-hearts section of a sex-related website. She later found out that her photograph had been put on the Internet, and that the photograph had been altered to present her in a provocative way. She made a report to the police after the other party refused to desist.<sup>31</sup>
- (32) Celebrities like Leslie Cheung, Maggie Cheung and Faye Wong were reported to have been stalked by the press.<sup>32</sup> Maggie Cheung was reported as saying that the inconsiderate behaviour of "paparazzi" amounted to "mental assault" which, in her opinion, was more serious and harmful than physical assault.<sup>33</sup>
- (33) A film director was harassed by a female fan for two years. The court granted an injunction prohibiting her from gaining access to his residence, office and business premises. She breached the injunction. In the committal proceedings brought by the film director, she was ordered to be detained in a mental hospital for observation pursuant to section 31 of the Mental Health Ordinance (Cap 136).<sup>34</sup>
- (34) A Mr Leung who suffered a loss in the property market had been harassing the officers of a property company by various means.

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<sup>28</sup> DCCC 128/2000. *South China Morning Post*, 3.6.00.

<sup>29</sup> WSC 4414/99.

<sup>30</sup> PCO, *Private Thoughts* (Nov 1999), p 4.

<sup>31</sup> *Apple Daily*, 13.4.00.

<sup>32</sup> Eg *Ming Pao Daily News*, 3.9.97.

<sup>33</sup> *Eastweek*, 18.9.97.

<sup>34</sup> HCA 13287/99.



Evidence was given that he had made about 1,000 calls to the company on one day and had distributed leaflets containing scurrilous remarks about the company to the public. The company eventually obtained an injunction restraining him from gaining access to its properties and making telephone calls to its staff.<sup>35</sup> After the court had delivered the judgment, Mr Leung said that he would “visit” the residence of the officer concerned instead.<sup>36</sup> It may be noted in passing that Mr Leung had previously been acquitted of indecent exposure outside a building owned by the company. Subsequent to the granting of the injunction, Mr Leung was charged with loitering outside a commercial building owned by that company.<sup>37</sup> The magistrate dealing with his case imposed certain conditions when bail was granted in his favour. He breached the conditions of bail by approaching within 50 metres of the residence of the chairman of the company. He pleaded guilty to the charge but was released by the magistrate on the basis that he had already been remanded for two weeks prior to the hearing.<sup>38</sup> Meanwhile, the company alleged that he had breached the injunction by repeatedly making a nuisance of himself within 50 metres of the car park of a building owned by the company. However, the company could not serve the necessary legal documents on him because he refused to give his address to the company. It was only when Mr Leung was remanded into custody for breach of the conditions of bail in the criminal proceedings mentioned above that the company could notify him of the particulars of the hearing. When Mr Leung failed to appear at the hearing for breach of injunction, the company applied for an order of committal against him so that he could be arrested and punished for contempt of court.<sup>39</sup>

- (35) A 41-year-old woman was alleged to have harassed her former manager by persistently making telephone calls to his office. Evidence was given that she had been lying in wait outside the victim’s residence and had made as many as 600 calls to the victim within two weeks. The victim did not know her motive but the calls were alleged to have sexual overtones. The victim claimed that his daily work and the operations of his employer had been adversely affected as a result. She was convicted of the offence of persistently making telephone calls for the purpose of causing annoyance, inconvenience or needless anxiety to another person under the Summary Offences Ordinance. The magistrate made an order requiring her to be under the supervision of a probation officer for one year. The press reported that she had been convicted of a similar offence involving the same victim a year ago.<sup>40</sup>
- (36) A 22-year-old unemployed man was obsessed with a Form 4 student, even though she rejected his advances. In addition to making repeated

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<sup>35</sup> HCA 16495/99.

<sup>36</sup> *Ming Pao Daily News*, 22.10.99.

<sup>37</sup> WSCC 1608/2000.

<sup>38</sup> *Apple Daily*, 15.4.00.

<sup>39</sup> HCMP 7997/99.

<sup>40</sup> NKCC 5586/99; *Apple Daily*, 1.6.00.

calls to her home, the man followed her to and from school every day. The student claimed that he had once forced his way into her school and tried to drag her away. He was cautioned by the police as a result. He had also assaulted one of her classmates because he was unhappy that they accompanied her on the streets. On one occasion, he intercepted her on the street and dragged her into a back lane. During the scuffle, he bit her arm and repeatedly asked why she rejected him. He was eventually arrested by the police. The student was reported as saying that the man had harassed her every day and that reporting the incidents to the police could not solve the problem.<sup>41</sup>

- (37) In a submission to the Privacy sub-committee, a private citizen alleged that he had been followed by members of the triad society for a long time after he had refused to lend them a huge sum of money. He said he had reported the incidents to the police but the latter could not provide any assistance to him. He claimed that as a result of such harassment, his life was under threat and his private life and mental condition had been adversely affected.<sup>42</sup>
- (38) News reports of debt collectors using abusive measures to collect debts are common in the press. While most debt collection agencies employed by reputable institutions usually operate within the law, a number of these agencies work mainly for criminals such as loan sharks and illegal gambling operators to pursue repayment of illegal debts. It is this latter group which has resorted to harassment, intimidation or violence.<sup>43</sup> Most recently, the Commissioner of Police reported that there was evidence of a general increase in criminal intimidation related to abusive debt collection practices in 1999. The number of cases of criminal intimidation reported to the police rose from 647 in 1997 to 1320 in 1999, representing an increase of 104% in two years. The detection rate, however, has dropped by 20% from 59% in 1997 to 39% in the first three quarters of 1999.

3.10 We are satisfied that stalking is a problem in Hong Kong that needs to be addressed. Although some of the activities described above are criminal in nature, existing criminal law is inadequate to cover all types of stalking behaviour fully.<sup>44</sup> Even if stalking does not affect a significant number of people in Hong Kong, it is clearly a serious problem for those affected by such conduct. As long as it is generally accepted that stalking is a problem in Hong Kong, we should consider whether the law should be reformed to provide better protection to the victims.

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<sup>41</sup> *Apple Daily*, 6.5.00.

<sup>42</sup> Submission to the Privacy sub-committee by a Mr Cheng dated 6.6.98.

<sup>43</sup> Hong Kong Police Force, press release, "Commissioner of Police, Mr Hui Ki-on, reviews the crime situation in 1998", 7.1.99.

<sup>44</sup> See Chapter 4.

## Chapter 4

### Protection under existing law

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4.1 In this chapter, we examine the extent to which victims of stalking can be protected from harassment under existing law. We begin with a description of the scope of remedies available under the civil law. This is followed by a discussion of the level of protection afforded by the criminal law.

#### Civil law

4.2 Stalking activities may cause substantial emotional distress, psychological harm, or personal injury to the victims. They may suffer a loss of income or incur therapy, removal and accommodation expenses as a result. Where a stalker commits a civil wrong such as assault, intimidation, trespass or nuisance in carrying out their campaign of harassment, the victim may bring a civil suit against the stalker in tort.

#### *Trespass to land*

4.3 The law of trespass to land protects occupiers against physical intrusion into their private premises. It affords no protection to occupiers where the stalking behaviour does not involve trespass to land. Furthermore, the protection does not extend to persons who do not have any proprietary interests in the premises in question.

#### *Private nuisance*

4.4 Stalking behaviour may constitute the tort of private nuisance if it interferes with the ordinary and reasonable enjoyment of the victim's property. Private nuisance covers unreasonable interference with the use and enjoyment of land by smoke, smell, noise, and vibrations.<sup>1</sup>

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<sup>1</sup> Constant surveillance of a house from the air may amount to nuisance: *Berstein v Skyviews* [1978] 1 QB 479, 489.



4.5 The making of relentless and harassing telephone calls by stalkers may amount to a nuisance.<sup>2</sup> In *Khorasandjian v Bush*, the court held that the inconvenience and annoyance to the occupier caused by unwanted telephone calls and the interference thereby with the ordinary and reasonable use of the property are sufficient damage for the purposes of the tort.<sup>3</sup> The number and frequency of calls and whether the calls are made at late hours of the night are relevant in determining liability.<sup>4</sup>

4.6 As nuisance is based on the right to peaceful occupation of real property, it cannot provide the legal basis for protection against stalking conduct which does not interfere with the occupation of property. Nor can it afford protection where the victim or his child is harassed at his place of employment, education or recreation. Furthermore, since nuisance is a tort to land, a person who has no right in the land cannot sue in private nuisance.<sup>5</sup> Recently, the Court of Appeal in *Khorasandjian v Bush* departed from this principle. The plaintiff in that case was pestered and threatened by unwanted telephone calls made by her ex-boyfriend to her parents' home. An injunction was granted restraining him from "using violence to, harassing, pestering or communicating with" the plaintiff even though she was not the owner of the premises. Dillon LJ regarded it as:

*"ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls."*<sup>6</sup>

The majority of the Court of Appeal therefore held that the right to sue for an injunction, on the ground of nuisance, to restrain persistent harassment by unwanted telephone calls should extend to the spouse and children of the householder. However, this decision has been overruled by the House of Lords in *Hunter v Canary Wharf Ltd*.<sup>7</sup> Their lordships upheld the traditional view that an action in nuisance will only lie at the suit of a person who has a right to the land affected. A mere licensee on the land has no right to sue.<sup>8</sup>

<sup>2</sup> *Motherwell v Motherwell* (1976), 73 DLR (3d) 62, 74; *Khorasandjian v Bush* [1993] 3 WLR 476. *Stoakes v Brydges* (1958) QWN 5, (1958) 32 Austral LJ 205; *Alma v Nakir* (1966) 2 NSW 396.

<sup>3</sup> [1993] 3 WLR 476 at 482B.

<sup>4</sup> 58 Am Jur 2d § 225; 53 ALR4th 1153.

<sup>5</sup> *Malone v Laskey* [1907] 2 KB 141.

<sup>6</sup> [1993] 3 WLR 476 at 481B.

<sup>7</sup> [1997] 2 All ER 426, 438g; applied in *Artco Properties Ltd v Yau Chun Wing* [2000] 1 HKLRD 697.

<sup>8</sup> *Ng Hoi Sze v Yuen Sha Sha* [1999] 3 HKLRD 890 (holding that a student resident of a university hostel, who did not have exclusive possession of the room occupied by her, did not have a sufficient interest in the room to found a cause of action in nuisance).

## ***Watching and besetting premises***

4.7 A stalker may harass his victim by watching, besetting or obstructing the access to premises. In *Lyons & Sons v Wilkins*,<sup>9</sup> the court held that picketing by workers which was accompanied by violence, obstruction, annoyance or molestation was actionable in tort. It stated that “to watch or beset a man’s house with a view to compel him to do or not to do what is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence.”<sup>10</sup>

## ***Intimidation***

4.8 The essence of the tort of intimidation is “intentional unlawful coercion”. It consists of two ingredients: (a) a threat of, or actual, unlawful conduct by the defendant deliberately aimed at another person with the intention of compelling the other person to obey the wishes of the defendant by doing an act or refraining from acting; and (b) the other person was coerced to act or refrain from acting by the threat or unlawful act.<sup>11</sup>

4.9 The tort covers cases in which harm is inflicted on the plaintiff by the defendant intimidating the plaintiff or a third person whereby the plaintiff or third person is compelled to act or refrain from acting in obedience to the wishes of the defendant. This action is not normally available to victims of stalking because the stalker may not have intended to coerce the person to whom the threat is addressed into doing or refraining from doing something. The stalker may threaten to commit a wrong without the requisite element of coercion. Even if such an element is present, a victim cannot invoke this tort if he or she is not coerced to act or refrain from acting by the unlawful act. Further, only coercion by way of “unlawful” conduct would be caught. Stalkers who seek to compel their victims into doing or not doing something by lawful means would not be liable for intimidation.

## ***Harassment on highway***

4.10 In *Thomas v National Union Mineworkers (South Wales Area)*,<sup>12</sup> the plaintiffs sought an injunction to restrain picketing which fell short of obstruction. The court held that unreasonable harassment of working miners who seek to exercise the right to use the highway for the purpose of going to work would be tortious.<sup>13</sup>

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<sup>9</sup> [1899] 1 Ch 255.

<sup>10</sup> At 267.

<sup>11</sup> *Godwin v Uzoigwe* [1993] Fam Law 65 at 66. See also *Rookes v Barnard* [1964] AC 1129, 1167.

<sup>12</sup> [1985] 2 All ER 1.

<sup>13</sup> The existence of this tort was denied in *News Group Newspapers Ltd v SOGAT 1982* (1986) 130 SJ 407.

*“Suppose an individual were persistently to follow another on a public highway, making rude gestures or remarks in order to annoy or vex. If continuance of such conduct were threatened no one can doubt but that a civil court would, at the suit of the victim, restrain by an injunction the continuance of the conduct.”*<sup>14</sup>

## **Defamation**

4.11 A stalker who makes a statement which tends to injure the reputation of his object is liable in defamation. Mere insult or vulgar abuse, whether it be spoken or written, will not suffice. Moreover, the defamatory statements must have been published to a third party. A private communication between the stalker and his victim cannot give rise to liability for defamation.

## **Trespass to the person**

4.12 An assault is committed when the defendant attempts or threatens to commit a battery whereby the plaintiff is put in reasonable fear or apprehension of an immediate infliction of an unlawful physical contact. Threatening acts or statements are not actionable unless they are of such a nature as to put the victim in fear or apprehension of immediate violence. Merely uttering annoying statements or singing or causing a nuisance outside another's house may not amount to a tort.<sup>15</sup>

4.13 A battery is committed when there is an actual infliction of an unlawful physical contact with the plaintiff. As long as there is an application of force to the person of another, it is not necessary to prove that the defendant has an intention to injure or that the contact has caused or threatened any physical injury to the plaintiff. Provided the ingredients are proved, the tort will have been committed however slight the force. Mere touching without consent or lawful excuse is therefore actionable. The tort is useful where the stalker applies force to the person of his object. But a stalker may only repeatedly make telephone calls or follow his object. Persistent following or verbal abuse does not amount to a battery even though the object suffers psychiatric illness as a result.

## **Threats causing nervous shock**

4.14 An act or statement which is calculated to infringe the “legal right to personal safety” of another and which does, in fact, cause physical harm to him through the medium of his mind, may be actionable under the principle stated in

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<sup>14</sup> [1985] 2 All ER 1, 22.

<sup>15</sup> *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549, 579D (unless “threats of physical violence are uttered and, *a fortiori*, in close proximity of one's residence, and reasonably appreciated by those inside it to be able to be carried out”).



*Wilkinson v Downton*.<sup>16</sup> This principle overcomes the limitations inherent in the tort of assault, which requires that the threatened personal violence be immediate. In *Janvier v Sweeney*,<sup>17</sup> the court upheld an award of damages for illness by nervous shock resulting from malicious lies and threats. More recently, the court in *Burnett v George*<sup>18</sup> granted an injunction against the defendant who had repeatedly made harassing telephone calls to the plaintiff. The order restrained him from “molesting or otherwise interfering with the plaintiff by *doing acts calculated to cause her harm*”.<sup>19</sup> After referring to *Wilkinson v Downton* and *Janvier v Sweeney*, the High Court in *Wong Kwai Fun v Li Fung* held that intimidation and threats uttered by a person to another can amount to a tort if the other to whom the threats were uttered suffered any nervous shock or illness therefrom.<sup>20</sup>

4.15 The tort recognised in the above cases is useful where there is no physical impact or threat of the application of force. However, many stalkers never intend to harm their victims. They may be suffering from delusional disorder or merely desire to make amends. Even if they do have the requisite intent, the tort provides no remedy where the shock does not result in physical harm. Although the term “nervous shock” is now understood by the court as referring to “recognisable and severe physical damage to the human body and system caused by the impact, through the senses, of external events on the mind”,<sup>21</sup> conduct resulting merely in emotional distress is not actionable under this tort.<sup>22</sup> Moreover, psychiatric symptoms are difficult and expensive to prove.

### ***False imprisonment***

4.16 False imprisonment is complete deprivation of the plaintiff’s liberty for any time, however short, without lawful cause. It is not necessary that the plaintiff be incarcerated. It is enough that the plaintiff has been unlawfully prevented from leaving the place he is in, eg a house or a motor vehicle. A threat of force whereby the plaintiff is intimidated into remaining in a place of safety is sufficient, but watching and besetting a residence or other premises without any show of force will not amount to false imprisonment.

<sup>16</sup> [1897] 2 QB 57. Negligent statement or conduct which places the plaintiff in reasonable fear of immediate injury to himself is also a tort: *Dulieu v White & Sons* [1901] 2 KB 669; *Hambrook v Stokes Bros.* [1925] 1 KB 141, 162.

<sup>17</sup> [1919] 2 KB 316.

<sup>18</sup> [1992] 1 FLR 525.

<sup>19</sup> Judge Nigel Fricker QC argued that the courts in *Janvier* and *Burnett* recognised as a separate actionable tort, distinct from assault and battery, “personal injury by molestation”, i.e. “actual impairment of health caused by molestation by another person when the wrongdoers intended or realized that his conduct was likely to cause impairment to the health of the victim.” N Fricker, “Harassment as a Tort” [1992] NLJ 247; M Brazier, “Personal Injury by Molestation - An Emergent or Established Tort” [1992] Fam Law 346.

<sup>20</sup> [1994] 1 HKC 549, 579-580.

<sup>21</sup> *Khorasandjian v Bush* [1993] 3 WLR 476, 482H - 483A.

<sup>22</sup> Cf *Hunter v Canary Wharf* [1997] 2 All ER 426 at 452, *per* Lord Hoffmann (stating that there is no reason why a tort of intention should be subject to a rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on the tort of negligence).

## ***Involuntary admission under the Mental Health Ordinance***

4.17 Stalkers often have personality disorders. Many of them may even suffer from mental illness. Where a stalker who is subject to the jurisdiction of the Court appears to be “mentally incapacitated”, his relative or spouse may ask the court to make an order directing an inquiry as to whether he is “incapable, by reason of mental incapacity, of managing and administering his property and affairs”.<sup>23</sup> In the event that the stalker is found to be “mentally disordered and incapable, by reason of mental disorder, of managing and administering his property and affairs”, the court may order him to be admitted into a mental hospital as an involuntary patient.<sup>24</sup> This procedure is useful only if the stalker appears to be mentally incapacitated and those who are entitled to apply are willing to bring proceedings under the Mental Health Ordinance (Cap 136). Furthermore, even if the stalker is found to be mentally disordered, he may not be admitted into mental hospital if he is still capable of managing his affairs, which is likely to be the case for stalkers. Such stringent requirements render the provisions ineffective in combating stalking activities.

## ***Sexual harassment***

4.18 Sexual harassment, which is unlawful under the Sex Discrimination Ordinance (Cap 480), is actionable as a tort in the District Court.<sup>25</sup> The Equal Opportunities Commission also has the power to serve an enforcement notice on a person who has committed an unlawful act of sexual harassment and require him not to commit or repeat the act in question. Persistent sexual harassment in breach of the enforcement notice may be restrained by an injunction granted by the District Court. A person “sexually harasses” another if (a) the person engages in unwelcome conduct of a sexual nature in relation to the other person in circumstances in which a reasonable person would have anticipated that the other would be “offended, humiliated or intimidated”; or (b) the person engages in conduct of a sexual nature which creates a “sexually hostile or intimidating work environment for her”.<sup>26</sup>

## ***Invasion of privacy***

4.19 A stalker who interferes with the private life of his target might be liable for the tort of “invasion of privacy by intrusion upon another’s solitude or seclusion” proposed in the sub-committee’s Consultation Paper on *Civil Liability for Invasion of Privacy*, but no such liability exists at present.<sup>27</sup> As the

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<sup>23</sup> Mental Health Ordinance (Cap 136), section 7. A nominated public officer also has this right.

<sup>24</sup> Cap 136, section 26.

<sup>25</sup> Section 76.

<sup>26</sup> Section 2(5).

<sup>27</sup> Unless the intrusion involves collection of personal data in breach of Data Protection Principle 1 under the Personal Data (Privacy) Ordinance (Cap 486). But unsolicited mailings, distributions, house calls, or telephone calls might render the caller or sender liable for the

intrusion need not be physical in nature, constant harassment, which is seriously objectionable and offensive to a reasonable person, might give rise to liability for invasion of privacy.<sup>28</sup>

4.20 However, the intrusion tort is generally considered to be inappropriate to stalking conduct engaged in public places where the object of pursuit has less privacy than when staying inside private premises. The authors of *Prosser and Keeton on Torts* suggest that the intrusion tort requires the plaintiff to establish that the defendant has done something in the nature of prying or intrusion. They hold the view that the plaintiff has no legal right to be alone on the public street or in any public place; nor is it an invasion of his privacy to do no more than following him about and watching him there.<sup>29</sup> The editors of *American Jurisprudence* observe that cases of unsolicited mailings, house calls or telephone calls have run substantially in favour of non-liability overall, especially where only a single means of intrusion was used.<sup>30</sup>

4.21 It may be noted in passing that the Privacy Commissioner for Personal Data holds the view that stalking is not directly related to privacy in relation to personal data.

### ***Is there a tort of harassment?***<sup>31</sup>

4.22 A victim of stalking who falls outside the scope of the Domestic Violence Ordinance will be dependent for protection either upon the law of tort, or, if they are involved in family proceedings, upon the inherent jurisdiction of the Court to grant injunctions to protect parties to these proceedings. However, injunctions will only be granted ancillary to an existing cause of action.<sup>32</sup> There must also be a sufficient link between the cause of action and the relief sought by the injunction. Furthermore, an injunction will generally be granted only in support of a recognised legal or equitable right.<sup>33</sup> The court will not grant an injunction in a common law action in respect of behaviour which does not amount to a tort or

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intrusion tort in exceptional circumstances: J F Ghent, "Unsolicited Mailing, Distribution, House Call, or Telephone Call as Invasion of Privacy", 56 ALR3d 457.

<sup>28</sup> 62A Am Jur 2d, Privacy, § 55.

<sup>29</sup> W P Keeton (ed), *Prosser and Keeton on Torts* (Minn, St Paul, West Publishing Co, 5th edn, 1984), 855.

<sup>30</sup> 62A Am Jur 2d, Privacy, § 64. J F Ghent, "Unsolicited Mailing, Distribution, House Call, or Telephone Call as Invasion of Privacy", 56 ALR3d 457.

<sup>31</sup> N Fricker, "Molestation and Harassment after *Patel v Patel*" [1988] Fam Law 395, 400; N Fricker, "Personal Molestation or Harassment" [1992] Fam Law 158; P Turl, "Protection of Privacy - The Common Law Gets a Grip" [1993] Fam Law 640.

<sup>32</sup> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court." *Siskina v Distos Compania Naviera SA* [1979] AC 210, 256 per Lord Diplock.

<sup>33</sup> Thus, divorce courts have granted injunctions against molestation in response to applications made ancillary to divorce, separation or nullity proceedings in order to enable the petitioner to pursue her action free from intimidation. The court can also grant injunctions to protect victims from the torts of assault, battery, nuisance or trespass.



a threatened tort, however greatly it may annoy or distress the person subjected to it.<sup>34</sup>

4.23 According to the orthodox view, neither molestation nor harassment is a tort at common law.<sup>35</sup> In *Patel v Patel*, the defendant harassed the plaintiff by telephone calls and visits to the plaintiff's home. During that time the defendant did not commit any trespass to either the person or property of the plaintiff. May LJ said that:

*"in common law actions based upon an alleged tort injunctions can only be an appropriate remedy where an actual tortious act has been or is likely to be committed. ... Unless an actual trespass is committed or is more than likely to be committed, it does not seem to me that merely to approach to within 50 yards of a person's house does give a cause of action which may be restrained by an injunction in those terms".*<sup>36</sup>

4.24 Therefore, according to *Patel*, the courts have no common law power to grant an injunction restraining a defendant from entering an "exclusion zone" outside the plaintiff's premises unless the defendant has committed or is likely to commit trespass against the person or property of the plaintiff.

4.25 In *Burnett v George*,<sup>37</sup> the plaintiff was harassed by a former boyfriend who repeatedly telephoned her in the middle of the night. The Court of Appeal affirmed that molestation and interference were not actionable wrongs where there was no question of matrimonial nexus and there were no children to protect. The prohibition against "assaulting, molesting or otherwise interfering with the plaintiff" imposed by the lower court was therefore held to be inappropriate. But if there were evidence that the health of the plaintiff was being impaired by molestation or interference which had been calculated to create such impairment, relief would be granted by way of injunction under the principle laid down in *Wilkinson v Downton*.<sup>38</sup> Since there was evidence that the plaintiff's health had been impaired in consequence of the defendant's molestation, the defendant was restrained from "assaulting, molesting or otherwise interfering with the plaintiff *by doing acts calculated to cause her harm*". This line of authority establishes that it is not possible to obtain an injunction to exclude the stalker from an area around the home, or to prevent him calling at the victim's place of work or the children's school, because of the requirement to prove at least a threatened tort, instead of simply molestation.<sup>39</sup>

<sup>34</sup> *Patel v Patel* [1988] 2 FLR 179 (CA).

<sup>35</sup> *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549, 578A; *Patel v Patel* [1988] 2 FLR 179, 182.

<sup>36</sup> *Patel v Patel* [1988] 2 FLR 179, at 180 and 181.

<sup>37</sup> [1992] 1 FLR 525 (CA).

<sup>38</sup> [1992] 1 FLR 525 at 527.

<sup>39</sup> The Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home* (LAW COM No 207) (London: HMSO, 1992), para 3.15.

4.26 However, the court in *Pidduck v Molloy*<sup>40</sup> held that the law is not restricted to restraining mere acts of assault or threats of assault or direct trespass. The court is entitled to make any order which prevents or forbids the defendant from committing a tortious act to the personal detriment of the plaintiff, in particular his own personal protection or peace of mind.<sup>41</sup> Therefore, although speaking to someone is neither of itself a tort nor a crime, intimidating, threatening or abusive conduct can be restrained “if the past conduct of the defendant has suggested that if he does speak to [the plaintiff], it is usually for the purpose of intimidating, threatening or abusing her, all of which are capable of amounting to crimes or torts”.<sup>42</sup>

4.27 Likewise, in *Burris v Azadani*,<sup>43</sup> the Court of Appeal held that the power of the court to grant an injunction was not limited to restraining conduct which is in itself tortious or otherwise unlawful. The court may make an “exclusion zone” order restraining conduct which is not in itself tortious “if such an order is reasonably regarded as necessary for protection of a plaintiff’s legitimate interest”.<sup>44</sup> Sir Thomas Bingham MR said:

*“Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff’s home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff’s interest - and also, but indirectly, the defendant’s - a wider measure of restraint is called for.”*<sup>45</sup>

4.28 It appears that the court would protect the “legitimate interests” of the plaintiff against acts which threaten such interests, even though the acts are not tortious. A victim who complains about a course of conduct which amounts to harassment might therefore be able to seek relief under the doctrine of “legitimate interests” in *Burris v Azadani*.

4.29 Despite the opinion expressed in *Patel* and *Burnett*, there are also authorities for the view that the tort of molestation or harassment exists as a primary tort at common law. The Court of Appeal in *Khorasandjian v Bush*<sup>46</sup>

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<sup>40</sup> [1992] 2 FLR 202.

<sup>41</sup> [1992] 2 FLR 202, 204.

<sup>42</sup> [1992] 2 FLR 202, 205G, *per* Lord Donaldson MR.

<sup>43</sup> [1995] 1 WLR 1372 (CA).

<sup>44</sup> At 1377. See also *Khorasandjian v Bush* [1993] 3 WLR 476 at 479 - 480. Examples are orders for the preservation of some property in safe custody until trial and orders to preserve the status quo until trial.

<sup>45</sup> [1995] 1 WLR 1372 at 1380 - 1381.

<sup>46</sup> [1993] QB 727. See also *Wilde v Wilde* [1988] 2 FLR 83.

accepted that there was a right for a person not to be molested. More recently, Sir Thomas Bingham MR stated in *Burris v Azadani* that the view that there was no tort of harassment could not be upheld.<sup>47</sup> Schiemann LJ also stated that an individual has an interest not to be harassed.<sup>48</sup>

4.30 Yet, even if a tort of harassment is recognised 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. It is uncertain that an injunction will be granted against the stalker on the basis of a past history of harassment or molestation alone. Creating a statutory tort of harassment is a better alternative if the law is to provide clarity and certainty.

4.31 Since the law of harassment in England has been put on a statutory basis by the enactment of the Protection from Harassment Act 1997, any arguments as to whether the common law could be developed to provide a remedy for harassment have been laid to rest as far as England is concerned. It will be recalled that the Court of Appeal in *Khorasandjian v Bush* held that a child of the householder could bring a suit in nuisance even though he did not have any interest in the premises. This decision was the subject of comment by Lord Goff in *Hunter v Canary Wharf Ltd*:<sup>49</sup>

*“If a plaintiff, such as the daughter of the householder in Khorasandjian v Bush, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother’s or her husband’s house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision of the Court of Appeal, viz Malone v Laskey<sup>50</sup>, by which the court was bound.”*

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<sup>47</sup> [1995] 1 WLR 1372 (CA).

<sup>48</sup> [1995] 1 WLR 1372, at 1378H and 1381H.

<sup>49</sup> [1997] 2 All ER 426 at 438.

<sup>50</sup> [1907] 2 KB 141, [1904-7] All ER Rep 304.



## ***Power to grant injunctions in family proceedings***

4.32 An injunction restraining the other party from molesting, assaulting or otherwise interfering with the applicant and the children may be granted in wardship proceedings and proceedings for an order under the Guardianship of Minors Ordinance (Cap 13) for the protection of the children.<sup>51</sup> As between parties to a marriage to which the provisions of the Domestic Violence Ordinance (Cap 189) do not apply, either party may apply for a non-molestation order only if matrimonial proceedings for other relief are pending between them and the order is necessary to protect the applicant or children. Since an injunction must “bear some sensible relationship to the cause of action”,<sup>52</sup> a wife or husband seeking a non-molestation order other than in proceedings under the Domestic Violence Ordinance has to start divorce, judicial separation or nullity proceedings to which the application for a non-molestation order could be said to be incidental, unless she or he could assert some legal or equitable right which is capable of being protected by the grant of an injunction.

## ***Domestic Violence Ordinance***

4.33 Pursuant to the Domestic Violence Ordinance (Cap 189), the District Court may grant a non-molestation or exclusion order not only between spouses but also between a man and woman who are cohabiting with each other. A person may apply for an order under the Ordinance even though no proceedings for other relief are pending between the parties.<sup>53</sup> Under section 3 of the Ordinance, if there is evidence that the applicant or a child living with the applicant “has been molested” by the other party, the Court may grant an injunction restraining the other party from molesting the applicant or any child living with him or her, or excluding the other party from the matrimonial home or from a specified area.

4.34 “Molestation” is not defined in the Ordinance.<sup>54</sup> It has been held that the word “molesting” in section 3(1) does not imply necessarily either violence or threats of violence. It applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the

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<sup>51</sup> *Re W (a minor)* [1981] 3 All ER 401.

<sup>52</sup> *McGibbon v McGibbon* [1973] Fam 170 at 173.

<sup>53</sup> Domestic Violence Ordinance (Cap 189), sections 3 and 5.

<sup>54</sup> “Molest” means “vex, annoy or injure”: *Fearon v Earl of Aylesford* (1884) 12 QBD 539, *per* Cotton LJ. In *Vaughan v Vaughan* [1973] 3 All ER 449, there had been no recent violence but the husband had been calling at the home of his wife early in the morning and late at night and calling at her place of work and “making a perfect nuisance of himself to her the whole time”. He admitted that he knew that his wife was frightened of him. Davies LJ observed that the effect of being constantly pestered by a man of whom she was frightened and who had on occasions used violence towards her must have had a deleterious effect on her health. He held that molestation had plainly been made out. Above, at 452E. Stephenson LJ said at 454G: “‘Molest’ is a wide, plain word which I should be reluctant to define or paraphrase. If I had to find one synonym for it, I should select ‘pester’. Whether communication amounts to molestation is a question of fact and degree.”

court.<sup>55</sup> The courts noted that molestation without the threat or use of violence may still be serious and inimical to mental and physical health.<sup>56</sup>

4.35 A non-molestation order may only be made on the basis that the harassment carried with it an element of intent to cause distress or harm. It has been held that the word “molesting” bears such a meaning whenever it is used, regardless of whether or not the particular proceedings are brought under the Domestic Violence Ordinance.<sup>57</sup> This requirement gives rise to difficulties where the other party acts out of affection or is incapable of forming intent because he is suffering from mental problems.

4.36 Injunctive relief under the Ordinance is available only to married persons and man and woman who are cohabiting with each other.<sup>58</sup> Victims of stalking who have never cohabited or have ceased to cohabit with the stalker when harassment occurs cannot invoke the jurisdiction of the court. Thus, the remedies are not available once the spouses are divorced. A former spouse cannot apply under the Ordinance unless she and her former husband are cohabiting after the decree. Similarly, in the case of cohabitants, there is no power to provide protection once the relationship has ended.

4.37 More importantly, harassment can occur in other types of domestic relationship. For instance, an elderly member of a family may be abused by those with whom he is living; parents may be abused by their violent child; and a gay or lesbian partner may become irrational or obsessive. The requirement of marriage or cohabitation has deprived these parties of the right to apply under the Domestic Violence Ordinance. Victims who are harassed outside the family and domestic context have to proceed in tort, but this is a more cumbersome procedure and is less effective because of difficulties over the precise scope of the remedies available against harassment or molestation.

4.38 Further, a child who has been molested has no standing to apply for an order under the Ordinance. An application must be made on the child’s behalf by a parent. The child receives no protection under the Ordinance if his or her parent is unwilling to bring an action against the other party. There is also a requirement that the child be living with the applicant. Children not living with their parents could not benefit from the Ordinance.

4.39 The court in *Pidduck v Molloy* commented that it was worthy of consideration “whether the [domestic violence legislation] ought not to be extended to cover the position of parties who *have* lived together in the same household as husband and wife ... as well as those who are still so living, because the need for non-molestation injunctions in relation to the woman and

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<sup>55</sup> *Horner v Horner* [1983] 4 FLR 50, 51G per Ormrod LJ.

<sup>56</sup> *Davis v Johnson* [1979] AC 264 at 334A, per Viscount Dilhorne.

<sup>57</sup> *Johnson v Watson* [1990] 1 FLR 350, 352. Cf *Khorasandjian v Bush* [1993] 3 WLR 476, 486 (suggesting that an injunction need not be qualified by adding words such as “by doing acts calculated to cause the plaintiff harm”).

<sup>58</sup> Cap 189, section 2(2).

child is very often even greater in cases where such a relationship has existed but has then broken down.”<sup>59</sup>

### ***Enforcement of injunctions***

4.40 Breach of an injunction is a contempt of court which is punishable by a fine or imprisonment. The sanction of imprisonment for breach is rarely used because committal orders are made “only when every other effort to bring the situation under control has failed or is almost certain to fail.”<sup>60</sup> As breach of an injunction does not constitute a criminal offence, the police have no power to arrest a person who is acting in breach of an injunction unless this is necessary to prevent a breach of the peace or a criminal offence has been committed. Hence, a person who wishes to enforce an injunction usually has to apply for an order of committal by following the procedures prescribed in the Rules of the High Court.<sup>61</sup> Such procedures fail to give speedy and effective redress for breaches of an injunction which might have serious consequences for the victims.

4.41 Chapter 3 above referred to cases in which the victims had applied for injunctive relief in the courts. These cases are few and far between because many victims do not have the time and resources to retain a lawyer and, perhaps, a private investigator. Moreover, since there must be a sufficient link between the cause of action and the relief sought by the injunction, the terms of the injunction are usually limited in scope even if one were granted in the victim’s favour. It will be recalled that a company has obtained an injunction which restrains the defendant from making telephone calls to its staff and gaining access to its properties. The immediate response from the defendant was that he would pay visits to the residence of the officers of that company instead. Stalkers are generally determined and clever and they will get around the injunction if possible. It is true that a stalker who has breached an injunction is liable to a fine or imprisonment for contempt of court. But rarely do we find someone like the film director referred to in Chapter 3 who went so far as to retain a lawyer and apply for an order of committal before the High Court.

4.42 The Domestic Violence Ordinance seeks to deal with this problem by enabling the court to attach a power of arrest to injunctions which restrain the other party from using violence against the applicant (or a child living with the applicant) or exclude him from the home or a specified area.<sup>62</sup> However, the court may exercise this power only if the other party has caused “actual bodily harm” to the applicant or the child living with the applicant and the other party is likely to cause actual bodily harm again. Although actual bodily harm is not

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<sup>59</sup> [1992] 2 FLR 202 at 206.

<sup>60</sup> *Ansah v Ansah* [1977] Fam 138, 144 *per* Ormrod LJ.

<sup>61</sup> Cap 4, RHC O 52.

<sup>62</sup> Section 5(1). A police officer may arrest without warrant a person whom he reasonably suspects of being in breach of the injunction to which a power of arrest is attached, and the court may fine him or commit him to prison for contempt of court: section 5(2).



confined to physical assault,<sup>63</sup> the court cannot attach a power of arrest if the other party has merely threatened to cause bodily harm to the applicant or child. Furthermore, a power of arrest is included only in exceptional situations “where men and women persistently disobey injunctions and make nuisances of themselves to the other party and to others concerned.”<sup>64</sup>

### ***Family Law Act 1996 (UK)***

4.43 In its report on *Domestic Violence and Occupation of the Family Home*,<sup>65</sup> the English Law Commission thought that the range of persons who were protected by the Domestic Violence and Matrimonial Proceedings Act 1976 in the UK was too narrow. It made a number of recommendations for reform of family law so as to strengthen protection for one member of a family against molestation or violence by another. The UK Government implemented the recommendations by enacting the Family Law Act 1996.<sup>66</sup> Under Part IV of the Act, an application for a non-molestation order may be made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is “associated with” the respondent. A person is “associated with” another if:

- a) they are or have been married to each other;
- b) they are cohabitants or former cohabitants;
- c) they live or have lived in the same household, otherwise than merely by reason of one of them being the other’s employee, tenant, lodger or boarder;
- d) they are relatives;
- e) they have agreed to marry one another (whether or not that agreement has been terminated);
- f) they are parents in relation to any child; or
- g) they are parties to the same family proceedings (other than proceedings under Part IV).<sup>67</sup>

4.44 A non-molestation order may contain a provision prohibiting the respondent from molesting a “relevant child” or another person who is associated with the respondent. A “relevant child” is defined as including “any child whose interests the court considers relevant”. There is no requirement that the child be living with one of the parties to the proceedings. A child may apply for an order on his own if he has obtained the court’s permission. A power of arrest is to be attached to the order where the respondent has used or

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<sup>63</sup> In *Kendrick v Kendrick* [1990] 2 FLR 107, the court held that if a person assaulted has suffered real psychological damage as a result of physical battery (albeit no physical injury was apparent), such assault could amount to actual bodily harm which would permit a power of arrest to be attached to the court order.

<sup>64</sup> *Lewis v Lewis* [1978] 1 All ER 729 at 731, per Ormrod LJ.

<sup>65</sup> The Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home* (LAW COM No 207) (London: HMSO, 1992).

<sup>66</sup> Part IV (sections 42 - 63).

<sup>67</sup> Section 62(3).

*threatened* violence against the applicant or a relevant child, and the applicant or child would not be adequately protected without such a power. If a power of arrest is attached to the order, a constable may arrest without warrant a person whom he has reasonable cause for suspecting to be in breach of the order. Such a power provides immediate and inexpensive means of enforcement which underlines the seriousness of the breach to the offending party. The inclusion of threatened violence is sensible because women and children should not have to wait to be injured before the law can come to their rescue.

4.45 The provisions of the 1996 Act represent an improvement to the law protecting individuals from domestic violence. The Privacy sub-committee believes that the private lives of all parties to domestic relationships can be better protected if the Domestic Violence Ordinance can be reformed along the lines recommended by the English Law Commission. The Privacy sub-committee therefore proposed in the Consultation Paper that the Administration should give consideration to reforming the law relating to domestic violence. None of the submissions disputes the need to reform the law in this area.

4.46 The Hong Kong Family Welfare Society hopes that the Law Reform Commission could review the situation in relation to domestic violence. They note that many changes have occurred in Hong Kong since the enactment of the Domestic Violence Ordinance and it is timely to conduct a review. They therefore support the proposal to amend the law relating to domestic violence. They further hope that the Commission could carry out a thorough review of the legislative provisions and services for abused women, including education and services for abusers and family members affected by domestic violence.

4.47 Harmony House would strongly like to see enhancement in the level of protection provided by the Domestic Violence Ordinance. Safetalk Domestic Violence Support Group also welcomes the proposal to reform the law relating to domestic violence.

4.48 The Social Welfare Department agrees that consideration be given to amending the law relating to domestic violence with a view to providing better protection to the private life of individuals facing marital problems.

4.49 JUSTICE agrees with the proposal of the sub-committee in this area. The Hong Kong Federation of Women Lawyers also agrees that the categories of persons to which the Domestic Violence Ordinance applies should be extended to cover all persons living in the household. They strongly urge the Administration to amend the law relating to domestic violence.

4.50 The Federation further proposes the establishment of a Family Court which would have jurisdiction over all matters affecting the family, including the handling of domestic violence cases, whether in criminal or civil proceedings. Such a court would have sufficient support services by way of counsellors and mediators as well as social welfare officers who could furnish the court with reports on the impact of domestic violence, including stalking, on the victim and

other members of the family. Since the provision of court services does not fall within the purview of this study, nor is there any evidence that the existing court structure cannot adequately deal with stalking cases, we have not examined this proposal in detail.

#### **Recommendation 1**

**We recommend that the Administration should give consideration to reforming the law relating to domestic violence.**

### **Criminal law**

4.51 As explained in Chapter 1, stalking behaviour involves a series of discrete and often unrelated acts. These acts are done individually and at different times and in different locations. Stalking is therefore different from most crimes. Such offences as there are under existing criminal law focuses primarily on the punishment of specific prohibited acts. It is only where an aspect of stalking behaviour constitutes a criminal act that the criminal law may be invoked to restrain or punish the stalker. Criminal law therefore treats stalking as a precursor to a crime or as evidence of its *mens rea* instead of a crime in itself.

4.52 In its submission, JUSTICE argues that the current criminal law is in a position to deal with most of the manifestations of stalking on the following grounds: (a) “bodily harm” in the Offences against the Person Ordinance includes recognisable psychiatric illness, (b) silent telephone calls which have caused psychiatric injury to the victim are capable of amounting to an assault, and (c) grievous bodily harm could be committed even though no physical violence is applied directly or indirectly to the body of the victim. These arguments will be given full consideration below when we discuss the efficacy of various offences in dealing with stalking behaviour.

#### ***Power to bind over to keep the peace or to be of good behaviour***

4.53 Although breach of the peace as such is not an offence at common law,<sup>68</sup> a person may be arrested without warrant for a breach of the peace. The Court of Appeal in *R v Howell* held that there is a power of arrest where:

- (a) a breach of the peace is committed in the presence of the person making the arrest; or

<sup>68</sup> *R v County of London Quarter Sessions Appeals Committee, ex p Metropolitan Police Commissioner* [1948] 1 KB 670 per Lord Goddard CJ at 673.



- (b) the person making the arrest reasonably believes that a breach of the peace is imminent; or
- (c) where a breach has been committed and it is reasonably believed that a renewal of it is threatened.<sup>69</sup>

4.54 Watkins LJ in *Howell* held that “there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property, or a person is in fear of being so harmed *through an assault, an affray, a riot, unlawful assembly or other disturbance*”.<sup>70</sup> The European Court of Human Rights observed that, in England, a breach of the peace is committed when an individual causes harm, or appears likely to cause harm, to persons or property, or acts in a manner the natural consequence of which would be to provoke violence in others.<sup>71</sup>

4.55 A person arrested for breach of the peace may be charged with an offence which has “breach of the peace” as an element of the offence,<sup>72</sup> or bound over to keep the peace or to be of good behaviour, or simply released.

4.56 The powers of judges and magistrates to bind over to keep the peace or to be of good behaviour derive from common law<sup>73</sup> and statute. They enable preventive action to be taken against potential offenders before they have committed an offence. The purpose is to prevent breaches of the peace before they occur, not to punish the arrestee for breaching the peace. The courts have a very wide discretion in deciding whether or not to bind over.<sup>74</sup> It has been held that a binding over order can be made if a judge or magistrate is satisfied that there is a risk that the person before him would be likely to cause a breach of the peace in the future or that his behaviour was *contra bonos mores*.<sup>75</sup>

4.57 The power to bind a person over to keep the peace or to be of good behaviour is provided for in section 109I of the Criminal Procedure Ordinance (Cap 221). It is a power by which judges and magistrates may require any person before the court to enter into his own recognizance and/or to find sureties that for a specified period of time he will keep the peace and/or be of good behaviour. The court may commit him to prison if he does not comply with the requirement. If after entering into a recognizance he fails to keep the peace, or is not of good behaviour, then the court may direct that the sum

<sup>69</sup> [1982] QB 416, 426. See also *Albert v Lavin* [1981] 3 WLR 955 (HL).

<sup>70</sup> [1982] QB 416, 427 (emphasis added); applied in *HKSAR v Tsui Yat Hung* [1999] 2 HKLRD F11.

<sup>71</sup> *McLeod v UK*, Case No 72/1997/856/1065, paras 24-27, 42. The English courts have encountered difficulty in employing the concept of breach of the peace to convict accused persons who had been stalking members of the Royal family. See T Lawson-Cruttenden, “Is there a law against stalking?” [1996] NLJ 418.

<sup>72</sup> Eg Public Order Ordinance (Cap 245), section 17B(2) (disorderly conduct in public place); section 18 (unlawful assembly); section 24 (forcible detainer of premises).

<sup>73</sup> Conservators of the Peace in England had a power at common law to bind people over to be of good behaviour if their acts or language were likely to endanger the public peace.

<sup>74</sup> *Hughes v Holley* (1988) 86 Cr App R 130 at 138.

<sup>75</sup> *le contrary to a good way of life which had the property of being wrong rather than right in the judgment of the majority of contemporary citizens. See Hughes v Holley* (1988) 86 Cr App R 130 at 139.

promised in the recognizance be forfeited. The court does not have power to commit him to prison for breach of his recognizance.

4.58 The English Law Commission is of the opinion that the procedure which governs the use of the powers to bind over “falls short of basic requirements of certainty and fair procedure that are taken for granted in other areas of English domestic law.”<sup>76</sup> But putting aside the difficulties with the concept of breach of the peace, the police cannot arrest a stalker for breach of the peace if there is no violence or risk of violence. Mere disturbance not involving violence or a threat of violence cannot amount to a breach of the peace.<sup>77</sup> The requirement that the breach of the peace be “imminent” has also rendered such protection as is available inapplicable to the majority of stalking cases. In any event, it is inappropriate to deal with a stalker under the law of breach of the peace which treats stalking as a prelude to crime instead of a crime in itself.<sup>78</sup> Stalking behaviour which causes the victim mental and economic harm is serious enough to warrant criminal sanctions. Even if a binding over order is made against a stalker, breach of such an order is punishable only with a fine which would not constitute any form of deterrent to a compulsive stalker. The court does not have power to put a stalker arrested for breach of the peace in prison even though the circumstances are such that it is likely that he will provoke a breach of the peace in the future. Although the law serves a useful purpose in preventing the commission of an unlawful act against a particular victim, the punishment of stalkers for their harmful conduct is also essential in deterring them from engaging in activities which might have serious consequences for the victim. Further, the court has no power to insert in the binding over order specific conditions such as could be inserted in a non-molestation order granted under the Domestic Violence Ordinance. The court can only give the most general guidance as to what the person bound over must do to avoid forfeiture of the recognisance.

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<sup>76</sup> The Law Commission, *Binding Over* (LAW COM No 222) (London: HMSO, Cm 2439) (1994) para 5.23. It recommends that the powers to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law and in related legislation be abolished without replacement.

<sup>77</sup> *Parkin v Norman* [1982] 2 All ER 583.

<sup>78</sup> K G McAnaney and others, above, 874.

## **Public Order Ordinance**

4.59 Section 17B(2) of the Public Order Ordinance (Cap 245) provides that any person who in any public place “behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused” is guilty of an offence. The court held that to constitute a breach of the peace under this section, there has to be threatened or actual violence. “Disturbance” in isolation cannot constitute breach of the peace. Mere insulting behaviour *per se* is also insufficient to constitute a breach of the peace.<sup>79</sup>

4.60 In the UK, a stalker of both the Queen and the Princess of Wales was charged under the Criminal Justice and Public Order Act 1994 for holding a placard outside Buckingham Palace bearing the words “The Queen is the Devil”. Evidence given at the trial showed that the crowd around him acted peacefully and ignored him. The magistrate held that his behaviour was not likely to cause a breach of the peace. On the contrary, it provoked no response from anyone.<sup>80</sup> He was not bound over to keep the peace. His acquittal shows that the laws on public order and breach of the peace are inadequate in dealing with stalkers who act in an orderly and peaceful manner when engaging in their campaign of harassment.

## **Assault and battery**

4.61 Assault and battery are offences at common law and under the Offences against the Person Ordinance (Cap 212).<sup>81</sup> An assault is any act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful violence. A stalker who is holding a weapon or grabbing his victim by the shoulders while threatening physical harm commits an assault. However, mere words cannot constitute an assault.<sup>82</sup> Nor will a stalker be guilty of an assault if his pursuit has not caused the victim to fear immediate unlawful violence.

4.62 A battery is the actual infliction of unlawful violence on another. “Violence” here includes any intentional touching of another person without the consent of that person. A battery needs not necessarily be hostile, or rude, or aggressive.<sup>83</sup> The merest touching without consent is a criminal offence. An unwanted kiss, for example, may be a battery even though the defendant is not

<sup>79</sup> *HKSAR v YANG You-ching* [1997] 3 HKC 744.

<sup>80</sup> *R v Wagner*, Horseferry Road Magistrates’ Court, March 1996, cited in T Lawson-Cruttenden & N Addison, *Blackstone’s Guide to the Protection from Harassment Act 1997* (Blackstone Press, 1997), at 6.

<sup>81</sup> Common assault is a common law offence. Section 40 of the Offences against the Person Ordinance (Cap 212) merely lays down the penalty to be imposed upon conviction. “Common assault” under section 40 includes battery.

<sup>82</sup> *R v Lam Leung-ping*, CA 579/77. In England, an assault can be committed by words alone: *R v Constanza* [1997] *The Times Law Reports* 31 March.

<sup>83</sup> *Faulkner v Talbot* [1981] 3 All ER 468 at 471, *per* Lane LCJ.



hostile.<sup>84</sup> Although physical contact, which is generally acceptable in the ordinary conduct of daily life, is excluded, persistent touching to gain attention in the face of obvious disregard amounts to a battery if it transcends the norms of acceptable behaviour.<sup>85</sup> However, persistent following and telephone harassment do not amount to a battery even though the object suffers psychiatric illness as a result. In *R v Ireland*, Lord Steyn held that it was not feasible to enlarge the meaning of what was a battery to include the circumstances of a silent caller who caused psychiatric injury. Lord Hope further held that the appellant could not have committed a battery over the telephone because “at no time was there any kind of physical contact between [him] and his victims”.<sup>86</sup>

### **Assault occasioning actual bodily harm**

4.63 Section 39 of the Offences against the Person Ordinance (Cap 212) provides a higher penalty for an assault or battery where “actual bodily harm” is occasioned. Once that assault or battery is proved, it remains only to prove that it occasioned actual bodily harm.<sup>87</sup> “Bodily harm” in the Ordinance includes “recognisable psychiatric illness” as well as physical injury,<sup>88</sup> but does not include “mere emotions such as fear or distress nor panic nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition.”<sup>89</sup>

4.64 In *R v Ireland*,<sup>90</sup> the defendant made a large number of unwanted telephone calls to three women. When the women answered the telephone there was silence. The complainants suffered significant psychological symptoms as a result. The House of Lords was sympathetic to those who were harassed by persistent telephone calls. Lord Steyn explained the terrifying effect of a campaign of telephone calls at night by a silent caller to a woman living on her own:

<sup>84</sup> *R v Chief Constable of Devon and Cornwall, ex p CEBG* [1982] QB 458, 471. But *Wilson v Pringle* [1986] 2 All ER 440 seems to require hostility. Cf *F v West Berkshire Health Authority* [1990] AC 1.

<sup>85</sup> *Collins v Wilcock* [1984] 1 WLR 1172 at 1178B.

<sup>86</sup> *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 546F & 549H.

<sup>87</sup> Other related offences include “assault with intent to commit offence” (Cap 212, section 36); and “use of violence or force to any person with intent ... to cause such person or any other person to do any act which he is not legally bound to do, or to omit to do any act which he is legally entitled to do” (Cap 200, section 25).

<sup>88</sup> *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 544A (HL). The Court of Appeal in *R v Chan-Fook* [1994] 1 WLR 689 at 695 held that “actual bodily harm” includes injury to any of those parts of the body responsible for a person’s mental and other faculties, such as his internal organs, his nervous system and his brain. In *R v Constanza*, 26 March 1996, unreported, the defendant wrote over a two year period, more than 800 letters to the victim, made numerous telephone calls and engaged in paint daubing. He was convicted of assault occasioning actual bodily harm at Luton Crown Court.

<sup>89</sup> *R v Chan-Fook* [1994] 1 WLR 689 at 696; *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 542 - 543.

<sup>90</sup> [1997] 1 All ER 112 (CA). See [1997] Crim LR 434; *Archbold News*, Issue 6, July 12, 1996, p 1; and *Archbold* 1996, Supplement No 3 - Aug 1996, 19-166.

*“It would be natural for the victim to regard the calls as menacing. What may heighten her fear is that she will not know what the caller may do next. The spectre of the caller arriving at her doorstep bent on inflicting personal violence on her may come to dominate her thinking. After all, as a matter of common sense, what else would she be terrified about? The victim may suffer psychiatric illness such as anxiety neurosis or acute depression. Harassment of women by repeated silent telephone calls, accompanied on occasions by heavy breathing, is apparently a significant social problem. That the criminal law should be able to deal with this problem, and so far as practicable, afford effective protection to victims is self-evident.”*<sup>91</sup>

4.65 The House of Lords held that a silent telephone caller may be guilty of an assault:

*“It involves questions of fact within the province of the jury. After all, there is no reason why a telephone caller who says to a woman in a menacing way ‘I will be at your door in a minute or two’ may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller’s arrival at her door may be imminent. She may fear the possibility of immediate personal violence. As a matter of law the caller may be guilty of an assault: whether he is or not will depend on the circumstances and in particular on the impact of the caller’s potentially menacing call or calls on the victim.”*<sup>92</sup>

4.66 Despite these positive statements, there are limitations in applying assault laws to deal with stalking. First, there is no offence if the stalker has not committed an act which causes his victim to fear violence. This would be the case where the stalker places his object under surveillance or sends incessant and frightening love letters or bizarre objects. Second, even if the stalker threatens to inflict violence on his victim, it must be a threat of immediate violence. A threat to inflict violence in the future cannot amount to an assault. Thus, although a person commits an assault when he says “Come with me or I will stab you”,<sup>93</sup> a stalker who says, “I will get you” cannot be charged with assault because there is no threat of *immediate* violence. *Archbold* comments that because of the requirement that the victim is caused to fear immediate

<sup>91</sup> *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 537H.

<sup>92</sup> *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 546H-547A. The House of Lords suggested that a silent caller who causes psychiatric injury cannot be guilty of battery. Above, at 546E.

<sup>93</sup> *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 546G.

unlawful violence, a silent telephone call is unlikely ever to constitute an assault in practice.<sup>94</sup> A stalker who inflicts physical harm can be charged with battery. But the offence of battery does not operate until the stalker has had physical contact with the victim.

### ***Wounding or inflicting grievous bodily harm***

4.67 It is an offence under section 19 of the Offences against the Person Ordinance (Cap 212) to unlawfully and maliciously wound or inflict grievous bodily harm upon any person, whether with or without a weapon or instrument. A person can “inflict” psychiatric injury on another person. The offence of inflicting grievous bodily harm can be committed even though no physical violence is applied directly or indirectly to the body of the victim. Although section 19 is useful where the stalker stages a “psychological assault” on his victim which results in recognisable psychiatric illness which is so severe as to equate with grievous bodily harm, the law should intervene at an early stage and provide a remedy before the stalker’s behaviour causes serious harm to his victim.

### ***False imprisonment***

4.68 False imprisonment is an offence at common law. It is committed where a person unlawfully and intentionally or recklessly restrains another’s freedom of movement from a particular place. A person will not be guilty of false imprisonment for preventing another person from going in a particular direction if the latter is free to go in another direction.

### ***Loitering***<sup>95</sup>

4.69 Section 160 of the Crimes Ordinance (Cap 200) prescribes three loitering offences:

- a) loitering in a public place or in the common parts of a building with intent to commit an arrestable offence;
- b) loitering in a public place or in the common parts of a building and in any way wilfully obstructing any person using that place or the common parts of that building; and
- c) loitering in a public place or in the common parts of a building and his presence there causing any person “reasonably to be concerned for his safety or well-being”.

<sup>94</sup> Archbold – Criminal Pleadings, Evidence and Practice 2000, § 19-173.

<sup>95</sup> Any person who is found to be “lying or loitering or being in any highway, yard, or other place during the night” may be apprehended by a police officer who has good cause to suspect that he has committed or intends to commit any indictable offence in the Offences against the Person Ordinance (Cap 212): Cap 212, section 56.



4.70 The offence in (c) is useful where a stalker loiters in a public place so as to cause his victim to fear for his safety. But the expression “reasonably to be concerned for his ... well-being” is vague. It is arguable that loitering behaviour which causes another to feel harassed or distressed falls within the scope of the loitering offence in (c). However, the section covers only one kind of stalking behaviour. The *Oxford English Dictionary* defines “loiter” as “linger idly about a place” and “travel or proceed indolently and with frequent pauses”. It appears that loitering 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”. In any event, it is difficult to prove loitering in a public place which is accessible to and frequented by ordinary citizens.

### ***Telephone and post office statutes***

4.71 The stalker may harass the victim by making persistent telephone calls. Such conduct amounts to harassment regardless of the content of the calls. If the content is obscene, threatening or objectionable, the harassment is all the greater.<sup>96</sup> Harassment by oral or written communications may be caught by the following statutory offences:

- a) sending any telephone message which is “grossly offensive or of an indecent, obscene or menacing character”;<sup>97</sup>
- b) sending any telephone message, which he knows to be false, for the purpose of “causing annoyance, inconvenience or needless anxiety to any other person”;<sup>98</sup>
- c) persistently making telephone calls without reasonable cause and for the purpose of “causing annoyance, inconvenience or needless anxiety to any other person”;<sup>99</sup>
- d) transmitting a “false distress, urgency, safety or identification signal” knowing it to be false or with intent to deceive;<sup>100</sup>
- e) sending by post of any “obscene, immoral, indecent, offensive or libellous writing, picture or other thing”.<sup>101</sup>

<sup>96</sup> *Khorasandjian v Bush* [1993] 3 WLR 476, 482B; *Burnett v George* [1992] 1 FLR 525.

<sup>97</sup> Summary Offences Ordinance (Cap 228), section 20(a).

<sup>98</sup> Summary Offences Ordinance (Cap 228), section 20(b). Silent telephone calls to a person over a period of time would fall into this category if the purpose was to cause annoyance, inconvenience or needless anxiety, assuming the prosecution can prove a link to the perpetrator.

<sup>99</sup> Summary Offences Ordinance (Cap 228), section 20(c).

<sup>100</sup> Telecommunication Ordinance (Cap 106), section 28.

<sup>101</sup> Post Office Ordinance (Cap 98), section 32(1)(f).

4.72 These provisions are of assistance to a stalking victim because the stalker may not threaten him or her but may merely be obscene or vulgar, or merely cause him or her annoyance or inconvenience. Prosecuting under such provisions may deter non-violent stalkers from future harassing behaviour or defuse a stalking situation because the stalker now knows that his behaviour is illegal and the police are aware of his existence.

4.73 However, the penalty under the telephone statutes is inadequate to reflect the culpability of a persistent offender where his conduct has impaired the victim's health. All three offences in (a) to (c) above are summary offences carrying a maximum custodial sentence of only 2 months' imprisonment. Moreover, the Post Office Ordinance (Cap 98) requires that the article sent by the defendant be "obscene, immoral, indecent, offensive or libellous". This provision is not applicable if the stalker relentlessly sends love letters, greetings cards, magazines, flowers or other unsolicited gifts. More importantly, the offences in (b) and (c) require the prosecution to prove that the accused made the calls "for the purpose of causing annoyance, inconvenience or needless anxiety" to any other person. Obsessional stalkers who harass their victims by making telephone calls may lack the requisite purpose; they may simply seek to negotiate with the victim or to force the victim to recommence a prior relationship. In any event, the offences fail to catch stalkers who harass their victims by sending a large volume of unwanted faxes and e-mail. Likewise, a stalker, who harasses his victim by sending messages to one or more Internet newsgroups revealing the victim's telephone numbers and residential address and at the same time soliciting sexual service in the name of the victim, would not be caught by these offences.

### ***Public nuisance***

4.74 A public nuisance is a criminal offence at common law. It is an act or omission which materially affects the reasonable comfort and convenience of life of a class of Hong Kong residents. It is not necessary to prove that every member of the class has been injuriously affected. It is sufficient to show that a representative cross-section of the class has been so affected. A person who has made a large number of telephone calls of an obscene nature, intending to cause offence and alarm, and resulting in such offence and alarm to a large number of people selected from a telephone directory or merely by chance dialling, may be charged with public nuisance.<sup>102</sup>

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<sup>102</sup> *R v Norbury* [1978] Crim LR 435. In *R v Johnson* [1997] 1 WLR 367, the defendant made obscene telephone calls on hundreds of occasions to at least 13 different women in the South Cumbria area. He was convicted of public nuisance by using telephone to cause nuisance, annoyance, harassment, alarm and distress. This decision was criticised by Michael Allen in "Look Who's Stalking: Seeking a Solution to the Problem of Stalking" [1996] 4 *Web Journal of Current Legal Issues* at 12–14.

## **Intimidation**

4.75           **Crimes Ordinance** - A stalker who threatens his victim with injury to the person, reputation or property of the victim or any third person, or otherwise with any illegal act, may be prosecuted for an offence under section 24 of the Crimes Ordinance (Cap 200). However, the offence would be committed only if the stalker threatened his victim with intent:

- i)       to alarm him or any other person; or
- ii)      to cause him or any other person to do any act which he is not legally bound to do; or
- iii)     to cause him or any other person to omit to do any act which he is legally entitled to do.

4.76           Similarly, the making of threats to destroy or damage property belonging to the victim or a third person amounts to an offence under section 61 of the Crimes Ordinance (Cap 200) only if he intended that the victim would fear it would be carried out.<sup>103</sup> The making of written threats to kill or murder any person is an offence under section 15 of the Offences against the Person Ordinance (Cap 212).

4.77           Although these provisions protect stalking victims who have actually been threatened, it does not help in situations where the stalker harasses his victim without making any threats. A stalker who persistently follows his victim, places him under surveillance or repeatedly sends unwanted letters or gifts places the victim in constant fear and terror, even though the stalker has not made any threat. Likewise, a stalker who engages in threatening conduct may not threaten his victim with an illegal act. Even if the stalker has threatened his victim with an illegal act, to be convicted under section 24, he must also have had the specific intent - an element which is difficult to prove beyond reasonable doubt in stalking cases.<sup>104</sup> Many stalkers initially lack any intent to harm their victim. They may intend merely to talk or to renew friendship with the victim. But their stalking behaviour may nevertheless constitute harassment or cause their victims to fear for their safety. Joel Fahnestock observes that unless there are laws to stop harassment, "women are forced into becoming psychological victims, helplessly waiting to be threatened or actually harmed."<sup>105</sup>

4.78           **Trade Unions Ordinance** - Section 47(1) of the Trade Unions Ordinance (Cap 332) provides:

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<sup>103</sup> See also Public Order Ordinance (Cap 245), section 23 (entry upon premises in a violent manner) and Crimes Ordinance (Cap 200), section 119 (procurement of unlawful sex by threats or intimidation).

<sup>104</sup> In *HKSAR v Yau Yu Ming* HCMA 437/1999, the court held that words that are "just 'wild and whirling words', uttered in exasperation, and signifying nothing more than an instinctive outburst of spleen" may not constitute an intent to cause alarm.

<sup>105</sup> J Fahnestock, above, at 799.



*“Every person who, with a view to compelling any person to abstain from doing or to do any act that such other person has a legal right to do or abstain from doing, wrongfully and without legal authority-*

- (a) uses violence to or intimidates<sup>106</sup> such other person or his wife or children, or injures his property; or*
- (b) persistently follows such other person about from place to place; or*
- (c) hides any tools, clothes or other property owned or used by such other person, or deprives him of the same or hinders him in the use thereof; or*
- (d) watches or besets the house or other place where such other person resides or works or carries on business or happens to be or the approach to such house or place; or*
- (e) follows such other person in a disorderly manner in or through any street or road,*

*shall be guilty of an offence”.*<sup>107</sup>

4.79 Although the intention of the provision was to prohibit harassment in the course of an industrial dispute, the wording of the provision is not so limited. The offence could also cover activities such as watching or besetting a person's residence or place of work or persistently following a person about from place to place in a domestic context. Yet even if the provision can be so applied, it is not particularly helpful in deterring stalking because not all stalkers have the requisite intent when engaging in the prescribed conduct.<sup>108</sup> Proof of compulsion may also be difficult where there have been no contacts between the stalker and the victim. More importantly, due to the requirement that the defendant's conduct be “wrongful”, the stalker's conduct must amount to a criminal offence or a civil wrong separately from the existence of the offence under the Ordinance. Thus, the section does not render unlawful conduct which would otherwise be lawful. It merely creates specific offences and makes conduct which is already tortious a criminal offence.<sup>109</sup> Watching, besetting or persistently following with intent would not render the stalker criminally liable under the Ordinance unless the conduct complained of is already criminal or tortious.

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<sup>106</sup> “Intimidation” means “to cause in the mind of a person a reasonable apprehension of injury to himself or to any member of his family or to any of his dependants or of violence or damage to any person or property”: section 2.

<sup>107</sup> Cf Conspiracy and Protection of Property Act 1875 (UK), section 7 (repealed); now see Trade Union and Labour Relations (Consolidation) Act 1992 (UK), section 241.

<sup>108</sup> In *Fidler* [1992] 1 WLR 91, the defendants stood outside an abortion clinic intending to dissuade women not to undergo abortion. They were acquitted of the “watching and besetting” charge. The court held that although they intended to prevent lawful abortions, their purpose was one of dissuasion, not compulsion.

<sup>109</sup> *Thomas v National Union of Mineworkers (South Wales Area)* [1985] 2 All ER 1.

## ***Criminal attempt***

4.80 The law of criminal attempt might be used to prevent or punish stalking behaviour. It enables the courts to punish a perpetrator at a point in time before he successfully commits an offence. It does not, however, protect victims from stalking activities that fall substantially short of the crime itself, even if those activities may be the prelude to serious physical injury. As observed by Kathleen McAnaney and others:<sup>110</sup>

*“Because stalking acts take place over a period of time, the acts are often not proximate enough to the substantive offense. Stalking does not happen in a single day, and by definition cannot be a single occurrence. Stalking scenarios involve a series of individual acts, such as harassing phone calls and slashed tires, that build on one another. Too often, the conduct does not end until serious physical injury, or even death, results.”*

## **Conclusion**

### ***Inadequacy of existing civil law***

4.81 Although the law of torts provides a remedy to victims of stalking in some instances, the protection is neither complete nor adequate. Protection under the law of torts is “fragmented, *ad hoc* and piecemeal”.<sup>111</sup> Despite the attempts that have been made by the courts to stretch the law of torts to provide a remedy for victims of stalking, none of the torts captures the full extent and degree of a stalker’s behaviour. Indeed judicial attempts to develop English law in this direction have met with disapproval from the House of Lords.<sup>112</sup>

4.82 In any event, relying solely on civil remedies has its limitations. To obtain an injunction, notice must be given to the stalker. This causes problems because a victim may not know the stalker’s name. The police cannot be called upon to assist the victim in finding out the identity and address of the stalker. The victim might have to retain a private investigator to stalk his stalker in order to find out where he lived so that a writ could be served on him. Even if the stalker is known to the victim, many victims are discouraged from seeking a civil remedy because the civil procedures are cumbersome, expensive and less appropriate where emergency protection is required. Kelli Attinello summarises the difficulties of dealing with stalking by way of injunctions:

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<sup>110</sup> K G McAnaney and others, above, at 889.

<sup>111</sup> Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997), p 25.

<sup>112</sup> *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426 at 438. See the comment made by Lord Goff quoted above.

*“Compliance is not guaranteed because injunctions, like other remedies, are only effective against people who understand what injunctions are and decide to comply with them. Many stalkers are not sufficiently deterred because they have mental disorders and cannot understand injunctions and thus, cannot follow them. Even if stalkers do not suffer from mental disorders, harassers often possess extremely strong desires, and an injunction will often not deter them.*

*Even if the assailant does understand the significance of the injunction, it does not always provide the victim with adequate protection because there are ways to avoid violating its terms while still continuing the harassing conduct. Enforcing injunctions is difficult because the police are unable to accompany the victim continuously in order to ensure the defendant’s compliance. Moreover, many stalkers actually measure the distance at which they are to remain from the victim and then move slightly beyond that point to continue the harassing behavior. As a result, the harasser is able to continue harassing the victim but cannot be arrested for contempt because the distance requirement set by the injunction is being observed. Finally, injunctions are most effective against people who are not extremely violent. Yet, many stalking cases fall into the domestic violence category involving ex-spouses or ex-lovers. It is these cases that police say have the highest potential for violence. Therefore, injunctions will not be very effective in protecting those victims who need the most protection.”<sup>113</sup>*

4.83 It has been pointed out that injunctions are mere pieces of paper - they will not stop a determined stalker. The director of the Dade County, Florida courts’ domestic violence unit said that they told the women seeking restraining orders that the paper would not stop a bullet, knife, or car.<sup>114</sup> Injunctions are ineffective because they penalize perpetrators only after the injunctions have been breached. In other words, they can do nothing to protect the victim until the harm which they are designed to protect against has already occurred.<sup>115</sup>

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<sup>113</sup> K L Attinello, above, at 1960 - 1.

<sup>114</sup> J Fahnestock, above, at 788. Restraining orders in the US were generally ineffective in either reducing the rate or severity of abuse by serious abusers. A study reveals that 60% of the victims were abused again regardless of the presence of a restraining order. See R A Lingg, above, p 357 n 55.

<sup>115</sup> K L Walsh, above, at 381.



### ***Inadequacy of existing criminal law***

4.84 Although existing criminal laws cover some aspects of stalking behaviour, they do not address stalking as an independent phenomenon. They treat stalking behaviour piecemeal and deal with it as isolated incidents. Law enforcement officers usually focus upon a particular aspect of the stalker's conduct and seek to bring it within an existing provision of the criminal law. The stalker can be prosecuted only if his act falls within the scope of a criminal offence. The result is that many stalking victims are told that "there is nothing that can be done until someone is actually harmed", or that "there is nothing to stop harassing behaviour because no laws were being broken". But stalking can occur without breach of the peace or threats of violence. A stalker can harm his victim by simply observing him or following him about without making any threat. Existing law is inadequate in dealing with stalkers who harass by following, fax, voice-mail, e-mail and/or on the Internet. The victim is helpless until he is threatened with an illegal act, apprehended immediate violence, or sustained physical or psychological injury.

4.85 The effectiveness of criminal remedies also depends on adequate police enforcement. However, some police officers consider complaints of vandalism or intimidation minor and time-consuming to investigate. As a result, stalking behaviour goes unchecked until the harassment escalates to a violent level. Even if the stalker commits acts of violence, the police are unwilling to intervene if the complaint arises out of a domestic context. The police and prosecutors in the US have been criticized for their failure to enforce applicable criminal laws against domestic violence. Fromson observes that police officers seem to view domestic violence as non-criminal, and that this attitude along with the physical danger posed by intervention has discouraged police involvement in cases involving abuse of woman.<sup>116</sup> Even if the police do respond, they rarely make an arrest or take any action to protect the woman from future harm.<sup>117</sup> The result is that stalkers feel that they can continue to harass their victims with impunity. We are concerned that the same situation may also exist in Hong Kong as far as domestic violence cases are concerned.<sup>118</sup>

4.86 In a study of domestic disputes in Hong Kong and the police response thereto,<sup>119</sup> Fiona Fung suggested that statistics on criminal justice did not accurately reflect the extent of the problem of domestic violence in Hong Kong. She observed that only cases involving serious personal injury would be recorded and processed as a crime. Minor assaults such as kicking, slapping,

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<sup>116</sup> T L Fromson, "The Cure for Legal Remedies for Abused Women" (1977) 6 *NYU L Rev & Soc Change* 135 at 144, cited in K L Attinello, above, at 1970 n 178.

<sup>117</sup> Above, at 145.

<sup>118</sup> The co-ordinator of Harmony House, which provides refuge service to abused women and their children, was reported as saying that the police had refused to entertain complaints made by battered women on the ground that they arose out of domestic disputes: *Ming Pao Daily News*, 27.9.97. Many women in Hong Kong are disillusioned as to what amounts to domestic violence. Those who are abused by their partners are often unaware that they are victims of unlawful violence.

<sup>119</sup> F M S Fung, *An Examination of Domestic Disputes and the Police Response in Hong Kong* (Hong Kong: The University of Hong Kong, 1994).

pushing or biting were rarely considered to be crime by the police. Furthermore, neither the Crime Statistics nor the Victim Survey kept separate statistics on domestic violence. It was impossible to identify domestic cases from such data.<sup>120</sup> Her study also shows that the police in Hong Kong were unwilling to arrest the perpetrators of domestic violence. They merely treated abuse of women as a private and civil matter and would not charge the perpetrators unless and until the victims had sustained injury and a serious crime had been committed.<sup>121</sup>

4.87 Buzawa and Buzawa explain why the police are insensitive towards domestic violence:

*“First, police do not believe that responding to domestic violence calls is ‘an appropriate police responsibility,’ because it does not constitute what is considered a ‘serious’ crime. Second, domestic violence calls are unproductive in the sense that they decrease the chance an officer will make a substantive felony arrest by using up his time. Third, police mistakenly believe that domestic violence calls are more violent than other types of calls. On the other hand, they accurately perceive that few domestic violence cases result in successful prosecution; their work, therefore, is ultimately futile. Finally, police share common societal sentiments that domestic violence and other ‘private misconduct’ should not be subject to public intervention.”<sup>122</sup>*

4.88 We think that stalking is a menace to society which ought to be taken seriously by the public and police. While some of the offensive behaviour associated with stalking can be dealt with under existing laws, the protection under the civil and criminal law are spotty, uncertain and ineffective. The criminal justice system fails to deal with stalking mainly “because it has tended to chop up the continuous film of persistent misbehaviour into individual, discrete snapshots”.<sup>123</sup> Existing criminal law deals mainly with single incidents of criminal behaviour such as murder, robbery, theft and assault. It is far less developed in dealing with behaviour such as stalking which is continuous and where the whole is worse than the sum of the parts or any individual part. It is inadequate in dealing with stalkers who repeatedly follow their victims or harass them by video, fax, voice-mail or e-mail. As explained by Keirsten Walsh:

*“The characteristic which distinguishes stalking as a unique crime, is that stalking behavior involves a series of discrete, individual acts, each one building upon the next. Although these*

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<sup>120</sup> Above, at 112. Fung concluded: “Statistics on domestic dispute and its consequential crimes are generally not accurately recorded. Possible reasons for this are under-recording of crimes reported to the police, under-reporting by victims and failure by the police to charge and the court to prosecute.” Above, at 115.

<sup>121</sup> Above, 81-82.

<sup>122</sup> Quoted in R A Lingg, above, at 358 n 68 (citing E S Buzawa & C G Buzawa, *Domestic Violence: The Criminal Justice Response* (1990) 27-31).

<sup>123</sup> *House of Commons Hansard* 17 Dec 1996, col 788.

*discrete acts, standing alone, may be considered innocent behaviors, they assume a threatening character when viewed in the aggregate. And while the existing related laws may prohibit some behavior also classified as stalking, these laws do not address the fundamental element of the crime which is the repetitive behavior.”*<sup>124</sup>

4.89 Some commentators therefore argue for a different conceptual and legal framework for these separate acts of harassment by treating a “series” of these acts as a more serious crime, rather than as a stream of unrelated minor offences.<sup>125</sup> It will be seen from Chapter 5 below that many common law jurisdictions adopt this approach to address the problem of stalking and harassment.

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<sup>124</sup> K L Walsh, above, at 381.

<sup>125</sup> K G McAnaney and others, above, at 883.



## Chapter 5

### Legislation in other jurisdictions

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5.1 We examine in this chapter the position in Australia, Canada, Ireland, New Zealand, Singapore, the United Kingdom and the United States. It will be seen that all the major common law jurisdictions have anti-stalking legislation. The social and economic conditions in these jurisdictions are similar to those in Hong Kong. Although we are not aware of any anti-stalking legislation in Asia, measures that aim at protecting individuals from stalking or harassment are permissible under the international human rights conventions. The right to privacy is protected by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights. It matters not that anti-stalking legislation originates from the West. Such legislation should be introduced as long as there is a social need to protect individuals from harassment in Hong Kong.

#### Australia

5.2 All the States in Australia make stalking a criminal offence. The definitions of “stalking” in these statutes are similar. For example, section 34A of the Crimes Act 1900 in the Australian Capital Territory provides that:

*“a person shall be taken to stalk another person if, on at least 2 occasions, he or she-*

- (a) follows or approaches the other person;*
- (b) loiters near, watches, approaches or enters a place where the other person resides, works or visits;*
- (c) keeps the other person under surveillance;*
- (d) interferes with property in the possession of the other person;*
- (e) gives or sends offensive material to the other person or leaves offensive material where it is likely to be found by, given to or brought to the attention of, the other person;*

- (f) *telephones or otherwise contacts the other person;*
- (g) *acts covertly in a manner that could reasonably be expected to arouse apprehension or fear in the other person; or*
- (h) *engages in conduct amounting to intimidation, harassment or molestation of the other person.”*

### **Australian Capital Territory**

5.3 Section 34A of the Crimes Act 1900 provides that a person commits an offence if he stalks another person with intent to cause (a) apprehension or fear of serious harm in the other person or a third person; or (b) serious harm to the other person or a third person. It is not necessary to prove that the person stalked or a third person, as the case may be, apprehended or feared serious harm.

5.4 “Harm” means physical harm, harm to mental health (including psychological harm) or disease, whether permanent or temporary. “Physical harm” includes “unconsciousness, pain, disfigurement and any physical contact that might reasonably be objected to in the circumstances, whether or not there was an awareness of that contact at the time.”

5.5 Where the offence involved a contravention of an injunction or the offender was in possession of an offensive weapon, the offender is liable to 5 years’ imprisonment; in any other case, he is liable to 2 years’ imprisonment.

### **New South Wales**

5.6 Stalking or intimidating another person with the intention of causing another to fear personal injury is an offence under section 562AB of the Crimes Act 1900 in NSW.<sup>1</sup> A person intends to cause fear of personal injury if he knows that the conduct is likely to cause fear in the other person. Causing a person to fear personal injury includes causing the person to fear personal injury to another person with whom he has a domestic relationship. It is not necessary to prove that the victim actually feared personal injury.

5.7 “Intimidation” means conduct amounting to harassment or molestation, the making of repeated telephone calls, or any conduct that causes a reasonable apprehension of violence or damage to any person or property. “Stalking” means “the following of a person about or the watching or frequenting of the vicinity of or an approach to a person’s place of residence, business or

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<sup>1</sup> Sections 562A to 562N.

work or any place that a person frequents for the purposes of any social or leisure activity”.<sup>2</sup>

5.8 A court may, on complaint, make an “apprehended violence order” if a person has reasonable grounds to fear and in fact fears that he is harassed, molested, intimidated or stalked by another person. For the purposes of applying for the order, conduct may amount to harassment or molestation even though it does not involve actual or threatened violence to the person. The order may impose “such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court.”<sup>3</sup>

5.9 A court who has convicted a person of an offence against section 562AB may also make a prohibition order for the protection of the victim. A person who knowingly contravenes a prohibition order is guilty of an offence.

### ***Northern Territory of Australia***

5.10 Section 189 of the Criminal Code Act makes it an offence to stalk another person with intent to cause (a) physical or mental harm to the other person or a third person, or (b) apprehension or fear. The offender is liable to imprisonment for 2 years. Where his conduct contravened a condition of bail or an injunction, or he was in the possession of an offensive weapon, he is liable to imprisonment for 5 years.

### ***Queensland***<sup>4</sup>

5.11 Queensland was the first Australian State to enact anti-stalking legislation. That attempt was criticised as unnecessarily complex. Following consultation, a new Chapter 33A on Unlawful Stalking was inserted into Queensland’s Criminal Code in 1999.<sup>5</sup> It sanctions intentionally directed conduct that occurs on one (if protracted) or, otherwise, on more than one, occasion that would cause apprehension or fear or causes “detriment”.

5.12 “Unlawful stalking” is defined in the Criminal Code as conduct -

- “(a) *intentionally directed at a person (the “stalked person”);*  
*and*
- (b) *engaged in on any 1 occasion if the conduct is protracted or*  
*on more than 1 occasion; and*

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<sup>2</sup> Sections 562A and 562AB.

<sup>3</sup> Section 562B.

<sup>4</sup> S Kift, “Stalking in Queensland: From the Nineties to Y2K”, (1999) 11 Bond LR 144.

<sup>5</sup> Criminal Code (Qld), sections 359A to 359F. See Criminal Code (Stalking) Amendment Act 1999 (No 18 of 1999) (Qld).



(c) *consisting of 1 or more acts of the following, or a similar, type-*

- (i) *following, loitering near, watching or approaching a person;*
- (ii) *contacting a person in any way, including, for example, by telephone, mail, fax, e-mail or through the use of any technology;*
- (iii) *loitering near, watching, approaching or entering a place where a person lives, works or visits;*
- (iv) *leaving offensive material where it will be found by, given to or brought to the attention of, a person;*
- (v) *giving offensive material to a person, directly or indirectly;*
- (vi) *an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;*
- (vii) *an act of violence, or threat of violence, against, or against property of, anyone, including the defendant; and*

(d) *that-*

- (i) *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; or*
- (ii) *causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.”*

5.13 “Detriment” is defined as including the following:

- (a) apprehension or fear of violence to, or against property of, the stalked person or another person;
- (b) serious mental, psychological or emotional harm;
- (c) prevention or hindrance from doing an act a person is lawfully entitled to do;
- (d) compulsion to do an act a person is lawfully entitled to abstain from doing.

5.14 In relation to limb (c) of the detriment definition, the legislation gives the example of a person who no longer walks outside his or her place of residence or employment, or significantly changes the route or form of transport he or she would ordinarily use to travel to work or other places. In relation to limb (d), the example given is that of a person selling a property he or she would not otherwise sell.

5.15 The Code expressly states that it is immaterial:

- (a) whether the offender intended to cause the apprehension or fear, or the “detriment”, mentioned in the section;
- (b) whether offender intends the stalked person to be aware that the conduct is directed at him;
- (c) whether the offender is mistaken about the identity of the victim (eg, offender intends to stalk A and in fact stalks B);
- (d) whether the conduct consists of the same or different acts;
- (e) whether the conduct actually causes the stalked person apprehension or fear of violence to, or against property of, the stalked person or another person; and
- (f) whether the conduct directed at the stalked person consists of conduct carried out in relation to another person or property of another person.

5.16 Under the new legislation, conduct on one protracted occasion is sufficient. The Explanatory Notes to the amendment legislation explained that the commission of the offence should not depend on a technical count of the number of acts done. The Discussion Paper issued by the Queensland Attorney General suggested that:<sup>6</sup>

*“there is no necessity for a minimum number of acts to constitute a course of conduct. The expression ‘stalking’ should encompass either a single protracted episode or repeated conduct and that the jury should be allowed to concentrate on the true nature and gravamen of the offence, the course of conduct, rather than on the particular occasions.”*

5.17 The following conduct is not unlawful stalking under the Code:

- “(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.”*

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<sup>6</sup> *Discussion Paper on the Offence of Stalking* (1998), at 7; quoted in S Kift, above, at 151.

5.18 The court may make a restraining order against the accused whether he is found guilty or not or the prosecution ends in another way. A person who knowingly contravenes a restraining order commits an offence.

### ***South Australia***

5.19 Section 19AA of the Criminal Law Consolidation Act 1935 creates the offence of stalking.<sup>7</sup> A person who stalks another with intent to cause (a) serious physical or mental harm to the other person or a third person, or (b) serious apprehension or fear, is guilty of an offence. The offender is liable to imprisonment for not more than five years if his conduct contravened an injunction granted by a court, or he was in possession of an offensive weapon, but only liable to imprisonment for not more than three years in any other case.

### ***Victoria***

5.20 Section 21A of the Crimes Act 1958 prohibits stalking. The prosecution must prove that the offender stalks another person with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his own safety or that of any other person. An offender also has the requisite intention if he knows or ought to have understood that engaging in the course of conduct would be likely to cause such harm or arouse such apprehension, or fear and it actually did have that result. The maximum penalty is 10 years imprisonment.

5.21 It is a defence to show that the conduct was engaged in by a person performing official duties for the purpose of the enforcement of the criminal law; the administration of any statute; the enforcement of a law imposing a pecuniary penalty; the execution of a warrant; or the protection of public revenue.

### ***Western Australia***

5.22 The new Chapter XXXIIIB of the Criminal Code creates two offences to deal with stalking. The indictable offence is created by section 338E(1), which provides that a person who pursues another with intent to intimidate that person or a third person commits an offence. Section 338E(2) creates the lesser offence where the accused pursues another in a manner that could reasonably be expected to intimidate, and does in fact intimidate.

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<sup>7</sup> Criminal Law Consolidation (Stalking) Amendment Act 1994 (South Australia); M Goode, "Stalking: Crime of the Nineties?" (1995) 19 CLJ 21.



## Canada<sup>8</sup>

5.23 In response to concern that the Criminal Code was inadequate to deal with stalking, the federal government in Canada has created an offence of “criminal harassment” in section 264 of the Canadian Criminal Code.<sup>9</sup> It provides:

- “(1) *No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.*
- (2) *The conduct mentioned in subsection (1) consists of*
- (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; or*
  - (d) *engaging in threatening conduct directed at the other person or any member of their family.”*

5.24 The Court held that the object of section 264 is to protect one’s personal freedom of choice and action from specific forms of behaviour, which would seriously and adversely impact upon those rights.<sup>10</sup> Over 2,600 charges were laid under section 264 across Canada between August 1, 1993, and July 1, 1994.<sup>11</sup> A national poll taken in 1993 showed that 83% of Canadians surveyed expressed support for passing laws that would make stalking illegal and subject the perpetrator to criminal charges and penalties.<sup>12</sup>

5.25 The prosecution must prove the following elements:<sup>13</sup>

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<sup>8</sup> B A MacFarlane, “People Who Stalk People: Part I” (1999) 57:2 *The Advocate* 201 and “People Who Stalk People: Part II” (1999) 57:3 *The Advocate* 353; Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997), 11-16.

<sup>9</sup> Act to Amend the Criminal Code and the Young Offenders Act, RSC C-126, §264(1)(2), (1993).

<sup>10</sup> *R v Sillipp* (1995) 99 CCC (3d) 394 at 419.

<sup>11</sup> Letter from the Federal Department of Justice to the office of the Attorney General of Alberta of March 17, 1995, referred to in *R v Sillipp* (1995) 99 CCC (3d) 394 at 414.

<sup>12</sup> Referred to in *R v Sillipp* (1995) 99 CCC (3d) 394 at 414.

<sup>13</sup> *R v Sillipp* (1995) 99 CCC (3d) 394 at 403.

- the accused person intended to do an act specified in subsection (2);
- he did that act;
- he did so without lawful authority;
- another person was harassed by those acts;
- the accused person knew that that person was harassed by such conduct on his part or he was reckless as to whether that person was so harassed;
- such behaviour caused that other person to fear for his or her safety; and
- that person's fear was reasonable in all the circumstances.

5.26 The term "harass(ed)" is left undefined in the Code. "Safety" includes not only freedom from physical harm but also freedom from fear of mental or emotional or psychological trauma.<sup>14</sup> It is unnecessary to prove that the accused intended to cause the victim to fear for his safety, or that the accused knew that the victim feared for his safety. The section only requires that the accused knows that the victim is harassed or is reckless as to whether the victim is harassed. The term "reckless" means that the accused is a conscious risk taker who knows that there is a high likelihood that the conduct will cause the person to fear for his own safety or the safety of a person known to him.

5.27 The scope of the offence is restricted to the kinds of conduct described in subsection (2). This provision covers the following of any person known to the victim because the stalker may repeatedly follow the victim's child or current partner in an attempt to harass the victim further. By including repeated communication with the victim or anyone known to him as a form of stalking behaviour, all means of communication, including telephone, fax, e-mail, signs, face-to-face oral statements and gestures are covered.

5.28 There is no legislation on the issue of civil liability but case law tends to support a role for the civil courts. The Manitoba Law Reform Commission recommends that provincial legislation should be enacted to enable victims of stalking to obtain a Protection or Prevention Order.<sup>15</sup> Protection Orders are designed to provide a victim with immediate protection. They are available from a designated Justice of Peace without notice to the stalker, upon proof of three criteria: the victim is being stalked, he reasonably fears for his safety or the safety of anyone known to him, and he has an honest belief that the stalker will continue to stalk him. The relief available under a Prevention Order includes all the relief available by way of a Protection Order plus several additional remedies designed to prevent further stalking and to compensate the victim. The stalker is given notice and a hearing is held before a judge.

5.29 The Act proposed by the Manitoba Law Reform Commission also creates a tort of stalking, thereby permitting the victim to recover all the relief available in civil actions. The definition of stalking uses the element of

<sup>14</sup> *R v Hau* [1996] BCJ No 1047 (British Columbia Supreme Court).

<sup>15</sup> Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997).

reasonable fear as the dividing line between lawful conduct which is merely annoying, and harassing conduct which can be the subject of legal remedies. Clause 2(1) of the Act provides:

*“Stalking occurs where a person, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engages in conduct on more than one occasion that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.”*

## England and Wales<sup>16</sup>

5.30 The Consultation Paper on Infringement of Privacy issued by the Lord Chancellor's Department and the Scottish Office in 1993 suggested that English law did not protect people adequately from being harassed.<sup>17</sup> It proposed a new cause of action in tort in respect of conduct which infringes privacy, causing the complainant substantial distress which a reasonable person would also have suffered in the circumstances. For the purposes of the tort, privacy should be defined as including a person's "health, personal communications, and family and personal relationships, and a right to be free from harassment and molestation."<sup>18</sup> This tort would provide remedies to individuals who are subject to harassment or molestation. Although the UK Government was not convinced that it was then necessary to introduce a tort of infringement of privacy, the draft bill annexed to the Government's Response suggested that an individual's right to privacy may include "a right to be free from harassment and molestation".<sup>19</sup>

### **Stalking Bill**

5.31 The Stalking Bill introduced to the House of Commons by Janet Anderson in March 1996<sup>20</sup> provided that a person who stalks another is guilty of an offence. Clause 1(1) gave a definition of "stalking":

<sup>16</sup> The position in Northern Ireland is similar to that in England and Wales. See The Protection from Harassment (Northern Ireland) Order 1997. In Scotland, harassment or stalking is usually prosecuted as a breach of the peace. Pursuant to the Protection from Harassment Act 1997, victims of harassment in Scotland are able to take civil action to obtain damages and a non-harassment order. Breach of that order is a criminal offence. See consultation paper issued by Scottish Executive Justice Department, *Stalking and Harassment* (2000).

<sup>17</sup> *Infringement of Privacy* (1993), above, para 4.20.

<sup>18</sup> Above, para 5.22. The Paper thought that the words "spying, prying, watching and besetting" suggested in the JUSTICE Bill are too broad and are insufficiently distinct from one another; if such activities cause substantial distress, they are likely to amount to harassment or molestation: paras 5.23 - 5.24.

<sup>19</sup> *Privacy and Media Intrusion* (London: Cm 2918, 1995), Annex B, para 2(i).

<sup>20</sup> This was followed by the Stalking (No 2) Bill introduced in the House of Lords.



*“ ‘stalking’ shall mean engaging in a course of conduct whereby a person-*

- (a) follows, loiters near, watches or approaches another person;*
- (b) telephones (which for the avoidance of doubt shall include telephoning a person but remaining silent during the call), contacts by other electronic means, or otherwise contacts another person;*
- (c) loiters near, watches, approaches or enters a place where another person lives, works or repeatedly visits;*
- (d) interferes with property which does not belong to him and is in the possession of another person;*
- (e) leaves offensive, unwarranted or unsolicited material at a place where another person lives, works or regularly visits;*
- (f) gives offensive, unwarranted or unsolicited material to another person; or*
- (g) does any other act or acts in connection with another person*

*so as to be reasonably likely to cause that other person to feel harassed, alarmed, distressed or to fear for his safety or for that of one or more third persons to whom he has a duty of protection or with whom he is associated.”*

5.32 The Bill created a defence that the defendant “did not know and had no reasonable cause to believe that his behaviour was likely to cause harassment, alarm, distress or fear for personal safety”.<sup>21</sup>

5.33 The Stalking Bill had been criticized both as being too wide and too narrow.<sup>22</sup> It was too wide because it covered activities of people such as journalists and political canvassers who were not provided with the defence of acting reasonably in all the circumstances. It was argued that the behaviour of such people, unless excessive and unreasonable, should not be penalized by the new offence.

5.34 The Bill was said to be too narrow because the definition of harassment provided a list of examples of conduct that would constitute stalking.

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<sup>21</sup> Clause 2(4).

<sup>22</sup> House of Commons Hansard, 17 Dec 1996, col 790.

There was a danger that stalking would be interpreted exclusively by reference to the list. The Government argued that even if the Bill had provided that the list was without prejudice to the generality of the scope of the clause, the interpretation of the clause would be subject to the *ejusdem generis* rule, which requires such a list to be construed in accordance with the nature of the activities that are identified in the list.<sup>23</sup> As the list in the Bill concentrated entirely on activities characteristic of classic stalking, it would not have covered activities that constitute racial or neighbourhood harassment. Stalkers use a variety of conduct to harass their victims. If a list approach were adopted, it is likely that stalkers would adopt another type of conduct, not covered by the list, in order to carry on their campaign of harassment.

5.35 Another criticism was that the Bill created only one offence covering both stalking causing harassment and stalking causing fear for safety. The UK Government thought that it would not have been sensible to apply the same penalty to both types of stalking behaviour.

5.36 The Bill also reversed the burden of proof. Stalking under the Bill was a strict liability offence because clause 2(1) simply provided that a person who stalks another person is guilty of an offence. The defendant would have had the burden of proving his innocence by showing that he did not know that his actions would have the alleged effect if he had carried out any of the actions described in the Bill.

5.37 Although the UK Government was not convinced that the Stalking Bill provided effective or workable solutions to the problem, it published a consultation paper on Stalking in July 1996.<sup>24</sup> The Protection from Harassment Act 1997 represents the results of that consultation.

### ***Protection from Harassment Act 1997***<sup>25</sup>

5.38 The aim of the Act is to make streets and communities safer and to help people whose lives are being ruined by anti-social behaviour. It protects victims of harassment not by defining activities that are known as stalking, but by focusing on the harmful effects that such activities have on the victims. A distinction is made between harassment which is violent and that which is not by creating two offences: the offence of harassment and the more serious offence of putting someone in fear of violence.

5.39 **Offence of harassment** - A person who pursues a course of conduct which amounts to harassment of another is guilty of an offence of harassment under section 2 of the Act provided that he knows or ought to know

<sup>23</sup> House of Commons Hansard, 17 Dec 1996, col 817.

<sup>24</sup> Home Office, *Stalking - The Solutions: A Consultation Paper* (July 1996).

<sup>25</sup> See generally, N Addison & T Lawson-Cruttenden, *Harassment Law and Practice* (London: Blackstone Press, 1999); P Infield & G Platford, *The Law of Harassment and Stalking* (Butterworths, 2000).

that it amounts to harassment of the other.<sup>26</sup> “Harassment” includes “alarming the person or causing the person distress”.<sup>27</sup> The defendant is not guilty of an offence of harassment if (a) the course of conduct was pursued for the purpose of preventing or detecting crime; (b) the course of conduct was pursued under lawful authority; or (c) the pursuit of his course of conduct was reasonable in the particular circumstances.<sup>28</sup>

**5.40 Offence of putting another in fear of violence** - A person whose course of conduct causes another to fear, on at least two occasions, that violence *will* be used against him is guilty of the more serious offence of “putting people in fear of violence” under section 4, provided that he knows or ought to know that his course of conduct will have such a consequence on each of those occasions.<sup>29</sup> The defendant is not guilty of this offence if (a) the course of conduct was pursued for the purpose of preventing or detecting crime; (b) the course of conduct was pursued under lawful authority; or (c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another’s property.<sup>30</sup>

**5.41 Penalty** - The maximum sentence for the offence of harassment is six months’ imprisonment and/or a level 5 fine.<sup>31</sup> Section 2(3) makes the offence of harassment an arrestable offence under section 24(2) of the Police and Criminal Evidence Act 1984. A constable therefore has power to enter and search any premises occupied or controlled by the stalker.<sup>32</sup> This power is necessary if the menace of stalking is to be tackled effectively. Where the level of harassment is such that a person is caused to fear violence on at least two occasions, more severe penalties are required to reflect the gravity of the conduct. The maximum penalty for the offence of putting another in fear of violence is therefore five years’ imprisonment and/or an unlimited fine.

**5.42 Restraining orders** - To protect the victim from further conduct which amounts to harassment or will cause a fear of violence, the court is empowered to make a restraining order prohibiting the defendant from doing anything described in the order.

**5.43 Civil remedy for harassment** - By virtue of section 3(1), an actual *or* apprehended breach of the provision prohibiting harassment may be

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<sup>26</sup> Section 1(1). “Conduct” includes speech: section 7(4). This would ensure that harassment by phone calls would be caught by the Act. Thus repeatedly saying “I’ll get you” on the phone would amount to harassment.

<sup>27</sup> Section 7(2).

<sup>28</sup> Section 1(3).

<sup>29</sup> This offence only applies where the victim has cause to fear that violence *will* be caused. However, a victim who is harassed by silent telephone calls may have cause to fear that violence *may* be used against him but no more. It is therefore difficult to secure a conviction in respect of a silent caller. *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 538E-F.

<sup>30</sup> Section 4(3). The defence of acting reasonably is not available because it cannot be reasonable to place someone in fear of violence.

<sup>31</sup> On the considerations for the sentencing court to bear in mind, see *R v Liddle* and *R v Hayes* [1999] 3 All ER 816 at 819.

<sup>32</sup> Police and Criminal Evidence Act 1984, section 18.



the subject of a claim in civil proceedings by the victim. The victim may claim damages for any anxiety caused by the harassment and any financial loss resulting from it. He may also seek an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment. Where the court has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction, the plaintiff may apply for a warrant for the arrest of the defendant. The defendant is guilty of an offence if he has done anything in breach of the injunction without reasonable excuse.

5.44 Some Members of Parliament attacked the Protection from Harassment Bill on the ground that it failed to give details of the circumstances in which stalking might arise. They argued that a police officer or lawyer could not say for sure whether or not certain behaviour amounted to harassment under the legislation because it would have to be tested in the courts. People would have to wait until there have been enough cases over the next few years to establish what constitutes harassment, what conduct is reasonable and what someone ought to know. Nonetheless, the Bill was passed with the support of both the Conservative and Labour Parties. There were about 300 convictions under the Protection from Harassment Act 1997 in the first year of its operation.<sup>33</sup>

### ***Public Order Act 1986***

5.45 Apart from the offence of harassment in the 1997 Act, the Public Order Act 1986 also makes intentional harassment, alarm or distress a summary offence. A person who, with intent to cause a person “harassment, alarm or distress”, “uses threatening, abusive or insulting words or behaviour” thereby causing that or another person “harassment, alarm or distress” is guilty of an offence under section 4A of the Public Order Act 1986. Section 5 of the Act creates a lesser offence by removing the requirement to prove intent. It is sufficient that the words or behaviour are likely to cause “harassment, alarm or distress” to a person who is present. Both sections make it a defence for the defendant to prove that his conduct was reasonable. Further, it is an offence under section 4 of the 1986 Act to use “threatening, abusive or insulting words or behaviour” with intent to cause another person to believe that immediate unlawful violence will be used against him or another, or whereby that person is likely to believe that such violence will be used.

## **Ireland**

5.46 Section 10 of the Non-Fatal Offences against the Person Act 1997 in Ireland creates the offence of harassment. Section 10(1) provides that:

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<sup>33</sup> L. Sheridan & G. M. Davies, “Stalking: What’s the problem?” (University of Leicester, Department of Psychology, 1998), p. 7.

*“Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.”*

5.47 For the purposes of the offence, a person harasses another where he, by his acts intentionally or recklessly, “seriously interferes with the other’s peace and privacy or causes alarm, distress or harm to the other”, and his acts are such that a reasonable person would realise that the acts would have such an effect.<sup>34</sup> “Harm” is defined as meaning “harm to body or mind and includes pain and unconsciousness”.<sup>35</sup> The court may order the defendant not to communicate with the victim for a specified period, or approach within a specified distance of the place of residence or employment of the victim. A defendant who fails to comply with the terms of the order is guilty of an offence.<sup>36</sup>

5.48 Recently, the Irish Law Reform Commission recommends the enactment of a tort of harassment which is modelled on the definition of harassment provided under section 10 of the Non-Fatal Offences against the Person Act 1997.<sup>37</sup>

## **New Zealand**

### ***Criminal harassment***

5.49 The Harassment Act 1997 makes the most serious types of harassment criminal offences and empowers the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation. Section 6 of the Act expressly provides that the object of the 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, and (b) ensuring that there is adequate legal protection for all victims of harassment. Section 8 of the Act provides that:

*“(1) Every person commits an offence who harasses another person in any case where:-*

*(a) the first-mentioned person intends that harassment to cause that other person to fear for:-*

*(i) that other person’s safety; or*

*(ii) the safety of any person with whom that other person is in a family relationship; or*

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<sup>34</sup> Section 10(2).

<sup>35</sup> Section 1(1).

<sup>36</sup> Section 10(3) & (4).

<sup>37</sup> Law Reform Commission of Ireland, *The Law Reform Commission Report on Privacy – Surveillance and Interception of Communications* (1998), paras 7.15 – 7.18.

(b) *the first-mentioned person knows that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for:-*

*(i) that other person's safety; or*

*(ii) the safety of any person with whom that other person is in a family relationship."*

"Safety", in relation to any person, is defined as including that person's mental well-being. Every person who commits an offence under this section is liable to imprisonment for a term not exceeding 2 years.

5.50 A person harasses another person if "he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months." The Act makes it clear that the specified acts may be the same type of specified act on each separate occasion, or different types of specified acts. The specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person. A specified act, in relation to a person, means any of the following acts:

*"(a) watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose;*

*(b) following, stopping, or accosting that person;*

*(c) entering, or interfering with, property in that person's possession;*

*(d) making contact with that person (whether by telephone, correspondence, or in any other way);*

*(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;*

*(f) 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 her safety."*



5.51 An act is done to a person ("person A") if that act is done in relation to A, or in relation to any other person ("person B") with whom A is in a family relationship, and the doing of the act is due, wholly or partly, to A's family relationship with B.

### **Civil harassment**

5.52 Any person who is being or has been harassed by another person may apply to the Court for a restraining order. The Court may make a restraining order if it is satisfied that:<sup>38</sup>

- the respondent has harassed, or is harassing, the applicant;
- the behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress;
- that behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances;
- the degree of distress caused or threatened by that behaviour justifies the making of an order; and
- the making of an order is necessary to protect the applicant from further harassment.

5.53 It is a defence to prove that the specified act was done for a lawful purpose. A person who, without reasonable excuse, does any act in contravention of a restraining order is guilty of an offence.

5.54 In order to assist victims who do not know the name or address of the alleged harasser, the Act provides that a police officer may require the harasser to give particulars of his name or address if that officer has reasonable grounds to suppose that the harasser is harassing, or has harassed, the complainant. A person who refuses to supply the particulars commits an offence and may be arrested, without warrant, by the police.<sup>39</sup>

5.55 On the making of a restraining order or an order varying or discharging a restraining order, the Registrar of the Court must ensure that a copy of the order is made available to the officer in charge of the police station nearest to where the person for whose protection the order was made resides.

5.56 It is interesting that the Act empowers the Court to conduct hearings in private and to restrict publication of proceedings under certain circumstances:<sup>40</sup>

*"Where ...the Court is of the opinion that it is desirable to do so, after having regard to the interests of any person (including,*

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<sup>38</sup> Section 16.

<sup>39</sup> Sections 26-28.

<sup>40</sup> Section 39.

*without limitation, the privacy of the applicant) and to the public interest, the Court may make any 1 or more of the following orders:*

- (a) an order forbidding publication of any report or account of the whole or any part of -
  - (i) the evidence adduced;*
  - (ii) the submissions made;**
- (b) an order forbidding the publication of -
  - (i) the name of any person, or any name or particulars likely to lead to the identification of that person;*
  - (ii) the affairs of any person;**
- (c) an order excluding all or any persons other than the parties to the proceedings, any lawyer engaged in the proceedings, and any officer of the court, from the whole or any part of the proceedings.”*

## **Singapore**

5.57 We are not aware of any anti-stalking legislation in Singapore but the Miscellaneous Offences (Public Order and Nuisance) (Amendment) Act 1996 has created several offences to deal with threatening and abusive behaviour.<sup>41</sup> Two of these offences are relevant for our purposes:

- (a) Section 13A of the Miscellaneous Offences (Public Order and Nuisance) Act<sup>42</sup> makes it an offence for any person to use threatening, abusive or insulting words or behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting, with intent to cause harassment, alarm or distress to another person.
- (b) Section 13B makes it an offence for any person to use threatening, abusive or insulting words or behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of any person likely to be caused harassment, alarm or distress thereby.

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<sup>41</sup> (1996) 8 SAcLJ 282.

<sup>42</sup> Cap 184 of the 1990 Revised Edition.

## United States

### *Anti-harassment legislation*

5.58 Stalking laws in the US are supplemented by laws closely related to stalking. These include harassment and intimidation. As at 1998, 25 States and the territory of Guam have adopted harassment laws.<sup>43</sup> In three of these States, harassment may be a felony. In three other States, a second harassment offence may also be a felony. Only one State makes harassment a summary offence. In the remainder of the States, harassment is a misdemeanour.

5.59 **Mens rea** - Almost all the harassment provisions in these States require specific intent on the part of the perpetrator. Most States require an intent to “harass, annoy or alarm” another person. A few States lay down a higher threshold and require an intent to frighten, threaten, intimidate or torment instead.

5.60 **Actus reus** - The overwhelming majority of the States specifies the acts or behaviour that amount to harassment for the purposes of the offence of harassment. The following are examples of these acts and behaviour:

- (a) “continues to follow another person in or about a public place for no legitimate purpose after being asked to desist”,<sup>44</sup>
- (b) “places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence, other than the residence of the defendant, for no purpose other than to harass, alarm, or annoy”,<sup>45</sup>
- (c) “in a public place directs obscene language or makes an obscene gesture to or at another person”,<sup>46</sup>
- (d) “follows a person in or about a public place or places”,<sup>47</sup>
- (e) “repeatedly follows or contacts another person or causes such following or contact knowing that he or she is thereby likely to cause a substantial disruption of the regular activities of the other person”,<sup>48</sup>

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<sup>43</sup> Violence Against Women Grants Office, Office of Justice Programs, US Department of Justice, *Stalking and Domestic Violence: The Third Annual Report to Congress under the Violence Against Women Act* (1998), at 26.

<sup>44</sup> Arizona Revised Statutes, Title 13, Criminal Code, § 13-2921, subsection A2.

<sup>45</sup> Arkansas Code of 1987, Title 5, Criminal Offences, § 5-71-208(a)(6).

<sup>46</sup> Colorado 1999 Statutes, Title 18 Criminal Code, § 18-9-111(1)(b).

<sup>47</sup> Kentucky Revised Statutes, § 525.070(1)(d).

<sup>48</sup> Delaware Code, Title 11, Crimes and Criminal Procedure, § 1312(a).



- (f) “makes a telephone call or causes a telephone to ring repeatedly, whether or not a conversation ensues, with no purpose of legitimate conversation”;<sup>49</sup>
- (g) “makes repeated communications at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another’s home or private residence or other private property”;<sup>50</sup>
- (h) “communicates with a person by telephone, telegraph, mail or any other form of written or electronic communication in a manner which the person knows is likely to cause annoyance or alarm”;<sup>51</sup>
- (i) “repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to, another in a manner likely to provoke a violent or disorderly response”;<sup>52</sup>
- (j) “in a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language to any person present”;<sup>53</sup>
- (k) “orders merchandise or services in the name of another, or to be delivered to another, without the other person’s knowledge or consent”;<sup>54</sup>
- (l) “striking, shoving, kicking or otherwise subjecting another person to physical contact or attempting or threatening to do the same”;<sup>55</sup>
- (m) “conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury”;<sup>56</sup>
- (n) “communicates a falsehood in writing or by telephone and causes mental anguish”;<sup>57</sup>

5.61 It is noteworthy that many States also include in the definition of harassment, an all-encompassing provision to catch harassing acts or behaviour that are not specified in the statute. The following are examples of these provisions:

- (a) “repeatedly commits an act or acts that harass another person”;  
“harassment” means “conduct directed at a specific person which

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<sup>49</sup> Colorado 1999 Statutes, Title 18 Criminal Code, § 18-9-111(1)(f).  
<sup>50</sup> Colorado 1999 Statutes, Title 18 Criminal Code, § 18-9-111(1)(g).  
<sup>51</sup> Delaware Code, Title 11, Crimes and Criminal Procedure, § 1311(a)(2).  
<sup>52</sup> Colorado 1999 Statutes, Title 18 Criminal Code, § 18-9-111(1)(h).  
<sup>53</sup> Kentucky Revised Statutes, § 525.070(1)(c).  
<sup>54</sup> Iowa Code 1999, § 708.7, subsection 1.a(3).  
<sup>55</sup> Wisconsin Statutes, § 813.125(1)(a).  
<sup>56</sup> Texas Penal Code, Title 9, Cap 42, § 42.07(a)(3).  
<sup>57</sup> 1999 North Dakota Century Code, Title 12.1 Criminal Code, § 12.1-17-07, subsection 1.d.

would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person”;<sup>58</sup>

- (b) “engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose”;<sup>59</sup>
- (c) “engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose”;<sup>60</sup>
- (d) “has personal contact with another person”; “personal contact” means “an encounter in which two or more people are in visual or physical proximity to each other” and “does not require a physical touching or oral communication, although it may include these types of contacts”;<sup>61</sup>
- (e) threatens “maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety” and the accused “by words or conduct places the person threatened in reasonable fear that the threat will be carried out”;<sup>62</sup>

5.62 **Defences** - Grounds on which the accused may escape liability include the following:

- (a) “lawful demonstration, assembly or picketing”;<sup>63</sup>
- (b) “whenever the actor is a law enforcement officer, licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his duty while conducting surveillance on an official work assignment”;<sup>64</sup>
- (c) the activity was for a “legitimate purpose”;<sup>65</sup>
- (d) the activity was “for a lawful purpose or constitutionally protected”;<sup>66</sup>
- (e) “lawful authority”;<sup>67</sup>
- (f) “any constitutionally protected activity”;<sup>68</sup>

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<sup>58</sup> Arizona Revised Statutes, Title 13, Criminal Code, § 13-2921, subsection A3 & E.

<sup>59</sup> Pennsylvania Consolidated Statutes, Title 18, Crimes and Offences, Chapter 27, §2709(a)3; Arkansas Code of 1987, Title 5, Criminal Offences, § 5-71-208(a)(5); Kentucky Revised Statutes, § 525.070(1)(e).

<sup>60</sup> Wisconsin Statutes, § 813.125(1)(b).

<sup>61</sup> Iowa Code 1999, § 708.7, subsection 1.b.

<sup>62</sup> Revised Code of Washington, Title 9A, Washington Criminal Code, § 9A.46.020(1).

<sup>63</sup> Arizona Revised Statutes, Title 13, Criminal Code, § 13-2921, D.

<sup>64</sup> Arkansas Code of 1987, Title 5, Criminal Offences, § 5-71-208(c).

<sup>65</sup> Iowa Code 1999, § 708.7, subsection 1.b.

<sup>66</sup> New Hampshire Revised Statutes, Title 62, Criminal Code, § 644:4(f).

<sup>67</sup> Nevada Revised Statutes, § 200.571, subsection 1(a).

<sup>68</sup> Pennsylvania Consolidated Statutes, Title 18, Crimes and Offences, § 2709(e).

- (g) “reasonable cause”;<sup>69</sup>
- (h) “good cause”;<sup>70</sup>
- (i) “[the provisions do not apply to] conduct which occurs in the furtherance of legitimate law enforcement activities or to private investigators, security officers or private detectives”;<sup>71</sup>
- (j) “words or conduct that is protected by the Constitution of this State or the United States”;<sup>72</sup>
- (k) “[the offence of harassment] does not apply to law enforcement officers or process servers performing their official duties”;<sup>73</sup>
- (l) the conduct is “performed under terms of a valid license, to ensure compliance with a court order, or to carry out a specific lawful commercial purpose or employment duty, is authorised or required by a valid contract, or is authorised, required or protected by state or federal law or the state or federal constitutions. [The offence of harassment by stalking, following or pursuing another] does not impair the right of any individual or group to engage in speech protected by the federal constitution, the state constitution, or federal or state law, including peaceful and lawful handbilling and picketing.”<sup>74</sup>

5.63 It is common to provide a heavier sentence if one or more additional elements are present, such as:

- (a) the defendant commits harassment because of the victim’s race, colour, religion, ancestry or national origin;<sup>75</sup>
- (b) the defendant has previously been convicted of harassment three or more times during the preceding ten years;<sup>76</sup>
- (c) the defendant has previously been convicted of any crime of violence involving the same victim or members of the victim’s family or household or any person specifically named in a no-contact or no-harassment order;<sup>77</sup>
- (d) the defendant commits harassment in violation of an injunction or restraining order that prohibits harassment;<sup>78</sup>
- (e) when the defendant commits harassment, he threatens to commit a “forcible felony” or “bodily injury”.<sup>79</sup>

### ***Anti-stalking legislation***<sup>80</sup>

<sup>69</sup> Maine Revised Statutes, Title 17-A, Maine Criminal Code, § 506-A, subsection 1.

<sup>70</sup> Arkansas Code of 1987, Title 5, Criminal Offences, § 5-71-208(a).

<sup>71</sup> Delaware Code, Title 11, Crimes and Criminal Procedure, § 1312(d).

<sup>72</sup> South Carolina Code of Laws, § 16-3-1700(A).

<sup>73</sup> South Carolina Code of Laws, § 16-3-1700(A).

<sup>74</sup> Minnesota Statutes 1999, § 609.749, subdivision 7.

<sup>75</sup> Colorado 1999 Statutes, § 18-9-111(2).

<sup>76</sup> Iowa Code 1999, § 708.7, subsection 2.

<sup>77</sup> Washington Criminal Code, § 9A.46.020(2).

<sup>78</sup> South Carolina Code of Laws, § 16-3-1710(B)

<sup>79</sup> Iowa Code 1999, § 708.7, subsection 2 & 3.



5.64 In 1990, following the fatal shooting of actress Rebecca Schaeffer and the murders of four other Californian women, the Californian legislature responded by passing the first anti-stalking law in the US. Within a four-year period thereafter, all 50 States and the District of Columbia had enacted some form of legislative measures to guard against stalking behaviour. Most stalking statutes require proof of intent to cause the victim to fear for his physical safety.

5.65 There are three main categories of stalking statutes in the US, depending on whether there is a threat requirement of some sort:<sup>81</sup>

- (a) One group of stalking statutes models on the California Penal Code and impose a threat requirement; requiring either a “credible threat”<sup>82</sup> or simply a “threat”. This requirement limits the scope of the statute because stalking or harassment *per se* is not an offence.
- (b) The second category is broader in scope. These statutes either make a threat with intent to place the victim in fear, a separate offence punishable under the statute,<sup>83</sup> or by defining the *actus reus* as a “course of conduct” over a period of time which places the victim in reasonable fear of physical injury.<sup>84</sup>
- (c) Stalking statutes in the last category do not require any threat but are limited to conduct in which the offender wilfully and repeatedly follows or lies in wait for the victim with the requisite intent.

5.66 While most States define stalking as the wilful, malicious and repeated following and harassing of another person, some States include in their definition such activities as lying-in-wait, surveillance, non-consensual communication, telephone harassment, and vandalism.

5.67 The National Criminal Justice Association, in conjunction with the National Institute of Justice, the National Victim Center, and other criminal justice and victim organizations, published a report in 1996 that included a model

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<sup>80</sup> See generally, M A Caner, “Validity, Construction, and Application of Stalking Statutes,” 29 ALR5th 487.

<sup>81</sup> R A Lingg, above, at 370-375.

<sup>82</sup> The California Penal Code defines a “credible threat” as “a threat made with the intent and 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. ...The threat must be against the life of, or a threat to cause great bodily injury to, a person”.

<sup>83</sup> Eg the Delaware stalking statute provides that “Any person who wilfully, maliciously, and repeatedly follows or harasses another person or who repeatedly makes a credible threat with the intent to place that person in reasonable fear of death or serious physical injury is guilty of the crime of stalking.”

<sup>84</sup> Eg the New York Penal Code provides that a person is guilty of menacing if the offender “repeatedly follows a person or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place another person in reasonable fear of physical injury, serious physical injury or death.”

stalking statute to assist States in developing felony-level anti-stalking laws.<sup>85</sup> The Model Code reads as follows:

*“Section 1. For purposes of this code:*

- (a) ‘Course of conduct’ means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;*
- (b) ‘Repeatedly’ means on two or more occasions; and*
- (c) ‘Immediate family’ means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.*

*Section 2. Any person who:*

- (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family;*
- (b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of death of himself or herself or a member of his or her immediate family; and*
- (c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;*

*is guilty of stalking.”*

5.68 Since some American courts have ruled that statutes including specific lists should be read as exhaustive, the Model Code does not specify the types of activities which could be construed as stalking behaviour, thereby

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<sup>85</sup> US Department of Justice, National Institute of Justice Research Report, *Domestic Violence, Stalking, and Antistalking Legislation* (1996), at B-1 to B-3.

minimizing the potential for an ingenious stalker to escape liability. The Code therefore targets against a “course of conduct” that would cause a reasonable person to fear bodily injury or death; and a “course of conduct” was defined as repeatedly maintaining a proximity to a person, or repeatedly conveying verbal or written threats or threats implied by conduct which are directed at a person.

5.69 Since a stalker may not intend to cause fear, but may intend to establish a relationship with his victim instead, it is unnecessary for the prosecution to prove that the defendant intended to cause fear under the provisions of the Model Code. As long as a defendant purposefully engages in conduct that would cause a reasonable person fear, and the defendant knows or ought to know that the person toward whom the conduct is directed will be placed in reasonable fear, the mental element is satisfied. Where a defendant knows that his victim has an unusual phobia and uses this knowledge to cause fear in the latter, the jury would have to determine whether the victim’s fear was reasonable under the circumstances.

5.70 While some States require the existence of both a “credible threat”<sup>86</sup> and the appearance that the perpetrator intends and has the apparent ability to carry out the threat, the Model Code does not make threats an essential requirement. As long as it can be shown that the accused repeatedly maintains a visual or physical proximity to the victim, the prosecution can prove stalking without any evidence of a threat conveyed by the accused. Such a formulation takes into account the observation that a stalker often will not threaten his victim but will instead engage in a course of conduct which, taken in context, would cause a reasonable person fear. Hence, the code only requires that the accused knows or ought to know that the victim will be placed in reasonable fear for his or his family members’ safety. However, his conduct must have actually induced fear in the victim.

5.71 The Project to Develop a Model Anti-Stalking Code recommends that States should consider penalty enhancements for stalking convictions in the following circumstances: (a) the offence involves a violation of a protective order; (b) the victim is a minor; (c) the defendant uses a weapon during commission of the crime; or (d) the defendant has committed a previous felony or stalking offence. Alternatively, States may create a separate offence of aggravated stalking to deal with stalkers who have committed previous felonies or stalking offences.<sup>87</sup>

5.72 Since stalking behaviour is often characterised by a series of increasingly serious acts, the Project to Develop a Model Anti-Stalking Code further suggests that States should consider establishing a continuum of charges that could be used by law enforcement officials to intervene at various stages.

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<sup>86</sup> Generally defined as a verbal or written threat of violence made against a person by the perpetrator.

<sup>87</sup> National Institute of Justice, Office of Justice Programs, US Department of Justice, *Domestic Violence, Stalking, and Antistalking Legislation – Annual Report to Congress* (1996), Appendix C (Principal Recommendations of the Project to Develop an Antistalking Model Code), at <<http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/appendc.htm>>, p 1.



Thus, statutes creating the offence of harassment or intimidation could be used to address stalking behaviour that causes a victim emotional distress but does not cause the victim to fear bodily injury or death, while aggravated harassment or intimidation statutes could be used in situations in which a defendant persistently engages in annoying behaviour. The most egregious cases of stalking behaviour that may pose an imminent and serious danger to the victim could then be dealt with by felony stalking statutes.<sup>88</sup> It is against this background that the Model Code treats stalking as a felony and requires a high level of fear, namely, fear of bodily injury or death. Actions that cause annoyance or emotional distress would be punishable under the harassment statutes referred to in the preceding paragraphs, which carry less severe punishment.

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<sup>88</sup> Above, Appendix B (A Model Antistalking Code for the States), at <http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/appendb.htm>, p 2.

## Chapter 6

### The new offence

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#### Need for criminal sanctions

6.1 Although there are no statistics on the prevalence of stalking in Hong Kong, figures in other jurisdictions and the cases and materials provided in Chapter 3 illustrate that stalking is a social problem in Hong Kong for which effective legal remedies should be provided. As pointed out in Chapter 5, all the major common law jurisdictions perceived a need to enact legislation to combat the menace of stalking.

6.2 We agree with JUSTICE that “no new criminal offences should be introduced unless there is a demonstrated need to criminalise a form of anti-social behaviour which is shown to be causing physical and mental harm to others and which cannot be dealt with in any other way under present law.” However, in the light of our findings in Chapters 1, 3 and 4 above, we hold the view that:

- stalking is a form of anti-social behaviour;
- it causes mental or psychological harm to the victims; and
- it cannot be adequately dealt with under existing law.<sup>1</sup>

6.3 Richard Lingg summarises the major advantages of anti-stalking statutes over the traditional remedies:

*“First, stalking statutes will be more uniform than existing protection.<sup>2</sup> Second, the statutes will be more effective than restraining orders because the wide discretion of the police, the judiciary, and the victims themselves will be reduced. Third, the stalking statutes are more comprehensive because they are available to all victims at all times, regardless of whether the victims qualify for civil relief or have the economic resources to pursue protective orders. Fourth, anti-stalking laws will be more responsive to the needs of victims by granting protection without requiring a court appearance. Similarly, the statutes will be effective against stalkers whose identities are unknown to victims,*

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<sup>1</sup> See Conclusion in Chapter 4 above.

<sup>2</sup> It has been pointed out that stalkers slip through the cracks of law enforcement and mental health agencies.

*whereas civil remedies totally fail in this regard since the name of the offender is a prerequisite to obtaining a protective order. Finally, stalking statutes will be a greater deterrent. Mere arrest will often dissuade or reform some offenders, and the prospect of stiffer fines and jail terms will, in many cases, give the would-be stalker reason to reconsider his or her planned conduct. If unsuccessful as a deterrent, the statutes will serve at least to incapacitate the offender and provide victims some relief from harassment.”<sup>3</sup>*

6.4 Harmony House reports that a survey of women staying at their sheltered premises revealed that half of them hoped that the police could give immediate assistance by stopping their husbands abusing them. They blamed the police for failing to discharge their duty to protect battered wives, and put the burden on them to decide whether to prosecute the perpetrators.

6.5 In our view, it is inadequate to rely solely on civil remedies for the following reasons:

- (a) Stalking is a menace to society that ought to be taken seriously by the public and police.
- (b) Stalking behaviour may become more frequent and intrusive and may escalate into violence if not restrained at an early stage.
- (c) It can have long-term and devastating effects on the private, family and business lives of the victims as well as their physical and psychological well-being. These effects are sufficiently serious to justify the imposition of criminal sanctions even though no physical violence is involved.
- (d) Civil proceedings are costly, slow, complex and not appropriate where a victim requires emergency protection.<sup>4</sup>
- (e) Police intervention is necessary to prevent stalking cases from developing into violence. The police should not wait until the stalker has committed violence against the victim. Making stalking an offence would enable the police to intervene in cases which used to be categorised as domestic or private, and give immediate assistance if necessary.
- (f) There is a need to deter stalking by sending a message to would-be stalkers that engaging in such behaviour would result in prosecution.

<sup>3</sup> R A Lingg, above, at 360-1.

<sup>4</sup> A family lawyer was quoted as saying that: “You can’t get hold of a judge and a solicitor in the middle of the night. But you can always get hold of the police.” SCMP, 15.1.98.



- (g) Enacting a stalking law would also send a clear message to the public and police that stalking victims are entitled to early protection of the law. Victims will feel safe and therefore more willing to report harassing behaviour.
- (h) There is also a need to protect the victims by imprisoning stalkers in serious cases. This would not only preclude them from inflicting further harm on their victims, but would also give their victims time to change address, seek help from relatives or social workers, and prepare for the stalker's release.
- (i) Police assistance is necessary if the victim does not know his or her stalker. Civil law cannot require the police to assist in this respect nor do the police have authority to do so if harassment is merely a tort.
- (j) Even if the victim were successful in obtaining a civil injunction, a power of arrest for breach of an injunction does not exist so that further action on the part of the victim is necessary to institute proceedings for contempt of court. It is essential that the investigative powers of the police are made available to bring the stalker to justice.
- (k) In the majority of cases, the mere fact that the police are investigating the matter would stop the stalker from harassing his victim.
- (l) Convicted stalkers who are mentally ill may be ordered to receive counselling, mental evaluation and mental treatment.

6.6 A private citizen points out that the proposal of the sub-committee would allow a woman to use the legislation against a male admirer whom she does not like after receiving gifts from him on two occasions without having told him that she did not like receiving flowers from him. Another private citizen also comments that the proposal would foment hatred among people, lead people to retaliate against each other, result in more antagonism between men and women, and infringe the freedom to court the opposite sex. The Hon James To was also reported as saying that it would be too harsh if human relationships were dealt with by legal measures.

6.7 In romantic and family disputes, a person may call another repeatedly and the ensuing conversations may become "unpleasant, heated or vulgar". These are normal risks of human intercourse and should normally be below the cognizance of the law. It would, however, be otherwise if he knowingly or recklessly persists in harassing the other person. An admirer who repeatedly intercepts or follows a woman on the streets and visits her home or workplace every day can cause alarm or distress to her if she is unwilling to develop a relationship with him. Actions that are acceptable in a normal, loving

relationship can become harassment if one of the parties wants the relationship to end but the other does not.

6.8 We are here not dealing with trivial or innocent behaviour but behaviour which potentially causes the life of victims to be unbearable. The private lives and well-being of many people are affected by the inconsiderate and harmful behaviour of stalkers. It has never been the intention of the sub-committee to restrict the freedom of a person to court the opposite sex, nor do we think that normal courting behaviour would be caught by the proposals. But if a suitor ignores the feelings of his or her target and embarks on a campaign of harassment in order to achieve his object, we see no reason why the law should not intervene to protect the victim.

6.9 People who trivialise the psychological abuse effected by stalking often adopt the stalkers' analysis of events. They see specific incidents out of context as if each incident of psychological abuse is distinct and has no impact on the way in which stalking victims view subsequent incidents. An act which may appear to be minor or trivial when viewed in isolation may constitute an act of psychological abuse if seen as forming part of a pattern of behaviour. Specific acts should be contextualised and seen from the perspective of the victim. Insofar as stalking behaviour is an attempt by the perpetrator to exercise power and control over his victim against the latter's will, there is clearly a need to protect the victim from such behaviour unless there is justification for it.

6.10 In its submission, JUSTICE refers to an article written by Celia Wells in 1997 on the criminal law response to the problem of stalking in England.<sup>5</sup> Wells claims that "there is little here that is not already covered by public order offences or by the [Offences against the Person Act 1861] as now interpreted."<sup>6</sup> JUSTICE echoes her view that "the need for [law] reform is misunderstood and what is identified as a failure of *law* is not a failure of legal *definition* or scope but of construction particularly at a social and cultural level which translates to the police and enforcement level."<sup>7</sup> JUSTICE criticises the "erroneous tendency" of the sub-committee in seeking to justify the proposed offence by reasons like the quick response from the police, sending a clear message to the public, and no need for courts to stretch existing legal concepts to find a remedy.

6.11 It should be pointed out at the outset that the Public Order Ordinance (Cap 245) in Hong Kong has not created the public order offences referred to in Wells' article.<sup>8</sup> In our view, anti-stalking legislation is necessary because there is a failure of "legal definition or scope" which cannot be cured simply by social and cultural recognition of stalking at the enforcement level. In particular, even if Hong Kong courts followed the English courts and applied the assault offences to stalking behaviour that causes psychiatric harm, there would

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<sup>5</sup> C Wells, "Stalking: The Criminal Law Response" [1997] Crim LR 463.

<sup>6</sup> Above, at 470.

<sup>7</sup> Above, at 465.

<sup>8</sup> I.e. sections 4, 4A & 5 of Public Order Act 1986 (UK) referred to in Chapter 5 above.

still be victims who cannot enlist the assistance of the criminal courts because the impact of harassment has not reached sufficiently a serious level. The problem is particularly acute where the behaviour of a stalker is neither criminal nor tortious. As explained in the concluding paragraphs of Chapter 4 above, the existing law has failed to provide effective protection to stalking victims.

6.12 JUSTICE submits that what is needed is (a) better police training to cultivate an understanding of the new developments of the law and the social phenomenon of stalking; (b) the bringing of prosecutions in line with the English case of *R v Ireland* to reflect the ability of the law to deal with stalking behaviour; and (c) the raising of judicial awareness of the phenomenon and the harm that can be done to victims of stalking. However, better police training cannot provide redress to stalking victims unless there is a specific offence of stalking in the statute books. Further, the decision of the House of Lords in *R v Ireland* is of limited use because it applies only to telephone harassment in very exceptional circumstances. Although the House of Lords agreed that “bodily harm” in the Offences against the Person Act 1861 includes “recognisable psychiatric illness”, criminal law should protect a victim from mental assault before such assault has caused him or her psychiatric illness.

6.13 It is impractical and, indeed, undesirable to await developments of the common law to provide comprehensive protection to victims of stalking. Article 15 of the International Covenant on Civil and Political Rights provides that no one shall be held guilty of any criminal offence on account of any act which did not constitute a criminal offence under existing law. Apart from this non-retroactivity principle, Article 15 also embodies the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy.<sup>9</sup> The decision of the House of Lords that the word “harm” in sections 47, 20 and 18 of the Offences against the Person Act 1861 covers both psychiatric as well as physical injury has been criticised as not observing the principle that criminal statutes should be interpreted strictly in favour of defendants.<sup>10</sup> The courts should not stretch the scope of specific offences beyond their proper limits in order to punish stalking behaviour which members of the public would consider ought to be punished.<sup>11</sup> It is therefore undesirable to leave the problem of stalking to the courts to resolve.

6.14 It is worth repeating that stalking is a course of conduct which comprises a range of actions each of which on its own may not be objectionable but, when combined over a period of time, interferes with the privacy and family lives of the victim thereby causing him or her harassment, distress, alarm or even serious impairment of his or her physical or psychological well-being. Existing offences that may be used to deal with stalking have not been designed with harmful persistent behaviour in mind. They address only certain aspects of

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<sup>9</sup> *Kokkinakis v Greece* (1993) A 260-A, para 52.

<sup>10</sup> N Lacey & C Wells, *Reconstructing Criminal Law* (Butterworths, 2<sup>nd</sup> edn, 1998), p 165.

<sup>11</sup> The attempt by the English Court of Appeal to exploit the law of private nuisance in order to create by the backdoor a tort of harassment which was only partially effective has met with disapproval by the House of Lords in the UK: *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426 at 438, *per* Lord Goff.



stalking in isolation. It is unlikely that the actions of the stalker would constitute an attempt to commit a substantive offence. Even if a particular aspect of a stalker's activities is caught by an existing offence, he is unlikely to receive a sentence that reflects the gravity of the abusive conduct viewed in aggregate. Stalkers who repeatedly commit the same offence also do not face the prospect of more severe sentences. The existing criminal law affords protection where a stalker uses violence. However, many stalkers have no intention of using violence; nor will their behaviour necessarily amount to a threat. But the behaviour can still have a serious impact on the health, freedom and quality of life of the victim and his or her family.

6.15 Criminalising stalking behaviour would provide a means of early intervention to prevent the risk of violence and psychological harm to the victim. It would also provide a graduated response to reflect the gravity of the behaviour. Once stalking becomes a crime in its own right, complaints about harassment will be responded to quickly. The police, social workers and mental health professionals will then be able to intervene before another more serious crime is committed. Not only will prosecutors be able to invoke a dedicated offence to deal with such conduct but the courts will also no longer have to stretch existing legal concepts to find a remedy. As most victims are women, stalking law may also be seen as a step towards greater protection of women in society. In the light of the foregoing paragraphs, we conclude that a new offence should be created to tackle the problem of stalking.

6.16 What is needed is a law which can protect victims before the stalkers take violent action. The procedures for obtaining such remedies must be simple, quick, inexpensive and effective. Early intervention by the police should be available in cases where the stalker continues to make unwanted contact with his victim which causes alarm or distress. Since there are many ways by which stalkers can harass their victims, the law must be flexible enough to deal with all kinds of stalking situations.

6.17 We consider that anti-stalking legislation should serve the following purposes:

- (a) to stop threatening and harassing behaviour which disrupts normal life for the victim;
- (b) to prevent such behaviour from escalating into violence by apprehending the stalker before his conduct reaches a serious level;
- (c) to deter stalkers from committing the crime;
- (d) to restrain convicted stalkers from repeating the crime; and
- (e) to provide mental treatment to stalkers in appropriate cases.

## Elements of the new offence

### *Course of conduct*

6.18 The essence of stalking is that the behaviour occurs repeatedly. The definition of “harassment” in the Oxford English Dictionary also refers to “*repeated attacks*” and “*constant molestation or persecution*”. Our study reveals that stalking does not apply to a single action but rather a multitude of actions. The mischief of anti-stalking legislation is repetitive behaviour which is lawful in itself but assumes a threatening character when viewed in aggregate. By imposing a requirement that a stalker engaged in a course of conduct, lawful isolated acts would not be caught.

6.19 Almost all States in the US require that the perpetrator engages in a “course of conduct”. The National Institute of Justice in the US defines a “course of conduct” as “a series of acts over a period of time, however short, evidencing a continuity of purpose”. Twenty five States use the Model Code’s requirement of two or more occasions to specify how many occasions are required to show repeated behaviour as part of a course of conduct; twenty four States do not use this definition, although several of these States use the undefined term “repeated” in their laws.<sup>12</sup> Only one State defines repeated behaviour as at least three acts.<sup>13</sup> There is no requirement that the subsequent acts be the same as the original.

6.20 California uses the phrase “however short” to describe the period of time over which the acts must occur to constitute a “course of conduct”. Some States omit this phrase while others give a more definite time frame. In New Zealand, the Harassment Act 1997 provides that a person harasses another person if he engages in a pattern of behaviour that is directed against that other person, being “a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.”

6.21 We consider that the concept of persistence should be introduced into the formulation of the new offence by utilising the phrase “course of conduct”. A single act, no matter how bizarre, should not attract criminal liability. However, the risk of a conviction increases with the number of contacts. The incidents constituting the course of conduct need not be the same each time.

6.22 The Consultation Paper considered that conduct on two occasions should suffice to constitute a “course of conduct”; and in order to achieve certainty, the law should provide that “course of conduct” involves conduct on at least two occasions. A respondent suggests that a higher threshold, such as conduct on at least three occasions, should be required. This suggestion is

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<sup>12</sup> American courts have held that two or three incidents can be a pattern or series. It appears that two or three activities are sufficient to establish the core of the crime of stalking: K G McAnaney and others, above, at 907.

<sup>13</sup> *The Third Annual Report to Congress under the Violence Against Women Act*, above, p 28.

made on the basis that Hong Kong people live and work in close proximity to one another. An alternative suggestion was that the legislation should require conduct on two occasions within a specified period of time, say six months. Other respondents comment that it would be too harsh if a person is arrested for telephoning or waiting outside another person's home on two occasions only.

6.23 The mere fact that there have been two incidents involving the same perpetrator and the same victim does not of itself necessarily establish that the former has pursued a course of conduct against the latter. Apart from the number of incidents, the distance in time between the incidents is also relevant. The longer the duration, the less likely that the incidents will constitute a course of conduct. Recently, the Queen's Bench Divisional Court in the UK held that the fewer the incidents and the wider apart they were spread, the less likely that a finding of harassment could reasonably be made.<sup>14</sup> However, incidents which are separated by a year can still constitute a course of conduct. To cite the example given by Timothy Lawson-Cruttenden and Neil Addison, an anti-Semite who shouts obscenities outside a synagogue every Passover can be said to be pursuing a course of conduct even though there is a period of a year between each incident.<sup>15</sup> Another example given by the English court is threats made on the complainant's birthday every year.<sup>16</sup>

6.24 Compared with jurisdictions that have stalking legislation, Hong Kong is a densely populated area whose residents live in close proximity to one another. However, this fact only indicates that there is even more reason supporting the introduction of such legislation: the more concentrated the activities of a city, the easier it is to stalk someone and the more difficult it is for the victim to avoid being stalked.

6.25 The word "course" has the following meanings in *The New Shorter Oxford English Dictionary* when used in relation to time, events or action:

"...11 *The continuous process (of time), succession (of events); progress through successive stages.* ... 12 *Habitual or regular manner of procedure; custom, practice.* ... 16 *A line of conduct, a person's method of proceeding.*"

6.26 We consider that the ordinary meaning of the phrase "a course of conduct" is sufficiently clear to render further elaboration unnecessary. It is unnecessary for the legislation to provide that a "course of conduct" must involve conduct on at least two occasions. Such a requirement as proposed in the Consultation Paper does not add anything. What is essential is that there be a "course of conduct". Whether conduct on two or more occasions amounts to harassment depends on the circumstances of the case. To achieve flexibility,

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<sup>14</sup> *Lau v Director of Public Prosecutions*, [2000] *The Times Law Reports*, 29 March.

<sup>15</sup> T Lawson-Cruttenden & N Addison, *Blackstone's Guide to the Protection from Harassment Act 1997* (Blackstone Press, 1997), at 13.

<sup>16</sup> *Lau v Director of Public Prosecutions*, [2000] *The Times Law Reports*, 29 March.



the legislation should neither specify the number of incidents involved nor specify the period of time within which the incidents should occur.

### ***Level of harm***

6.27 Some of the activities of stalkers that are directed at the victim are harmless in themselves. It is lawful for someone to walk up and down a street or hang around in the street outside a house. The line between stalking and just following someone is difficult to draw. It is more of an emotional situation than a physical one. There are usually no signs of physical contact with the victim. But seemingly innocuous activities such as following, when done repeatedly for a period of time and targeted at the same individual, are likely to generate fear or cause substantial emotional distress. The victim's state of mind is therefore an important component of stalking law. It is the harmful effect which the behaviour has on the victim that turns what would otherwise be legitimate behaviour into criminal conduct.

6.28 The impact of stalking on the victim is often to cause harassment, alarm, distress or fear. In the UK, it is an offence to pursue a course of conduct which amounts to harassment of another; and harassment of another is defined as including causing that person alarm or distress. The Irish Act also proscribes persistent acts that harass another; a person harasses another if he "seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other".

6.29 In New Zealand, the mischief is acts that cause a person to fear for his or her safety (or the safety of his or her family members). The position in Canada is similar. The behaviour of the accused must cause the other person to fear for his or her safety (or the safety of someone known to him or her) and such fear must be reasonable in all the circumstances. The test that the fear must be reasonable in all the circumstances is an objective one. It serves to exclude from the scope of the legislation fears that arise from paranoia or are purely imaginary.

6.30 The position in the US varies from State to State. The US Model Code requires reasonable fear of bodily injury or death. A statute requiring a reasonable fear of death or bodily injury criminalises a narrower range of behaviour than a statute adopting the "reasonable fear for safety" test. In 1998, 26 States in the US require a reasonable fear of death or bodily injury to prosecute under the stalking law; five States require a fear for one's personal safety; and nine States protect against emotional distress and related response, such as feelings of annoyance or being threatened. Many States extend the scope of fear to include the victim's family. Six States omit completely the requisite level of fear needed to prosecute.<sup>17</sup> However, it should not be overlooked that the threshold of harm in the harassment statutes in the US is

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<sup>17</sup> *The Third Annual Report to Congress under the Violence Against Women Act*, above, p 28.

generally lower than that in the stalking statutes in that country. The following are examples given in Chapter 5 above:

- (a) the accused “continues to follow another person in or about a public place for no legitimate purpose after being asked to desist” ;
- (b) “places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence, other than the residence of the defendant, for no purpose other than to harass, alarm, or annoy” ;
- (c) “repeatedly follows or contacts another person or causes such following or contact knowing that he or she is thereby likely to cause a substantial disruption of the regular activities of the other person” ;
- (d) “makes repeated communications at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another’ s home or private residence or other private property” ;
- (e) “communicates with a person by telephone, telegraph, mail or any other form of written or electronic communication in a manner which the person knows is likely to cause annoyance or alarm” ;
- (f) “repeatedly commits an act or acts that harass another person” ;
- (g) “engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose” ;
- (h) “engages in a course of conduct which harass or intimidate another person and which serve no legitimate purpose” ;
- (i) “has personal contact with another person” .

6.31 The sub-committee recommended in the Consultation Paper that a person who knowingly “pursues a course of conduct which amounts to harassment of another” should be guilty of an offence. Although they further recommended that “harassment” be defined as including causing someone “alarm or distress”, the sub-committee considered that it was unnecessary to give a definition to “harassment” itself.

6.32 The following are comments from respondents to the Consultation Paper:

- (a) Safetalk Domestic Violence Support Group agrees that the more flexible the law can be, the more successfully it can be applied. The Group points out that many abusive partners have the “creative ability” to manipulate around legal barriers they encounter once they receive warnings.
- (b) The Law Society’s Criminal Law and Procedure Committee is concerned that “stalking” can be such a wide concept that criminalising stalking may have the adverse effect of making people avoid any social contact in order to prevent any false accusations.
- (c) Security Bureau comments that there appears to be a need to define more clearly what constitutes “stalking” or “harassment” so that people may have a clear idea of what they cannot do. They add that this would also help to avoid unnecessary uncertainty in law enforcement.
- (d) The Hong Kong Federation of Women suggests that stalking should be more clearly defined in legislation so that those who handle stalking cases have clearer guidance. They propose that the following factors should be taken into account when defining what constitutes stalking:
  - the number of occasions;
  - the gravity of the behaviour;
  - an objective test, ie whether ordinary people would regard it as stalking and would cause the victim alarm or distress;
  - a subjective test, ie whether the conduct has affected the well-being of the victim and the victim regards the pursuit as amounting to stalking.
- (e) The Hong Kong Human Rights Commission comments that since any person who is convicted of stalking might be imprisoned, they are concerned that the new legislation might be abused if it does not strictly define what amounts to harassment.
- (f) The Hong Kong Journalists Association proposes that the definition of harassment be tightened to include only activities that caused, or could cause, alarm or distress.
- (g) The Hong Kong Association of Banks comments that the proposed formulation would set the standard too low. They prefer the Canadian formulation that the harassment has caused the other person to fear for his safety or the safety of anyone known to him, and that “safety” here means not only freedom from physical harm but also freedom from fear of mental or emotional or psychological trauma.
- (h) The Legal Aid Department agrees that an approach which focuses on the effect of behaviour in terms of its tendency to give rise to harassment rather than by characterising aspects of particular behaviour would overcome the impracticality of attempting to enumerate all behaviour that could or might constitute harassing conduct. However, they suggest that



“harassment” should be defined for the purposes of the offence. They point out that without a clear definition, piecemeal developments of case law would result in uncertainties in law.

6.33 There are at least five options open to the Commission:

**Option A**

Retain the original recommendation in the Consultation Paper, and maintain that “harassment” should not be defined in the legislation.

**Option B**

Retain the original recommendation but give a definition of harassment.

**Option C**

Retain the original recommendation but give examples of a course of conduct which would amount to harassment of another.

**Option D**

Raise the threshold of harm from “harassment” to, for instance,

- (a) the victim fearing for his or her safety or the safety of a person known to him or her, and “safety” may be further defined as including the victim’s mental well-being; or
- (b) the victim being placed in fear of physical or mental harm, and “mental harm” may be further defined as including psychological harm and pain.

**Option E**

Instead of relying on the concept of “harassment”, the law should list all the proscribed behaviour instead, with or without an all-encompassing provision.

6.34 Insofar as an individual ought to have a right to be protected from harassment under the law, a person whose pursuit amounts to harassment of another can properly be said to be culpable.<sup>18</sup> It is not sufficient to confine the scope of the legislation to cases where the stalker has caused a victim to fear for his or her safety. Harassing behaviour which has not caused the victim to fear physical or mental harm might nevertheless be frightening and objectionable. For instance, a man who has never said a word to the victim may have been persistently watching and following him or her. But the mere presence of that man at every turn might cause the victim alarm or distress. Silent telephone calls at night may also seem menacing. There are many cases where the victim is

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<sup>18</sup> It may be recalled that (a) mere touching without consent and without causing actual bodily harm is suffice to bring a charge of common assault the maximum penalty of which is one year’s imprisonment and (b) a person is liable to two years’ imprisonment if he loiters in a public place and his presence there has caused another person to be reasonably concerned for his “well-being”.

subject to constant harassment but knows that the stalker is unlikely to put his or her safety at risk. If the legislation were focused on a particular kind of belief, many stalkers could get round the offence and their victims would be deprived of the protection they deserve. As Michael Allen puts it:<sup>19</sup>

*“The purpose of an anti-stalking law must be to provide protection to victims from behaviour which seriously impairs their quality of life. The essence of this behaviour is not that it threatens violence or will lead to violence (although it generally creates a fear of violence on the part of the victim) but rather that it constitutes an enforced form of contact between the victim and the stalker which the victim does not want and which the stalker pursues either for the purpose of compelling the victim to do or abstain from doing that which the victim has a right to abstain from doing or to do, or simply for the purpose of causing harassment, alarm or distress to the victim. That many victims are put in fear, or suffer harm, are aggravating factors but these should not be seen as prerequisites to establishing an offence.”*

6.35 Whether a pursuit amounts to harassment depends on the particular circumstances of the case. Persistently asking a woman for a date does not normally constitute harassment. But if it were coupled with other behaviour such as unwanted communications, uninvited visits, loitering and following, and continued for weeks or months despite being expressly told not to do so, then the court may have grounds to conclude that the stalker has exceeded the bounds of reasonableness.

6.36 In the light of the aforementioned, we decide that a person who, without lawful authority or reasonable excuse, pursues a course of conduct which amounts to harassment of another, should be guilty of an offence.

6.37 **Degree of harassment experienced by the victim** - The sub-committee considered that it is unnecessary to define harassment in the legislation, “harassment” being an ordinary word that can easily be understood by the courts and the ordinary public. Harassment is similar to concepts like molestation and pestering. These concepts are familiar to the family courts. “Molestation” is not defined in the Domestic Violence Ordinance but it is clear that molestation includes, but is wider than, violence. It has been held that “violence is a form of molestation but molestation may take place without the threat or use of violence and still be serious and inimical to mental or physical health.”<sup>20</sup> Hence, molestation encompasses any form of serious pestering or harassment and applies to any conduct which could properly be regarded as such a degree of harassment as to call for the intervention of the court. We are not aware of any problems having arisen from the fact that molestation is not defined in the Ordinance.

<sup>19</sup> M J Allen, “Look Who’s Stalking: Seeking a Solution to the Problem of Stalking” [1996] 4 Web JCLI at <<http://webjcli.ncl.ac.uk/1996/issue4/allen4.html>> (21.10.99) pp 28 – 29.

<sup>20</sup> *Davis v Johnson* [1979] AC 264 at 334A, per Viscount Dilhorne.

6.38 The offence of harassment in section 264 of the Canadian Criminal Code does not contain a definition of the word “harass”. Canadian courts therefore resort to the ordinary or dictionary definition of the word.<sup>21</sup> The Alberta Court held that various words in that section, including the word “harass”, are capable of definition by using either case law or an appropriate dictionary definition. After reviewing the definitions of the word “harass” in the Oxford English Dictionary and Webster’s Dictionary, the court concluded that the most appropriate synonyms are those which imply “being tormented, troubled, worried continually and chronically, being plagued, bedeviled and badgered.”<sup>22</sup> We consider that providing a definition of harassment in the legislation might become over restrictive and could lead to borderline disputes.

6.39 **Causing alarm or distress** - Nonetheless, we agree that harassment that does not involve any real degree of harm should be below the cognizance of the law. In order to address the concern that the requirement of harassment is too low because the harm suffered by a victim of harassment could be nothing other than a triviality, we further decide that the degree of harassment experienced by the victim must have reached such a level that he or she is alarmed or distressed. Hence, the activities engaged in by the stalker should have caused the victim alarm or distress before the former could be charged with the offence of harassment.

6.40 We have considered whether the expression “alarm, distress or harm” should be used instead. We hold the view that the word “harm” (which might be defined to cover both physical and mental harm) need not be included because any harm to the victim, which is more serious than causing him or her alarm or distress, is likely to be caught by the existing criminal law, which protects individuals from intimidation as well as “recognisable psychiatric illness” and physical assault wrongfully inflicted by another.

6.41 **Target of the pursuit** - The person against whom the course of conduct is directed need not be the same person as the one who is subjected to harassment. The stalker may engage in a course of conduct that is directed against a person or persons known to the victim in order to harass the latter. A person could be alarmed or distressed without himself being the direct target of the course of conduct.

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<sup>21</sup> The Manitoba Law Reform Commission Report on Stalking observes at p 58: “The word ‘harass’ has been held to mean ‘engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.’ It includes troubling someone by frequent attacks, and subjecting them to constant molesting or persecution. In another context, courts have defined ‘harassment’ as meaning to ‘vex, trouble or annoy, continually or chronically ...’ The criminal cases have also concluded that ‘harassment’ requires conduct which occurs on more than one occasion because the word ‘harass’ imports a sense of ongoing or repeated conduct. A single act, even if it puts another in fear for her safety, does not constitute harassment.” (Footnotes omitted)

<sup>22</sup> *R v Sillipp* (1995) 99 CCC (3d) 394, 418.



6.42 **Alternative of listing all prohibited acts in the legislation -**

The alternative to making harassment an offence is to define in the legislation all imaginable stalking activities. Examples can be found in the Canadian and Australian statutes referred to in Chapter 5 above. The UK Government thought that this would inevitably omit some activities that are distressing to victims, since stalkers are adept at finding new ways to harass their victims. The US Task Force on Stalking concluded that legislation should not list specifically prohibited acts “because ingenuity on the part of an alleged stalker should not permit him to skirt the law.”

6.43 We consider that it is impossible to enumerate all the behaviour that could constitute harassing conduct. The law should be wide enough to provide maximum protection to victims. It should be flexible enough to enable the courts to make common-sense judgments based on a determination of when harassing and intrusive conduct exceeds the bounds of what society will tolerate and poses a risk to an individual’s physical or mental health.<sup>23</sup> By criminalising conduct which constitutes harassment without specifying a list of prohibited activities, all kinds of activities that cause harassment can be caught, irrespective of whether they might be termed stalking or otherwise.

6.44 **Concluding remarks** - It is noteworthy that the level of “violence” in assault need not be great and will be satisfied by any unlawful touching of another, including an unwanted kiss. Despite the wide scope of the offence of assault, there has never been any suggestion that it is open to abuse in practice. Blackstone explained that:

*“the law [of assault] cannot draw the line between different degrees of violence, and therefore prohibits the first and lowest stage of it; every man’s person being sacred, and no other having a right to meddle with it, in any slightest manner.”<sup>24</sup>*

6.45 Under the law as it stands, a person who has committed assault or battery against another on one occasion may be arrested and imprisoned even though he has caused the victim neither physical harm nor emotional distress. Harassment is in the nature of psychological assault. Given that stalking behaviour that causes alarm or distress is more harmful than unlawful touching, a stalker should be no less culpable than a person who is guilty of common assault.

### ***The threat requirement***

6.46 In the US, most stalking laws require the existence of a “credible threat” which was “made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear

<sup>23</sup> M Brazier, “Personal Injury by Molestation - An Emergent or Established Tort” [1992] Fam Law 346 at 348.

<sup>24</sup> Blackstone, *Commentaries*, iii, 120, cited in *Collins v Wilcock* [1984] 3 All ER 374 at 378.

for his or her safety”. Others include in their requirements threats against the victim’s immediate family. But some States require only that the perpetrator’s course of conduct constitute an implied threat.

6.47 The credible threat element requires a victim to wait until the stalker has made a threat, intends to carry out the threat and has the apparent ability to do so. Hence before a victim is protected, the stalker must be ready, willing and able to commit an act of violence. By the time this happens, the stalker may be only moments away from harming his victim.<sup>25</sup> This is unsatisfactory because the victim will remain unprotected until the stalker becomes violent. Stalking behaviour should be taken seriously even in the absence of a “credible threat”. Stalking perpetrated by a former intimate is often a warning sign of future violence. In order to protect stalking victims before it is too late, legal protection of stalking victims should begin from the commencement of stalking behaviour.<sup>26</sup>

6.48 Many of the more serious consequences of stalking are not preceded by any threat. If a stalker does not threaten his victim, but instead repeatedly makes telephone calls, follows his victim down the street, waits near the approach to the victim’s home, and sends unwanted articles to him or her, the stalker cannot be prosecuted until the stalker becomes violent. But sending a dozen roses to the office of the victim every day or lying in wait outside the victim’s place of residence every evening could be threatening even though the stalker has not made any oral or written threat.<sup>27</sup> Stalkers who are familiar with the elements of the crime would refrain from communicating any threat, and so avoiding apprehension by the police.<sup>28</sup>

6.49 The loophole created by the threat requirement may be closed by providing that the making of a threat is a separate act punishable under the statute. Another option is to omit any reference to the making of a threat. The US Model Code follows this approach. It defines the *actus reus* of the crime as “purposely engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury” to himself or a member of his immediate family.

6.50 The Consultation Paper argued that harassing behaviour is harmful whether or not the stalker has threatened his victim. Imposing a threat requirement will fail to catch stalkers who have not made any threat or have little or no communication with their victims. It is also unnecessary to make threatening conduct an alternative component of the crime. Where the stalker has committed an act which threatens his victim with injury to his person or property, he may be prosecuted for an assault or an intimidation offence.

6.51 The Association for the Advancement of Feminism agrees with the sub-committee that verbal threats or threatening conduct should not be an

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<sup>25</sup> C A Marks, above, at 482 & 498.

<sup>26</sup> C A Marks, above, at 476.

<sup>27</sup> N Diacovo, above, at 408.

<sup>28</sup> R A Lingg, above, at 371 n 149; N Diacovo, above, at 410-411.

element of a stalking offence. The Hong Kong News Executives' Association also agrees that imposing a threat requirement will fail to catch stalkers who have not made any threat or have no communication with their victims. However, they point out that the absence of a threat requirement would render genuine investigators liable to be prosecuted. They believe that whether or not there was a threat should be taken into consideration when deciding whether the behaviour was reasonable and in determining the sentence to be imposed on the offender. We agree with their views but do not think that this needs to be spelt out in the legislation. Whether the defendant has threatened the victim is surely one of the factors to be taken into account by the courts. We conclude that the making of a threat should not be included as an element of the offence.

### ***Mental element of the proposed offence***

#### *Intention*

6.52 Most Australian stalking statutes require proof of intent to cause harm to another person or a third person. Some of the stalking statutes in the US also require that the accused has the intent to cause the victim to fear death or injury or to place him in fear of his safety. However, proof of either knowledge or recklessness would suffice under the relevant provisions of the Canadian Criminal Code and the Irish Act. The UK Protection from Harassment Act requires actual or constructive knowledge. As for New Zealand, the prosecution may prove either intention or knowledge.

6.53 It is common cause that if the stalking offence requires specific intent on the part of the stalker, the anti-stalking provisions will not help victims who suffer at the hands of stalkers who are delusional and not capable of forming the necessary intent. A delusional stalker may be acting out of "love" for the victim, or out of a belief that he or she is, or is meant to be, bonded to the victim.<sup>29</sup> He may also truly believe that his object is in need of his protection:

*"[A] stalker in the Erotomania category, who believes his victim shares his romantic feelings and would respond but for some barrier, may not initially intend to put the victim in fear. He may simply be trying to accomplish his goal of removing the barrier which he believes hinders the establishment of a relationship with his victim. Furthermore, the methods employed by those stalkers who do specifically intend to place their victims in fear may be too subtle or dependent on context to qualify as credible proof of intent to place in fear."*<sup>30</sup>

6.54 Dillon LJ echoed this view when he said that it was both undesirable and unnecessary that the order of the court restraining the defendant

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<sup>29</sup> K G McAnaney and others, above, at 907.

<sup>30</sup> See C A Marks, above, 483.



from “using violence to, harassing, pestering or communicating with” the plaintiff be qualified by words such as “by doing acts calculated to cause the plaintiff harm”.<sup>31</sup>

*“I regard such a qualification as undesirable, because it would complicate enforcement of the injunction pending trial of the action; the defendant would assert that any act of pestering or harassment of which complaint was made was not by itself calculated to cause the plaintiff harm. I also regard the qualification as unnecessary because (i) the campaign of harassment has to be regarded as a whole without consideration of each ingredient in isolation, and viewed as a whole it is plainly calculated to cause the plaintiff harm, and can be restrained quia timet because of the danger to her health from a continuation of the stress to which she has been subjected; (ii) threats of violence can be restrained per se, whether or not the threat, without the subsequent violence, is calculated to cause the plaintiff harm; and (iii) telephone harassment is, in my judgment, as indicated above, an actionable interference with her ordinary and reasonable use and enjoyment of property where she is lawfully present, and thus, on the past history, can be restrained quia timet without further proof of damage.”*

6.55 Existing offences, which require proof of specific intent, are not effective in convicting stalkers because many stalkers could claim that they have no intention of causing harm to their victims. In an English case,<sup>32</sup> a stalker was charged with “causing grievous bodily harm with intent” under section 18 of the Offences against the Person Act 1861. The accused stalked the victim by various means. He telephoned her up to ten times a day. He had sat outside her house with a machete; registered his car in her name; and ensured that she received a string of parking tickets. On one occasion, he threatened her with a knife. However, the magistrate held that there was insufficient evidence to prove intention to cause grievous bodily harm.

6.56 A stalker who is infatuated with his object may never have intended to cause harm or distress to him or her. He may claim that his actions are motivated by love or a desire to protect the victim, or by a belief that his activities are welcomed by his victim. We therefore conclude that intention to harass should not be included as an element of the proposed offence.

### *Knowledge that the victim is harassed because of the pursuit*

6.57 Although stalkers may not intend to cause harm to any person, they usually know that they are harassing another person. The US Model Code, the

<sup>31</sup> *Khorasandjian v Bush* [1993] 3 WLR 476 at 486.

<sup>32</sup> *R v Chambers*, Inner Crown Court, September 1996, cited in T Lawson-Cruttenden & N Addison, *Blackstone's Guide to the Protection from Harassment Act 1997* (Blackstone Press, 1997), at 7.

UK Protection from Harassment Act 1997, the Canadian Criminal Code and the New Zealand Harassment Act 1997 therefore make knowledge an element of the offence. The US Model Code requires that (i) the accused purposefully engaged in a course of conduct that would cause a reasonable person fear, and (ii) he knew or ought to have known that the victim would be placed in reasonable fear. Likewise, the UK Protection from Harassment Act 1997 requires that the accused knew or ought to have known that his pursuit amounted to harassment. In Canada, the prosecution has to prove that the accused knew that another person was harassed or was reckless as to whether the other was harassed. As for New Zealand, the Harassment Act 1997 accepts proof of either intention or knowledge on the part of the accused. The Irish Non-Fatal Offences against the Person Act 1997 adopts intention and recklessness as the mental element of the offence of harassment.

6.58 In order to avoid the difficulty arising from the need to prove intent, it should suffice that the stalker knows that his conduct amounts to harassment of his victim. The proposed offence should not be based on a course of conduct which amounts to harassment of a reasonable person as opposed to a particular individual. As long as the victim is alarmed or put in a state of distress by the stalker, it is not necessary to show that a reasonable person would be so harassed. If the stalker were to be found guilty only if the pursuit constitutes harassment of a reasonable person, he would be able to escape liability if his victim is hypersensitive or otherwise suffering from mental illness even though he is aware of this fact. Applying a subjective test would not be unfair to the accused because the prosecution would still have the burden of proving that he knew that his pursuit amounted to harassment of his victim. A stalker who knows that his victim is sensitive to his campaign of harassment but nevertheless subjects him to harassment should be held liable for his conduct.

6.59 The submission of Safetalk lends support to the above observations by pointing out that certain forms of stalking behaviour may not seem particularly noteworthy to a reasonable person but the victim may have a different perspective because he is acutely sensitive to the abuser's mindset and actions built up from knowledge of the stalker in the past. Safetalk thinks that a person who has himself been stalked would be a better benchmark to use, rather than an ordinary person with no such experience.

6.60 There are also stalkers who do not turn their minds to the feelings of their victim. Some of these stalkers are aware that their conduct might amount to harassment but nevertheless persist in harassing the victim. Where the stalker is an erotomaniac individual who truly believes himself or herself to be loved by the victim, he or she is incapable of realising that the target is harassed as a result of his or her pursuit. It will be recalled that an erotomaniac stalker often fantasizes the existence of an idyllic romantic love with the target. They may misperceive the target to be his or her spouse or suitor, or project the target into the role of lover or would-be lover. They then view themselves as the one being pursued or loved rather than as the pursuer or harasser. These stalkers believe that their targets would respond to their romantic feelings but for some barrier.

Some of them therefore justify their role as suitor or would-be lover on the basis of their mistaken but honest belief that the targets sufficiently reciprocate affection despite the absence of any actual relationship or emotional reciprocity. These stalkers try various means to contact their targets. Their object is not to annoy or harass their targets, but to seek to evoke love feelings from the latter and to establish a relationship with them.<sup>33</sup> In order to catch stalkers who are reckless as to whether their victims are alarmed or put in a state of distress, the proposed offence should ensure that a person who pursues a course of conduct, which a reasonable person would realise amounts to harassment of the victim, could not escape liability even though the stalker himself does not know that the pursuit is harassing. Where the victim has indicated that the stalker's conduct is unwelcome but the stalker nevertheless continues to act in a harassing way, the stalker should be deemed to have the necessary knowledge which would render him liable in respect of the subsequent conduct.

6.61 A few submissions expressed concern that the proposals would catch innocent conduct. For example, JUSTICE argues that the new offence is undesirable from the angle of the administration of criminal justice. The reason being the defendant would be at the mercy of the alleged victim "who may be in a position to transform startling coincidences into deliberate acts to cause alarm." We consider that if the prosecution is able to prove that the stalker has deliberately engaged in a course of conduct which he knows or ought to know amounts to harassment of another person, it is unlikely that the stalker's behaviour is innocent unless one of the defences is available to him.

6.62 In the light of the above considerations, we conclude that a person who pursues a course of conduct which amounts to harassment of another should be guilty of the proposed offence if he knows or ought to know that his pursuit amounts to harassment of the other.<sup>34</sup>

### *Standard of a reasonable person in possession of the same information*

6.63 An objective test would be applied in determining whether a person ought to know that his course of conduct amounts to harassment of another. This would ensure that the mere act of watching, following or approaching the victim, if standing alone, would not be sufficient to constitute the offence of harassment. Conduct which is aimless, unintentional or accidental should not be made criminal under the legislation.

6.64 However, although the standard of a reasonable person would normally be used as a yardstick when applying the objective test, adopting such

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<sup>33</sup> P E Dietz and others, "Threatening and Other Inappropriate Letters to Hollywood Celebrities", 36 *J Forensic Sci* 185 (1995), cited in K G McAnaney and others, above, 832.

<sup>34</sup> The Washington and Indiana statutes have withstood constitutional attack despite the lack of a specific intent element: *State v Lee*, 917 P 2d 159 (Wash Ct App 1996) (upholding stalking statute which did not require a specific intent to cause harm but did require that a stalker know or should have known that his or her behavior was frightening); *Johnson v. State*, 648 N.E. 2d 666, 670 (Ind Ct App 1995) (upholding stalking statute because it required a stalker to engage in a knowing or intentional course of conduct). See C A Marks, above, 495.



a standard cannot protect persons who are harassed by stalkers who know that they are sensitive or would react strongly to certain objects, behaviour or suggestions.

6.65 To illustrate how the reasonable person test can operate to the disadvantage of a victim of stalking, we cite the example of a man who repeatedly tells his former spouse that he would send lizards to her home at night if she does not accede to his request. One may postulate that his conduct would not be considered by the courts as amounting to harassment if the reasonable person test is applied; the reason being a reasonable person would not be afraid of lizards which do not cause any harm to human beings. However, if the woman is afraid of lizards and this piece of information is known to that man, the latter should be held liable for harassment if the woman was alarmed or put in a state of distress as a result of his words or conduct, even though a reasonable person would not feel the same way as the woman did.

6.66 The Consultation Paper recommended that a person should be taken to have the requisite knowledge if a reasonable person *in possession of the same information* would think that the pursuit amounted to harassment of the victim.

6.67 JUSTICE thinks that if the prosecution chooses to prove actual knowledge instead of imputed knowledge, the court would not be asked to assess whether a reasonable person in the position of the victim would react with alarm or distress to the course of conduct. They argue that this creates the danger of “taking the victim as one finds him or her”.

6.68 Under the proposals of the sub-committee, the prosecution would have the burden of proving that the victim is in fact harassed by the accused’s pursuit *and* the accused knew or ought to have known that the victim was subjected to harassment as a result of the pursuit. It is not a case of the accused taking the victim as he finds him. The accused will be someone who chooses to harass the particular victim even though he knows or ought to know that the victim will be harassed as a result of his deliberate acts. A person who possesses the requisite knowledge but nonetheless conducts a campaign of harassment ought to be liable for his conduct irrespective of whether or not a reasonable person in the position of the victim would have reacted in the same way as the victim did.

6.69 JUSTICE also comments that where the court is asked to consider whether the defendant ought to have known that the pursuit amounted to harassment, the standard of a reasonable person in possession of the same information as the victim would require the court “to hypothesize and to perform ‘mental gymnastics’”. In our opinion, if the courts have encountered no great difficulties in formulating the reasonable person test and defining notions such as “negligence”, “intention” and “recklessness”, there is no reason to speculate that they would encounter difficulties in defining the standard of “a reasonable person in possession of the same information”.

6.70 The Legal Aid Department submits that to allow proof of imputed knowledge and to define this mental state by reference to a reasonable person in possession of the same information would have the potential of introducing an element of uncertainty “by introducing a new objective test of the reasonable man whose effect may be to complicate rather than provide for clarity”. They opine that the introduction of this “new and untried concept” would place an additional and difficult burden on the prosecution to establish what information was in fact available to the offender in order to enable the court to determine whether or not a reasonable person would consider, on the basis of such information, that the pursuit does in fact amount to harassment. They prefer a requirement based on the concept of recklessness. They argue that this has the advantage of basing the mental element on established common law principles relating to recklessness.

*Reckless as to whether the victim is harassed*

6.71 There are two kinds of recklessness in criminal law, which have been called “*Cunningham* recklessness” and “*Caldwell* recklessness” after the leading cases. *Cunningham* recklessness requires proof that the defendant was aware of the existence of an unjustifiable risk of causing the particular kind of harm and yet has gone on to take the risk of it. He must actually know of the existence of the risk and deliberately take it. This test applies to assault and battery. A person charged with assault or battery must actually foresee the risk of causing apprehension of violence, or the application of it, as the case may be, and take that risk. Where *Cunningham* recklessness is required, the defendant can escape liability if he was unaware of the risk – even though he ought to have been aware of it; the inadvertent taking of an unjustifiable risk does not entail liability.

6.72 *Caldwell* recklessness requires proof that the defendant did an act which created an obvious risk of causing the particular kind of harm.<sup>35</sup> The risk must be obvious to the ordinary prudent person. Furthermore, the prosecution has to prove that when the accused did the act he either:

- (i) had not given any thought to the possibility of there being any such risk, i.e. he failed to advert to the obvious (“inadvertent recklessness”); or
- (ii) had recognised that there was such a risk and had nonetheless gone on to do it, i.e. he ignored a known and unacceptable risk (“advertent recklessness”).

6.73 It is not at all clear whether the *Cunningham* test or the *Caldwell* test would be applied if the term “reckless” were used in the stalking legislation.

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<sup>35</sup> It seems that the *Caldwell* test is limited to criminal damage and a number of statutory, probably mainly regulatory, offences. In England, *Caldwell* recklessness does not apply to offences against the person at common law, rape and manslaughter.

Terms such as reckless and recklessly may not necessarily bear the same meaning in different legislation.<sup>36</sup>

6.74 Where *Caldwell* recklessness is applied by the courts, a defendant who fails to direct his mind to the possibility of a risk, which would have been obvious to a reasonable person had he done so, is reckless. However, if he has considered whether there is such a risk and mistakenly concludes that there is none, he is not reckless under the *Caldwell* test. This is sometimes referred to as the lacuna in the *Caldwell* definition of recklessness.<sup>37</sup>

6.75 In our view, a harasser should be liable if his pursuit has created a risk of causing another person alarm or distress, which is obvious to a reasonable person in possession of the same information, such that the harasser ought to know that the risk exists, and

- (a) he has not given any thought to the possibility of there being any such a risk; or
- (b) he has given thought to this possibility but wrongly and unreasonably decided that there is no risk, or the risk is negligible; or
- (c) he knows that there is some risk involved but has nonetheless gone on to do it.

6.76 Neither *Cunningham* recklessness nor *Caldwell* recklessness covers all three situations. A stalker should be deemed to have satisfied the mental element of the offence as long as he has created a situation that would have drawn the attention of a reasonable person in his circumstances to the possibility that his pursuit is capable of amounting to harassment of his victim. A stalker who knows or ought to know that his pursuit amounts to harassment of his victim when he conducts the pursuit is necessarily reckless in doing so. We consider that the mental element of the offence as proposed in the Consultation Paper is sufficient to cover all three situations above. To avoid any uncertainty and to ensure that there will not be any lacuna in the proposed offence, the use of the term “reckless” should be avoided.

### ***Proposed offence***

#### **Recommendation 2**

**We recommend that:**

<sup>36</sup> *R v Reid* [1992] 3 All ER 673.

<sup>37</sup> *Chief Constable of Avon and Somerset v Shimmen*, 84 Cr App R 7.



- (a) a person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;**
- (b) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and**
- (c) a person ought to know that his course of conduct amounts to harassment of another if a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other.**

## **A dissenting view**

6.77 While the majority of the Commission believed that the creation of a new criminal offence as set out at Recommendation 2 was the appropriate way forward, one member was not persuaded that there was a problem of sufficient scope to justify such a course at this stage. He accepted that there may be a degree of under-reporting (as is the case with sexual offences), but did not think that this is likely to be of such a magnitude as to justify immediate criminal sanction. Instead, he preferred a progressive approach, and considered that the problem could be adequately addressed by the application of a civil remedy such as is proposed at Recommendation 9.

6.78 In reaching his conclusion, this member observed that the approach in Hong Kong is very different from that under the United States system. In the US, the victim can stop a prosecution, unlike the position in Hong Kong where the decision on prosecution is one solely for the prosecuting authorities. Echoing the points made at paragraph 9.24, this member argues that in many domestic cases the victim would not wish criminal sanctions to be applied. The application of a civil remedy, rather than a criminal sanction, is therefore likely to be more widely acceptable to victims of stalking.

6.79 It follows that, while this member supports the conclusions at Recommendations 1 and 9 to 12, he does not support Recommendations 2 to 8.

## Chapter 7

### Defences

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#### Lawful authority and crime prevention or detection

7.1 We have to ensure that the law would not put in jeopardy the freedom of others to pursue lawful or legitimate activities. For instance, police officers have to follow suspects and keep them under surveillance for crime investigation purposes. Ordinary citizens may also pursue a course of conduct which has as its object the prevention or detection of crime. Hence, the defences of lawful authority and prevention or detection of crime should be made available so as to exclude such activities from the scope of the offence.

7.2 The Correctional Services Department advises that their officers have to trace or re-establish contact with missing supervisees and recapture prisoners who are at large. They therefore suggest that pursuits engaged in by Correctional Services Officers who are acting in the course of their duties should be specifically exempt from criminal liability in the legislation. In this connection, we note that Correctional Services Officers are tasked with supervision duties under various Ordinances. We believe that the proposed defences of lawful authority and prevention or detection of crime would be more than sufficient to protect Correctional Services Officers.

#### Pursuit that is reasonable in the circumstances

7.3 We are mindful that it is incumbent upon the press to impart information and ideas on matters of public interest. Without some protection for seeking out such information and ideas, the press will not be able to fulfil its checking function. Likewise, political canvassers, those who serve subpoenas or statements of claim, religious activists, debt collectors, security guards, insurance company investigators who are retained to detect malingering, and private investigators who are hired to gather evidence in civil disputes,<sup>1</sup> may cause harassment which is legitimate if undertaken reasonably. In order to

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<sup>1</sup> Owing to the public interest of exposing fraudulent claims and because of the fact that some sort of private investigation is necessary to uncover fictitious injuries which form the basis of a claim, a reasonable and unobtrusive investigation which is not intended to harass or intimidate the person being investigated has been held not to constitute an actionable invasion of his privacy in the US - even though the investigation is inadvertently made known to that person: 13 ALR3d 1025, at 1027.

safeguard all these activities, the Consultation Paper recommended that there should be a defence of acting reasonably in the circumstances of the case.

7.4 As far as newsgathering activities are concerned, a course of conduct pursued for the purpose of covering news that involved a matter of public interest would be covered by this defence. Where a journalist pursues an individual in an attempt to expose corruption among public officers or employees, he would not only be able to rely on the defence of prevention or detection of crime, but would also be covered by the defence of reasonable pursuit; it is in the public interest that corruption be detected and exposed. However, a pursuit, which causes alarm or distress and is engaged in merely for the purpose of obtaining information that satisfies the prurient curiosity of readers, would probably be considered by the courts to be unreasonable. There is a difference between information which is a legitimate concern to the public and information which is merely interesting to the readers or audience of a news organisation.

7.5 The Hong Kong Journalists Association argues that the defence would give rise to uncertainty because the term “reasonable” is a difficult word to decipher in the absence of any guidelines. They point out that a court may decide that it is not “reasonable” to ring someone everyday for a comment when they have indicated their wish to be left alone.

7.6 JUSTICE submits that the defence is “very vague”:

*“It illustrates the broad scope of the proposed offence but fails to narrow it for the purpose of informing the public of what is lawful activity or course of conduct. A door-to-door salesman / religious follower repeatedly calling on the same flat plying his goods or evangelising his beliefs can be as persistent and cause as much annoyance and concern as a spurned lover or bitter ex-spouse. By failing to draw the line and leaving it to individual magistrates, the Sub-Committee unwittingly promotes uncertainty in the law, makes the law more like a lottery, and creates a new occupational hazard for many people with legitimate occupations.”*

7.7 One commentator suggests that the legislation should list the lawful activities which would be exempt from criminal responsibility, such as when reporters, politicians, salesmen, religious activists, etc are engaging in certain specific activities. He thinks that these activities are within the contemplation of the legislature and the legislation should clearly set them out so as to provide better guidance for the public and the courts. Nevertheless, he agrees that there should be a catch-all provision so that the courts may rule on activities which are hard to define.

7.8 It should be noted at the outset that proof of “reasonable excuse” is a good defence for many statutory offences. This defence has the merit of



flexibility which is necessary to ensure that an accused will not be convicted of an offence if he could offer an excuse which is reasonable in the circumstances. To give only two examples, a person is guilty of an offence under section 33 of the Public Order Ordinance (Cap 245) only if he has with him in any public place any offensive weapon “without lawful authority or reasonable excuse”. Likewise, a person is guilty of an offence under section 20(c) of the Summary Offences Ordinance only if he has persistently made telephone calls for the purpose of causing annoyance, inconvenience or needless anxiety to another person “without reasonable excuse”.

7.9 Just as it is a good defence to a charge of common assault that the physical contact in question is generally acceptable in the ordinary conduct of daily life, conduct which is generally acceptable in the ordinary conduct of daily life is likely to be considered by the courts to be reasonable in the circumstances when construing the defence of reasonable pursuit.

7.10 Where a pursuit was engaged in for the purpose of collecting personal data, it is likely that the courts would take into account the requirements of Data Protection Principle 1 (DPP1) in the Personal Data (Privacy) Ordinance (Cap 486) when construing the defence. DPP1 provides that personal data should be collected by means which are not only lawful but also “fair in the circumstances”.<sup>2</sup> The fairness or otherwise of the pursuit under DPP1 is something that would qualify the expression “in the circumstances” appearing in the defence.

7.11 A defence based on the reasonableness of the pursuit provides flexibility and has the merit of not excluding something that ought to have been included when the legislation was passed. Replacing the general defence of reasonable pursuit by a list of specific exemptions would run the risk of excluding something that ought to have been included. The inclusion of a catch-all provision would not help because the *ejusdem generis* rule would be applied by the courts in interpreting that provision.<sup>3</sup>

7.12 Certain activities that are carried out for legitimate purposes may assume the form of stalking if the manner in which they are carried out is excessive or unreasonable. Nonetheless, it is also essential to safeguard press freedom and the freedom of various trades and professions to go about their ordinary business. We therefore conclude that the defence of acting reasonably in the circumstances should be adopted. If the incorporation of such a defence has any impact on the news media, it is only when the pursuit of a journalist has caused alarm or distress and is considered by the court to be unreasonable in the circumstances.

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<sup>2</sup> *Eastweek Publisher Ltd v The Privacy Commissioner for Personal Data*, HCAL 98/98.

<sup>3</sup> The meaning of the *ejusdem generis* rule is that where general words follow an enumeration of things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to things of the same kind as those specifically mentioned: *Black's Law Dictionary*.

## News-gathering activities

7.13 The Hong Kong Journalists Association (HKJA) strongly requests that the proposals be modified to ensure that journalists engaged in legitimate news-gathering would not be at risk of arrest or imprisonment if the proposals were implemented. They submit that fraudsters or other persons who have something to hide would be able to back up their “no comment” with a threat of calling the police to arrest the investigating journalists. They say that journalists must sometimes be persistent, particularly when the subject who has refused to comment might change his mind later. They are concerned that journalists who observe in all respects the ethics of the journalistic profession might be found guilty of harassment if they pursue an individual with persistence. The Association cites the following example in support of their views:

*“Suppose a journalist has the phone number of a business executive accused of cheating their customers. Everyday new allegations may emerge about the company’s business activities. When a reporter rings the executive, they may say that they never speak to the press and slam down the phone. Nevertheless, if the next day’s article has new disclosures about the firm, it is the duty of an ethical reporter to ring and try and put the allegations to the executive. They have the right to say once again they never speak to the press and slam down the phone. ... The actions of the reporters involve no threat of violence, or risk of escalation. However, this could easily be construed as ‘harassing behaviour which disrupts normal life for the victim’ ... particularly if ten reporters all calling everyday. Should the executive have the right to have the reporters arrested? The HKJA believes not. But the reporters’ activities seem quite likely to be classed as harassment going by the proposed definition.”*

7.14 Asia Television Ltd is concerned that the defences proposed in the Consultation Paper may not protect all legitimate activities of the media. They give the example of journalists waiting outside the responsible officers’ home from day to night so as to obtain their views and other information about the chaos of the new airport when the officers came out. Their concern is that waiting outside someone’s premises for a long time or even overnight might be considered unreasonable under the proposed legislation.

7.15 In our view, the behaviour of the journalists in the examples cited by the HKJA and ATV above are reasonable in the circumstances even if their conduct is found by the courts to have amounted to harassment. The HKJA seeks to support their views by citing two incidents supplied by the National Union of Journalists in the UK, but the journalists involved were not convicted of the offence of harassment under the UK Protection from Harassment Act 1997.

7.16 The HKJA suggests that a defence based on the special characteristics of media activities be created:

*“For instance, the difference between ‘harassment’ by journalists and those by others is that journalists should identify themselves and thus put the subject’s mind at ease over their intentions. There should be no risk or threat that their activities will be arbitrarily extended, escalate, or be calculated to cause mental anguish. It could be made a defence that the harassment was such that the victim had no reasonable cause for alarm or fear under the circumstances.”*

7.17 If it is true, as suggested by the HKJA, that revealing the fact that the person seeking information is a journalist would “put the subject’s mind at ease”, enquiries made by journalists can never amount to harassment as long as they disclose their identity. Further, if the journalist in an action for harassment could show that the subject had no reasonable cause for alarm or fear in the circumstances, he would have no difficulty rebutting any claim that he knew or ought to have known that his pursuit amounted to harassment of the subject. We therefore consider it unnecessary to include the defence suggested by the HKJA.

7.18 The Hong Kong News Executives’ Association argues that it is difficult to define what is reasonable behaviour on the part of a journalist. They say that it may differ depending on who the subject is. In relation to the claim that a few celebrities have been stalked by journalists, the Association submits:

*“It would be unreasonable to put [celebrities] in a position of being able to use that public attention one day yet threaten criminal action for the same action another day. So-called ‘paparazzi’ may be unwelcome but their attentions are almost a part of the disadvantage of being a public figure. Provided they are not violent or abusive they should not be denied their work in a public place simply because the public figure decides they do not want to be a public figure for a few hours.”*

7.19 The Hong Kong News Executives’ Association comments that the proposed offence will catch many “genuine journalists” who do indeed pursue a course of conduct which the subject considers harassing, particularly when the subject has some scandal to hide. They suggest as a specific defence (or as an example of reasonable pursuit) that the defendant’s course of conduct was a “normal pursuit by a journalist of his profession”.

7.20 Commercial Radio Hong Kong comments that legitimate public interest in an individual’s activities may outweigh the importance of his personal feelings. They argue that stalking legislation must not be able to be used as a



tool by unscrupulous members of the public to prevent legitimate news gatherers from doing their job.

7.21 The Hong Kong Press Photographers Association explains that in the course of gathering news materials, journalists unavoidably need to rely on close observation of their target to check his credibility. They hold the view that such conduct should not be caught by the legislation. It is, perhaps, worth pointing out that a journalist would not be liable for harassment if the subject is not aware that he is being pursued.<sup>4</sup>

7.22 The press in Hong Kong plays an important role in the discussion of public affairs. It has been doing the general public a great service by acting as a purveyor of information and a public watchdog. The nature of journalism requires journalists to have many interactions with private citizens when covering news. We agree with the news associations that journalists must sometimes be persistent when trying to solicit a response from their targets who refuse to talk to them over a matter of public interest. It is reasonable for a journalist to pursue a course of conduct in order to report on a matter of public interest. However, if the story is about the private facts of an individual with no public interest involved, as would be the case when the object of the news organisation is merely to satisfy the curiosity of its readers or audience, the journalists should not pursue the individual to the point that he or she is alarmed or put in a state of distress. The need to balance press freedom with the right of privacy is all the more pressing in these cases even though the target is a public figure such as an artiste. Journalists should use means that do not amount to harassment when no public interest is at stake.

7.23 By virtue of Data Protection Principle 1 in the Personal Data (Privacy) Ordinance (Cap 486), every person, including the press, is under an obligation to collect personal data by means which are lawful and fair in the circumstances. The public may have a legitimate interest in the activities of an individual but journalists should still gather information by means which are fair. Obtaining personal information through harassment or persistent pursuit is an unfair collection unless it falls within one of the many exemptions prescribed in the Ordinance.<sup>5</sup> In determining whether a journalist's actions were reasonable or not, the courts would consider all the circumstances of the case, including any claim that he was pursuing a story involving a matter of public importance, whether the means used were proportionate to the importance of the story, and whether the conduct of the journalist was fair in the circumstances under DPP1.

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<sup>4</sup> If the subject subsequently discovers by reading a newspaper that he has been followed and watched surreptitiously, he might have a remedy under the Personal Data (Privacy) Ordinance on the basis that the stalker has collected his personal data by unfair means.

<sup>5</sup> Clause 4(i) of the Code of Practice ratified by the Press Complaints Commission in the UK provides that "Journalists and photographers must neither obtain nor seek to obtain information or pictures through intimidation, harassment or persistent pursuit" unless the use of such means can be demonstrated to be in the public interest. *Eastweek Publisher Ltd v The Privacy Commissioner for Personal Data*, HCAL 98/98.

7.24 By the same token, it is unnecessary to include a defence of “legitimate news-gathering activities”. Such a defence is subsumed under the defence of reasonable pursuit. A more elaborate defence for legitimate news-gathering activities is also not practicable. Whether the harassing conduct of a journalist is legitimate or not depends on many factors, such as:

- the purpose of the pursuit, eg whether the matter investigated by the journalist is a matter of public importance;
- the nature and gravity of the subject matter;
- the status of the subject (for example whether he is a public officer, a celebrity or a victim of crime);
- whether the journalist persisted in total disregard of the subject’s response;
- the time and place at which the incidents occurred;
- the number of calls or visits made; and
- whether abusive language was used.

7.25 Commercial Radio Hong Kong comments that where an individual withholds information which is of public interest, the activities of journalists who seek to solicit information from that individual might not generally be regarded as harassment. They argue that celebrities may rely upon the intrusion of the press to attract publicity and maintain their livelihood:

*“[Celebrities] may feel angered, annoyed, put out or deem such [press] attention an invasion of their privacy. Yet how much of that attention do they at other times encourage in order to further their careers? It is obviously impractical for anyone to desire press attention at some times, to receive it and benefit from it, and yet object strongly to it at other times.”*

7.26 A celebrity who persistently seeks publicity would face an uphill battle in convincing the court that he or she has been harassed by the press. However, it should be stressed that the right of privacy may be waived for one purpose, and still asserted for another; and it may be waived on behalf of one class, and retained as against another class. Celebrities are entitled to protection from unreasonable harassment. The fact that the alleged victim is a celebrity is merely one factor which the court would take into account.

7.27 Commercial Radio maintains that wealthy or influential figures or people holding public office may argue that a lower threshold for harassment should apply to them because of “the pressures of their positions” or because their work is “busy, important or sensitive”. In our view, where a public figure is accountable to the public because of his power and influence over society, a reasonable person would hold that he has a higher rather than a lower threshold for harassment. There is no reason to believe that influential figures and public officers would abuse the legislation by threatening journalists with unmerited legal actions.<sup>6</sup>

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<sup>6</sup> See also the section on Potential for Abuse in Chapter 9 below.

7.28 Where the nature of the job requires a public figure to have frequent contacts with the press, that public figure is unlikely to feel alarmed or distressed when pursued by journalists. He should have no cause for alarm or distress if a journalist rings him ten times a day. However, if a journalist sought to obtain information about the public figure's private life through harassment or persistent pursuit, it is only fair that the journalist is required to account for his conduct by convincing the court that his pursuit was reasonable.

7.29 A journalist or a team of journalists who constantly follow a public figure and keep him under surveillance twenty four hours a day over a long period of time to the extent that the public figure has been deprived of his private life in its entirety may be found by the court to be unreasonable if the object is not to publish a story of public importance but merely to pry into the public figure's intimate affairs in a bid to increase the circulation and profits of the publisher. The credentials of the particular journalist and the *bona fide* nature of the investigation are factors which the court would take into account.<sup>7</sup>

7.30 The Hong Kong News Executives' Association notes that while the majority of journalists are responsible, there will be some who are pushed beyond acceptable bounds by their employers. They think that in such circumstances, the employer should be liable for the behaviour of their employees. The point raised by the Association is a matter governed by the general principles of law. An employer who instructs his employee to commit an offence will be liable to be prosecuted as the principal in the first degree or as a secondary participant.

7.31 Where a private citizen has been repeatedly harassed, without justification, by journalists from the same news organisation but different journalists have been deployed on different occasions, the journalists concerned would not be liable because they have not engaged in a course of conduct, but the editor, as the person who has responsibility over the daily activities of the journalists, would probably be.

7.32 Professor Kenneth W Y Leung of the Chinese University of Hong Kong suggests that news-gathering activities should be exempt from liability provided: (a) the persistent course of conduct is neither unlawful nor harmful to the source of information; (b) the pursuit is conducted by the staff of a "*bona fide* news organisation"; and (c) the information gathered by its staff is related to "public figures, public affairs or public interests".

7.33 It is not clear how a news organisation would qualify as a "*bona fide* news organisation". Although "news organisation" may be defined in terms similar to those appearing in section 61 of the Personal Data (Privacy) Ordinance (Cap 486), which contains a definition of "news activity", it is difficult, if not impossible, to work out the criteria under which a news organisation would be regarded as *bona fide*. Yet even if it is possible to work out such a definition,

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<sup>7</sup> T Lawson-Cruttenden & N Addison (1999), above, 36-37.



it is not in the interests of press freedom to employ notions such as “*bona fide* news organisation” in the legislation. Moreover, not all activities carried out by the staff of a news organisation are journalistic in nature. There is no guarantee that all the activities of a news organisation will always adhere to the highest standard of media ethics. We have seen that Data Protection Principle 1 requires that personal data be collected by means which are fair in the circumstances. It is arguable that personal data in relation to public figures should also be gathered by means which would not amount to harassment unless there are good reasons for using such means.

## Public interest

7.34 The Hong Kong Human Rights Commission comments that the legislation should strike a balance between the protection of privacy and press freedom. It considers that journalists are entitled to use various news-gathering techniques to interview public figures or public officers who are involved in matters of “public interest”, and in interpreting what constitute matters of “public interest” reference should be made to international jurisprudence. They hope that such an approach could prevent members of the public from abusing the new legislation to obstruct the news-gathering activities of journalists.

7.35 The HKJA proposes that the legislation should provide for a defence that “the course of conduct was pursued for public interest”.

7.36 The scope of a defence based on the notion of public interest is both narrower and wider than the defence of reasonable pursuit proposed by us. A public interest defence is narrower because *only* matters of public interest recognised by the courts would be protected. The threshold for public interest is high. It is undesirable if pursuits that cannot be justified in the public interest would not be exempt even though they were reasonable in the circumstances.

7.37 A public interest defence is also wider than the defence of reasonable pursuit. If the latter defence were adopted, then even if a public interest is at stake, the courts would still have to consider it in the circumstances of the case and take all factors into consideration. Hence, the requirement that the pursuit be reasonable “in the circumstances” might render a course of conduct pursued for a public interest unreasonable if other competing interests, if any, have been taken into account. The principle of proportionality may also render a particular pursuit disproportionate to the importance of the issue at stake and, hence, unreasonable in the circumstances of the case.

7.38 Since the public interest in a matter pursued by journalists would be taken into account by the courts if the defence of reasonable pursuit were adopted, we conclude that it is unnecessary to provide for the defence of public interest in the legislation. The defence of acting reasonably in the circumstances would provide greater protection to journalists and other persons who carry out legitimate activities.

## **Adherence to trade practices**

7.39 Standard Chartered Bank argues that the interests of commercial viability must be balanced against that of personal freedom. They propose that the legislation should provide a defence that the defendant adhered to “established trade practices or other rules and regulations issued by a competent authority” such as the Hong Kong Monetary Authority and the Hong Kong Association of Banks.

7.40 The Legal Aid Department comments that it is desirable to have some guidelines as to what pursuit would be considered as reasonable. By way of example, it suggests that a person’s course of conduct should be considered as reasonable “if he was acting reasonably in the course of his profession, trade, business or other lawful activity.”

7.41 Many professions are regulated by a code of practice which is promulgated and enforced by a competent authority. These regulatory schemes ensure that members of the profession are accountable to the public. In determining whether the pursuit of an accused who had been acting in the course of his profession was reasonable or not, the courts would take into account whether the profession in question has adopted such a code and whether the conduct of the accused was permissible thereunder. A person acting in compliance with a professional code of conduct, which is reasonable and generally accepted by the industry, is likely to be treated by the courts to have been acting reasonably in the circumstances.

7.42 It is true that the suggestion of the Legal Aid Department would direct the courts’ mind to the legitimate activities of various professions when assessing the reasonableness of a pursuit. But even if the accused can show that he was merely acting in the course of his profession, he would still have the burden of proving that he had been acting reasonably in the circumstances. We do not think that the Department’s suggestion adds much to the defence of reasonable pursuit.

## **Freedom of assembly and of demonstration**

7.43 Safetalk Domestic Violence Support Group is concerned that stalking legislation might be applied to curtail Hong Kong residents’ right to freedom of demonstration. They suggest that the needs of demonstrators should be addressed in the legislation. They argue that the “reasonable person” test might be misapplied in Hong Kong because it does not have the same traditions of democracy as other jurisdictions. Another respondent submits that political and other forms of protests should be exempt. He comments that the defence of reasonable pursuit is too general and will cause uncertainty, thus putting constraints on the right to demonstrate.

7.44 **ICCPR** - Article 21 of the International Covenant on Civil and Political Rights recognises the right of “peaceful assembly”. Only peaceful assemblies are protected under that Article. “Peaceful” means the absence of violence in its various forms. Yet even peaceful assemblies may be restricted if the restrictions serve one of the purposes listed in the Article and are necessary in a democratic society for attaining that purpose. Thus, an assembly may be prohibited and broken up if this is “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 freedom of others.”<sup>8</sup>

7.45 **Canada** - In Canada, freedom of expression under the Canadian Charter of Rights and Freedoms has to be balanced against the right of privacy.<sup>9</sup> In a case in Ontario,<sup>10</sup> the Attorney General of Ontario sought injunctions to restrain anti-abortion picketing of hospitals, abortion clinics and doctors’ homes and offices. Although the defendants opposed the injunctions by relying on freedom of expression and freedom of assembly, the court granted the injunctions to protect the health, well-being and privacy of patients, doctors and third parties.

7.46 The stalking provision in the Canadian Criminal Code has been attacked on the ground that it infringes freedom of expression. The court in *R v Sillipp* held that for stalking behaviour to be criminal in nature, the psychological integrity, health or well-being of the person must have been interfered with in a substantial way. Since direct psychological harm is often “more pervasive and permanent in its effect than any physical harm”, any expression which may flow from stalking behaviour does not fall within the scope of freedom of expression under the Canadian Charter of Rights and Freedoms.<sup>11</sup> Murray J said:<sup>12</sup>

*“The thrust of the defence is that s. 264 has the potential of restricting many activities including picketing and other labour activity as well as various forms of protest behaviour. Counsel takes the position that the section restricts and impinges upon all three of the principles and values underlying the protection of free expression. It was argued that picketers and protestors bring forward information for the public and thus it is a matter of seeking and attaining a truth. Also, this activity has political elements*

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<sup>8</sup> Restrictions may be imposed on the ground of public safety if an assembly constitutes a specific threat to the safety of persons (ie, their lives, their physical integrity or health): M Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (Strasbourg: N P Engel, 1993), 380.

<sup>9</sup> J Craig & N Nolte, “Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort” [1998] 2 EHRLR 162.

<sup>10</sup> *Ontario (Attorney General) v Dieleman* (1994) 20 OR (3d) 229; discussed in J Craig & Nolte, above, at 169.

<sup>11</sup> *R v Sillipp* (1995) 99 CCC (3d) 394. The court agreed at p 411 that “in our democratic society, the freedoms in s. 2 of the Charter [of Rights and Freedoms] must never serve to diminish a person’s right to be free from and protected against violence, or the threat of violence brought about by harassing conduct.”

<sup>12</sup> Above, at 416.



*which s. 264 will dampen. Thirdly, picketers and protestors must be free to do things because there is something inherently good about self-expression and participating in group activities which benefits individuals in forming their soul or their intellect or developing their personality, even if this behaviour impinges on the rights of other people. The thrust of the argument is that to restrict such expression 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 will experience substantial interference with their 'psychological integrity, health or well-being'.*

*I have trouble seeing how the meaning conveyed by means of the forms of expression enumerated in s. 264 can validly be said to fall within the ambit of the three enunciated values and principles [of freedom of expression] set out in Irwin Toy.<sup>13</sup> Indeed, a form of expression which leads to such a result is, to my mind, inconsistent with all three and the antithesis of the third."*

7.47 The Canadian court in *Irwin Toy* held that where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.<sup>14</sup>

*"if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee."*<sup>15</sup>

7.48 **United States** - It is generally accepted in the US that freedom of speech does not comprehend the right to speak whenever, however, and

<sup>13</sup> In *Irwin Toy Ltd v Quebec (Attorney-General)* (1989), 58 DLR(4<sup>th</sup>) 577 at 612, 25 CPR(3d) 417, [1989] 1 SCR 927, the court summarised the nature of the principles and values underlying freedom of expression as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

<sup>14</sup> "The bold line ...between restrictions upon publication and regulation of the time, place and manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress 'harmful' information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed." A Cox, *Freedom of Expression* (Cambridge, Mass: Harvard University Press, 1981), at pp 59-60.

<sup>15</sup> *Irwin Toy Ltd v Quebec (Attorney-General)*, above, at 611-12.

wherever one pleases. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions.<sup>16</sup> Accordingly, reasonable regulations as to the time, place, and manner of exercise of protected speech are permissible under the First Amendment where they are necessary to further significant governmental interests, provided they are evenhanded or non-discriminatory, and that no undue burden or absolute prohibition is imposed on free speech.<sup>17</sup>

7.49 Frederick Schauer observes that although the free speech principle is relevant even in those cases where the regulation is not directed at the communicative impact of the conduct, freedom of speech cannot be as high a trump card in these instances, both because of the legitimacy of the countervailing interests in order, traffic flow and the like, and also because the absence of an intent to interfere with communication weakens the free speech interest.<sup>18</sup>

7.50 American courts reject the view that an apparently limitless variety of conduct can be labelled “speech” whenever the person engaging in the conduct intends thereby to express an idea.<sup>19</sup> A physical assault is not expressive conduct protected by the First Amendment, even though the person committing assault intends to thereby express an idea.<sup>20</sup> Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are not expressive conduct protected by the First Amendment.<sup>21</sup> People who want to propagandize or protest have no right under the First Amendment to do so whenever, however and wherever they please.<sup>22</sup> The editors of *American Jurisprudence* observe that:

*“Despite the constitutional guarantee of freedom of expression, the government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue. Nothing in the United States Constitution compels persons to listen to or view any unwanted communication, whatever its merit, and no one has a right to press even ‘good’ ideas on an unwilling recipient. ...On the other hand, the ability of government to shut off discourse solely to protect others from hearing it is dependent on a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”*<sup>23</sup>

<sup>16</sup> 16A Am Jur 2d, Constitutional Law, §§491 & 512.

<sup>17</sup> 16A Am Jur 2d, Constitutional Law, §512.

<sup>18</sup> F Schauer, *Free Speech: a philosophical enquiry* (Cambridge University Press, 1982), 204-5.  
<sup>19</sup> *Wisconsin v Mitchell*, 124 L Ed 2d 436, 444 (1993).

<sup>20</sup> *US v Soderna*, 117 S Court 507, 136 L Ed 2d 398 (1996).

<sup>21</sup> *Roberts v United States Jaycees*, 468 US 609 at 628, 82 L Ed 2d 462 (1984).

<sup>22</sup> *Adderley v Florida*, 385 US 39 at 48, 17 L Ed 2d 149.

<sup>23</sup> 16A Am Jur 2d, Constitutional Law, §475. The American Supreme Court has upheld exclusion of political advertisements from public buses in *Lehman v Shaker Heights*, 418 US 298 (1974), and upheld the exclusion of protestors from privately owned shopping centres in *Lloyd Corp v Tanner*, 407 US 551 (1972).

7.51 The US Supreme Court has ruled that an ordinance, which makes it “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual”, was not *prima facie* invalid under the First Amendment on the following grounds:<sup>24</sup>

- the ordinance is content-neutral;
- it prohibits only focused picketing taking place solely in front of a particular residence;
- it leaves open ample alternative channels of communication for the dissemination of messages, including marching alone or in groups in residential neighbourhoods, going door-to-door or through the mail, and contacting residents by telephone, short of harassment; and
- it is narrowly tailored to serve the significant government interest of protection of residential privacy, especially where the picketing is narrowly directed at the household, not the public, and where, even if some picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy.

7.52 The Supreme Court held that the ordinance served the significant governmental interest of protecting residential privacy. An important aspect of such privacy is the protection of unwilling listeners within their homes from intrusion of objectionable or unwanted speech. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. There is no constitutional right to force speech into the home of an unwilling listener:

*“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech. The target of the focused picketing ..is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.”*<sup>25</sup>

7.53 The Supreme Court stated that the devastating effect of targeted picketing on the quiet enjoyment of the home is “beyond doubt”. It noted that the tensions and pressures on the residents may be psychological as well as physical, and the home becomes something less than a home when and while the picketing continues.<sup>26</sup> “Whether ..alone or accompanied by others ...there are few of us that would feel comfortable knowing that a stranger lurks outside our home.”<sup>27</sup>

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<sup>24</sup> *Frisby v Schultz*, 487 US 474, 101 L Ed 420 (1988).

<sup>25</sup> At 487, citations omitted.

<sup>26</sup> *Carey v Brown*, 447 US 455 at 478, 65 L Ed 2d 263 (1980).

<sup>27</sup> Quoted in *Frisby v Schultz*, at 487.



7.54 It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.<sup>28</sup> In *Madsen v Women's Health Center*,<sup>29</sup> the US Supreme Court held that the fact that an injunction limiting the protests of anti-abortion demonstrators restricted only their speech and not others did not make the injunction content-based. The mere fact that the injunction covered people who shared a particular viewpoint did not render the injunction content or viewpoint based.

7.55 **England** - In an English case,<sup>30</sup> an animal-testing company obtained an *ex parte* injunction against certain anti-vivisection campaigners under the Protection from Harassment Act 1997. In discharging the injunction, the court held that:

*"[the 1997 Act] was clearly not intended by Parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of political protest and public demonstration which are so much part of our democratic tradition. I have little doubt that the courts will resist any such wide interpretation as and when the occasion arises."*

7.56 We note that the UK Protection from Harassment Act 1997 provides that the accused has a defence if the pursuit was reasonable in the particular circumstances. Likewise, section 4A of the Public Order Act 1986, which creates the offence of using "threatening, abusive or insulting words or behaviour" thereby causing another person "harassment, alarm or distress", also provides that the accused has a defence if he could show that his conduct was reasonable. The English courts have not encountered difficulties in construing such a defence.

7.57 **Our response** - The proposal in the Consultation Paper would not apply to pickets proceeding on a definite course or route in front of a home or place of work, nor would it prohibit general marching through residential or commercial districts or walking a route in front of a building. The proposal would only affect offensive and disturbing assemblies focused on a "captive" who has no ready means of avoiding the unwanted speech. This will be the case if the target is trapped in his or her residence, a nursing home, a health centre or business premises. Our proposals would not prohibit more generally directed means of public communication especially when they take place in public place.

7.58 Stalking legislation is introduced not because of the messages intended to be conveyed, but because of a legitimate purpose which is unrelated

<sup>28</sup> 16A Am Jur 2d, Constitutional Law, §492.

<sup>29</sup> 512 US 753, 129 L Ed 2d 593 (1994), referred to in 16A Am Jur 2d, Constitutional Law § 460.

<sup>30</sup> *Huntingdon Life Sciences v Curtin* [1997] *The Times Law Reports*, 11 December. E Finch, "Legitimate Protest or Campaign of Harassment – Protesters, Harassment and Reasonableness: The Decision in *DPP v Moseley*" [1999] 5 *Web JCL*.

to the content of the expression. The regulation of conduct which amounts to harassment is content-neutral. 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.

7.59 Protests and demonstrations are important and legitimate forms of communication. However, they need to be balanced against equally important and legitimate public interests. The Government maintains an interest in protecting the privacy, family, home, health and well-being of Hong Kong residents. Stalking legislation furthers this important governmental interest by putting its focus on the harmful effect of stalking behaviour on victims. Insofar as stalking legislation is not directed intentionally at the communicative impact of the conduct, it is unrelated to the suppression of free speech. Any restriction on free speech is incidental; and any such incidental restriction is no greater than is essential to the protection of public health and privacy interests. The regulatory measures are not aimed at ideas or information in the sense of singling out conduct for control or penalty because of the specific message or viewpoint such conduct expresses. They do not fall within the scope of the free speech principle even though free speech would be restricted incidentally as a result. We conclude that there is no real danger that the legislation would compromise free speech protected under the Basic Law.

7.60 Further, we have little doubt that the courts in Hong Kong would resist any wide interpretation of the stalking legislation which would impinge on the freedom of assembly, of procession and of demonstration guaranteed in the Basic Law. The courts will take into consideration the provisions of the Basic Law in determining whether the conduct of the demonstrators was reasonable in the circumstances. In determining whether the course of conduct engaged in by demonstrators was reasonable or not, the courts would take into consideration whether the pursuit was directed at a particular individual, a group of individuals, or the public at large. Where the pursuit was directed at a particular individual, the fact that he is or is not a public figure would be relevant. But even public figures, including politicians, are entitled to protection from unreasonable harassment.<sup>31</sup>

7.61 To conclude, due to the prevailing effect of the Basic Law, the proposed legislation will not be construed in such a way as would limit the rights and freedom guaranteed in the Basic Law. A demonstrator who is charged with harassment would have a strong case to argue if he was exercising his right to “freedom of assembly, of procession and of demonstration” pursuant to Article 27 of the Basic Law in a lawful manner.<sup>32</sup>

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<sup>31</sup> Members of the Legislative Council are protected from molestation under section 19 of the Legislative Council (Powers and Privileges) Ordinance (Cap 382).

<sup>32</sup> Article 41 of the Basic Law.

## Activities protected by the Basic Law

7.62 Under the “overbreadth” doctrine in the US, an accused may challenge a controlling statute as being overbroad on the ground that it may criminalise constitutionally protected activity. In order for a statute to be void for overbreadth, its potential application to First Amendment activities must be substantial when compared to its legitimate uses. The US Supreme Court distinguishes between conduct and speech in overbreadth analysis, showing more deference to statutes which regulate conduct rather than speech.<sup>33</sup>

7.63 Constitutionally protected activities or conduct that serve a legitimate purpose would be protected by the defence of reasonable pursuit. Since the courts would construe the stalking legislation narrowly so as to limit its effect to actions that the Government may regulate or prohibit, the defence of reasonable pursuit may be construed as including any legitimate activities that are protected under the Basic Law.

7.64 One option open to us is to make an exception for “constitutionally protected activities”. Another option is to specify that the courts should take into account Article 27 of the Basic Law (which guarantees “freedom of speech and of the press” as well as “freedom of assembly, of procession and of demonstration”) when determining whether a pursuit was reasonable. We consider these provisions superfluous because the courts will take the Basic Law into account when determining whether the conduct of the stalker was reasonable in the circumstances. The courts will construe the defence of reasonable pursuit in such a way as to be consistent with the Basic Law. If a court failed to take into account the Basic Law and construed the defence in such a way as to infringe the lawful rights and freedoms of the accused under the Basic Law, the judgment would be open to challenge on the basis that the Basic Law would have a prevailing effect over the stalking legislation.

7.65 Nevertheless, in recognition of the importance of free speech, press freedom and the right of peaceful assembly, we agree that apart from the right of privacy, the courts should also have regard to the right to freedom of expression and the right of peaceful assembly when determining whether the pursuit in question was reasonable in the particular circumstances.

### **Recommendation 3**

**We recommend that it be a defence for a defendant who is charged with the offence of harassment to show that:**

- (a) the conduct was pursued for the purpose of preventing or detecting crime;**

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*Broadrick v Oklahoma*, 413 US 601, 614 (1973). See also L H Tribe, *American Constitutional Law* § 12-27 (2<sup>nd</sup> edn, 1988).



- (b) the conduct was pursued under lawful authority; or**
- (c) the pursuit of the course of conduct was reasonable in the particular circumstances.**

#### **Recommendation 4**

**We recommend that the courts should take into account the rights and freedoms provided in Article 17 (privacy, family, home and correspondence), Article 19 (freedom of expression) and Article 21 (peaceful assembly) of the International Covenant on Civil and Political Rights when determining whether the pursuit in question was reasonable in the particular circumstances.**

### **Serious crime and security**

7.66 In order to ensure that the work of the intelligence and security services is not compromised by the enactment of anti-stalking legislation, section 12 of the UK Act provides that the Secretary of State may certify, retrospectively, that a course of conduct carried out by a specified person on a specified occasion related to national security, the economic well-being of the UK, or the prevention or detection of serious crime, and was done on behalf of the Crown. The certificate shall be conclusive evidence that the Act does not apply to the activity in question. Such a procedure is intended to ensure that the exemption can be proved in the situations described quickly and effectively.

7.67 The sub-committee thought that similar procedures should be in place to facilitate proof of a specified defence where the pursuit related to serious crime or security matters. Security work may be compromised if intelligence agents were required to testify before the court and were cross-examined by the prosecutor. Likewise, an investigation in relation to a serious crime might be frustrated if a police officer had to adduce evidence in open court showing that the purpose of his pursuit was to prevent or detect crime.

7.68 The Consultation Paper therefore recommended that a certificate issued by the Secretary for Security stating that anything carried out by a specified person on a specified occasion related to security in respect of the HKSAR, or the prevention or detection of serious crime, and was carried out on behalf of the HKSAR Government should be evidence that the provisions of the stalking legislation do not apply to the conduct of that person on that occasion.

7.69 Only one respondent queried the need to make special rules for law enforcement agencies. It argued that it was unnecessary to follow the English example because the law enforcement agencies would be in a position to show that their surveillance activities were carried out in a lawful manner if there were any challenges in court.

7.70 We maintain that procedures similar to those prescribed in section 12 of the UK Act should be introduced for the reasons stated above.

7.71 Another respondent suggests that it is desirable to define “serious crime” in the legislation. We agree with this suggestion because the procedure would be open to abuse if the term is not defined. In our view, the term should be defined with reference to the maximum sentence applicable to the particular offences. By way of example, “serious crime” may be defined as an offence punishable on indictment with seven years’ imprisonment or more.

7.72 One respondent points out that the Independent Commission Against Corruption does not come under the policy portfolio of the Secretary for Security. It is therefore inappropriate for the Secretary for Security to issue certificates on behalf of the ICAC. We have considered the alternative of vesting the power to issue the certificates to both the Secretary for Security and the Commissioner of the ICAC. This is, however, not advisable because this arrangement would enable the complainant to find out whether the investigation was corruption-related or not. We consider it essential that the complainant should not be able to deduce from the title or position of the person who had signed the certificate which law enforcement agency had been engaged in the pursuit. We believe that the Chief Executive or his designate is the right person to issue the certificates.

#### **Recommendation 5**

##### **We recommend that:**

- (a) a certificate issued by the Chief Executive or his designate stating that anything carried out by a specified person on a specified occasion related to security or the prevention or detection of serious crime should be conclusive evidence that the provisions of the anti-stalking legislation do not apply to the conduct of that person on that occasion; and**
- (b) the term “serious crime” referred to in (a) above should be defined in the legislation with reference to the maximum sentence applicable to the offences**

that could be considered as falling within that description.



## Chapter 8

### Penalty

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#### General

8.1 **Sentencing policies** - The American report on the Model Anti-Stalking Code urges the States to consider adopting stalking sentencing policies that:

- seek to protect the stalking victim;
- allow law enforcement officials to intervene when appropriate;
- provide appropriate sanctions for the convicted stalker; and
- ensure treatment services for a stalker who can be helped by medical and psychiatric intervention.<sup>1</sup>

8.2 **Penal goals** - Criminal sentences are intended to protect the public by punishment, reformation or deterrence. However, McAnaney and others think that the proper penal goal of stalking laws should be incapacitation of the stalker:

*“Deterrence is not an appropriate goal because stalkers, especially emotionally disturbed or mentally ill stalkers, will not cease their harmful behavior because of criminal penalties. The anecdotal and limited statistical evidence available shows that persons intent on stalking will break protection orders, and other laws, to contact their victim. Protection of the victim will be best served by basing sentencing provisions on the primary goal of incapacitation. From the victim’s point of view, only so long as the stalker is incarcerated, will the victim feel safe and able to live a normal life.”<sup>2</sup>*

8.3 It may be recalled that persistence is a key element in the offence of harassment. Stalkers who have been persistent in pursuing their victims are likely to repeat the offence of harassment if not precluded from contacting their victims. Incarceration not only protects the victims by preventing stalkers from committing a second offence, it also gives the victim time to rearrange his personal affairs or escape to a safe place. It assures victims that they can be

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<sup>1</sup> National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States* (Washington, DC: US Department of Justice, National Institute of Justice, 1993), p 49.

<sup>2</sup> K G McAnaney and others, above, 906.

safe at least while the stalker is in prison.<sup>3</sup> Besides, the stalker can receive counselling or mental treatment in jail. Although stalkers who are mentally ill will not be stopped by laws and jail terms, the passage of stalking legislation can be justified as long as a few stalkers can be deterred or a few lives can be saved. The legislation would also make victims, most of them women, feel that they have a tool with which to fight so that they will no longer have to quit jobs, hide, or turn to violence themselves.<sup>4</sup> We therefore consider that the courts should have the power to impose a custodial sentence.

**8.4 Level of maximum sentence** - In determining the appropriate custodial sentence for the proposed offence, we have in mind the principle that the penalty must be commensurate with the seriousness of the offence, and the principle that the maximum sentence would be reserved for the most serious examples of the offence which are likely to be encountered in practice. In this connection, we note that the Swedish Criminal Code provides that sentences should be based on the penal value of the offence, which is determined with special regard to the harm, offence or risk which the conduct involved, what the accused realised or should have realised about it, and the intentions and motives of the accused.<sup>5</sup> Where an offence was deliberate and premeditated and inflicted personal or mental injury, it would usually be more serious than where it was spontaneous and unpremeditated and inflicted financial loss only.<sup>6</sup>

**8.5 Sub-committee's proposal** - The sub-committee recommended in the Consultation Paper that a person guilty of the offence of harassment should be liable to imprisonment for two years. This recommendation is agreeable to the Working Group on Battered Spouses, the Hong Kong Federation of Women and the Social Welfare Department. Safetalk Domestic Violence Support Group comments that two years may be appropriate for first offenders, but enquires what if they repeat their stalking behaviour? The Hong Kong Federation of Women Lawyers submits that there should be a difference between the penalty for the first conviction and those for repeated convictions. The Legal Aid Department is of the opinion that two years' imprisonment is too heavy. It notes that most of the offences listed above which are akin to stalking attract a term of 6 months or less. They suggest that the penalty be (a) a term not exceeding one year for the first conviction; and (b) a term not exceeding two years for the second and subsequent conviction.

**8.6 Penalties for related offences** - We have made reference to the maximum penalty for related offences as prescribed in the statutes:

- Common assault (Cap 212, section 40)  
*1 year imprisonment*

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<sup>3</sup> In California, a victim or family member may request that the Department of Corrections notify them 15 days before a convicted stalker is released from prison.

<sup>4</sup> J Fahnstock, above, at 804.

<sup>5</sup> Chapter 29 of the Swedish Criminal Code, quoted in Andrew Ashworth, *Sentencing & Criminal Justice* (Butterworths, 2<sup>nd</sup> edn, 1995), p 89.

<sup>6</sup> *R v Howells*, *The Times Law Reports*, 21 August 1998.

- Assault occasioning actual bodily harm (Cap 212, section 39)  
*3 years' imprisonment*
- Wounding or inflicting grievous bodily harm (Cap 212, section 19)  
*3 years' imprisonment*
- Loitering with intent to commit arrestable offence (Cap 200, section 160(1))  
*\$10,000 fine and 6 months' imprisonment*
- Loitering which causes obstruction (Cap 200, section 160(2))  
*6 months' imprisonment*
- Loitering which causes another to be concerned for his safety or well-being (Cap 200, section 160(3))  
*2 years' imprisonment*
- Sending indecent, obscene or menacing telephone message (Cap 228, section 20(a))  
*\$1,000 and 2 months' imprisonment*
- Sending telephone message which causes annoyance or anxiety (Cap 228, section 20(b))  
*\$1,000 and 2 months' imprisonment*
- Persistently making telephone calls to cause annoyance or anxiety (Cap 228, section 20(b))  
*\$1,000 and 2 months' imprisonment*
- Transmitting false signal with knowledge of falsity or with intent to deceive (Cap 106, section 28)  
*Level 3 fine and 2 years' imprisonment*
- Posting obscene, immoral, indecent or offensive article (Cap 98, section 32(1)(f))  
*\$20,000 and 6 months' imprisonment*
- Threats to destroy or damage property (Cap 200, section 61)  
*10 years' imprisonment*
- Disorderly conduct in public place (Cap 245, section 17B(2))  
*\$5,000 and 12 months' imprisonment*
- Threats to kill or murder (Cap 212, section 15)  
*10 years' imprisonment*
- Intimidation (Crimes Ordinance, Cap 200, section 24)



*\$2,000 and 2 years' imprisonment on summary conviction  
5 years' imprisonment on conviction upon indictment*

- Intimidation (Trade Unions Ordinance, Cap 332, section 47(1))  
*\$1,000 and 6 months' imprisonment*

8.7 We note that the merest touching without consent is an offence punishable with one year's imprisonment, and a person who posts an immoral, indecent or offensive article is liable to be imprisoned for six months. However, the closest analogy to the proposed offence of harassment is loitering which causes another to be concerned for his safety or well-being. The maximum sentence for this offence is two years' imprisonment.

8.8 As stated in Chapter 1, stalking behaviour instills fear and terror in the minds of the victim and can result in the victim losing control over his life. Where the victim is deprived of his or her social life in consequence of the stalker's pursuit, the effect on his or her living standards can be significant, even though he or she has not suffered any bodily or physical harm. In extreme cases, stalking behaviour has the effect of depriving the victim of his or her freedom of movement. The victim might be afraid to go out, be forced to move to a new place, or change his or her career in order to avoid the stalker's pursuit. Severe discomfort will be caused to the victim if he is subject to constant harassment by various methods over a long period.

8.9 As observed by Andrew Ashworth, a person who plans or organises a crime is generally more culpable because the offence is premeditated and the offender is therefore more fully confirmed in his anti-social motivation than someone who acts on impulse.<sup>7</sup> In the case of stalking, although the stalker may not have any intention to harm the victim, he would be fully aware of what he is doing to his victims. A typical stalker does not act out of impulse but carefully plans his actions beforehand. All the acts comprising the course of conduct are done deliberately. By the nature of their actions, stalkers are premeditated and persistent offenders who are more culpable than those who act on the spur of the moment.

8.10 Although intention on the part of the stalker would not be an element of the offence, there are stalkers who set out to cause mental harm to their victims with intent. A stalker may harass his target and his target's children or other family members in order to destroy the target's family, career, or relationship with his current partner. Given that stalking can escalate into violence, the offence can be very close to the infliction of actual bodily harm. There is also a need to protect victims from further harm in serious cases. We have in mind the findings that the majority of stalking victims are women. Other vulnerable persons such as teenagers, the elderly and handicapped persons may also be targeted by stalkers.

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<sup>7</sup> A Ashworth, above, p 131.

8.11 We consider that a maximum penalty of two years' imprisonment would be an appropriate punishment for the worst type of stalking which falls short of threatening or causing the victim actual bodily harm. Stalkers adopt a variety of measures to carry out their campaigns of harassment, ranging from merely following the victim in public on a few occasions, to a combination of various stalking behaviour, all of which are of a serious nature and persisted in for a long period of time. Although a person charged with harassment would not be accused of causing the victim bodily harm, the alarm and distress that comes from psychological abuse can have as enduring and damaging an impact on the victim as physical assault.

8.12 However, a distinction should be drawn between stalkers who know that their pursuits amount to harassment, and stalkers who do not have this knowledge but, when viewed objectively according to the standard of a reasonable person in possession of the same information, ought to know that their pursuits amount to harassment. Offenders in the latter category do not normally act with malice. They are usually delusional and are merely obsessed with their victims. Where the offender is a delusional erotomaniac, he (or she) truly believes that the victim loves him (or her). He may believe he is having a relationship with his victim even though they might never have met. These stalkers may therefore act under the mistaken, but honest, belief that their actions are harmless and are welcomed by the victims. Whilst we consider that these stalkers should also be subject to criminal sanctions if they have caused their victims alarm or distress without justification, they are less culpable than those who commit the offence knowingly. Hence, the law should prescribe a lower penalty for those who are convicted under the "ought to know" limb.

8.13 Where the gravity of the offence committed by the accused does not warrant the imposition of a custodial sentence, a fine alone would be the appropriate punishment, particularly if the court makes a restraining order in addition to the fine.

#### **Recommendation 6**

##### **We recommend that:**

- (a) a person who is guilty of the proposed offence of pursuing a course of conduct which amounted to harassment of another, and which he knew amounted to harassment of the other, should be liable to a fine and to imprisonment for two years; and**
- (b) a person who is guilty of the proposed offence of pursuing a course of conduct which amounted to harassment of another, and which he ought to have known amounted to harassment of the other, should**

**be liable to a fine and to imprisonment for 12 months.**

## **Penalty for second and subsequent offences**

8.14 The fact that the person convicted of harassment is a first offender would be something that will tell in his favour at the sentencing stage. However, if the evidence shows that he poses a danger to the public, or if the criminality of the pursuit engaged in by him is the worst possible example of the offence of harassment, he would not receive any discount.

8.15 A few submissions invited us to consider whether stalking legislation should provide for a heavier penalty for repeat offenders. To deal with the problem posed by recidivists, some legislation provides that the court may impose a higher sentence on a repeat offender than that imposed on a first offender. These provisions, however, are few and far between in Hong Kong.<sup>8</sup>

8.16 Although a previous conviction is not an aggravating factor in deciding the appropriate sentence, it has an impact upon the mitigation attaching to a guilty plea. While a first offender would normally receive a reduction of sentence, a recidivist would gradually lose that mitigation. Generally speaking, a recidivist is likely to receive a sentence higher than that received by a first offender.

8.17 The principle that sentences should be more severe for second and subsequent offences than for first offences has been criticised on the ground that it makes no allowances for the fact that some offences are minor in nature, and some offences stem from human weakness rather than wickedness. The proposed offence of harassment, which would carry a maximum penalty of two years' imprisonment, is not a serious offence. Even though stalkers convicted of harassment would have been persistent in harassing their victims, most of them would not be the "rationally motivated wicked offenders" that the principle assumes. It is therefore doubtful that the principle is effective in deterring stalkers. Besides, it is arguable that the principle is unfair to the individual offenders. Applying the principle would punish a person twice over for the same offence by increasing subsequent sentences on account of previous offences which have already been punished. It is well established that an accused should not be sentenced again for his previous convictions. The fact that an accused is a recidivist is not a factor to be taken into account when sentencing the accused for the offence before the court.<sup>9</sup> We therefore have reservations proposing that recidivists be subject to a heavier penalty.

<sup>8</sup> I G Cross & P W S Cheung, *Sentencing in Hong Kong* (Butterworths, 2<sup>nd</sup> edn, 1996), p 32.

<sup>9</sup> I G Cross & P W S Cheung, above, ch 14.



## **Victim Impact Statements**

8.18 The Hong Kong Federation of Women Lawyers proposes that stalking cases, whether civil or criminal, should not proceed without the court hearing evidence by way of a Victim Impact Statement prepared by or on behalf of the stalking victim. In addition, the court should also hear evidence of the impact on any children of the relationship, as research shows that children witnessing violence are traumatised by the event, and that stalking constitutes a form of psychological abuse.

8.19 Since any proposal touching on the role of the victim in the criminal justice system is beyond the remit of the privacy reference, we have not embarked on a detailed study of Victim Impact Statements in this report. However, we understand that the Working Group on Victims of Crime convened by the Department of Justice has recently recommended that Victim Impact Statements should be introduced in Hong Kong.

## **Notice of offender's release from prison**

8.20 Safetalk points out that many women fear for their safety when stalkers are released. They suggest that probation officers should give notice to the victim in advance of the offender's release from prison so that the victim can make appropriate adjustments for their personal security.

8.21 We believe that the majority of offenders who receive a custodial sentence for harassment would be imprisoned for about six months. Even if the offender receives the maximum sentence of two years' imprisonment, his actual term of imprisonment would be reduced by a third if remission is granted in his favour. While it is desirable to notify the victim if the offender has been in prison for a long period of time, such notice is unnecessary where the actual term of imprisonment is less than two years and no more than a few months in the majority of cases. One would expect that a victim of stalking who wishes to avoid his or her stalker would make the necessary adjustments shortly after the court passed a sentence of imprisonment on the latter.

## **Electronic monitoring**

8.22 One of the possible alternatives to incarceration is electronic monitoring by the use of an electronic ankle bracelet. This bracelet can track the movement of the stalker and help notify police if he appears within a specific distance of the victim's house. Electronic monitoring does not necessarily infringe the right to privacy of convicted stalkers because the device may be designed in such a way that the police would be aware of the whereabouts and movement of the convicted stalker only if he comes within a specified distance of a specified area or person. This would deter and prevent the stalker from

intimidating or assaulting his victim.<sup>10</sup> The American Project to Develop an Anti-Stalking Model Code recommends States consider monitoring convicted stalkers released on probation or parole through electronic monitoring or house arrest. The Administration may wish to consider if this is a viable alternative to imprisonment.

## **Aggravated stalking**

8.23 The proposed offence would penalize the pursuit of a course of conduct which amounts to harassment. A question arises as to whether this offence without more is sufficient to address the mischief caused by stalking behaviour.

8.24 The conduct of stalkers has a serious impact on victims where their pursuits not only cause them alarm or distress but also place them in fear of their safety or in fear of bodily injury or death. The American report on the Model Anti-Stalking Code suggests that if the conduct of the stalker should be dealt with as a felony, the course of conduct must be such as would cause a reasonable person to fear death or bodily injury to himself or a member of his immediate family and has actually induced such fear in the victim. The Protection from Harassment Act 1997 in the UK imposes a heavier penalty for aggravated stalking by creating an additional offence of putting another in fear of violence. Whereas the maximum custodial penalty is six months' imprisonment for the lesser offence of harassment, a person who commits the offence of putting another in fear of violence is liable to five years' imprisonment.

8.25 We consider that a single offence of harassment would suffice to deal with stalking conduct which presently goes unpunished. Conduct which puts someone in fear of violence may be dealt with under existing criminal law. A stalker who has unlawfully applied force to his victim commits a battery. Where the stalker does not have any physical contact with his victim but the element of immediacy is satisfied, the stalker may be charged with "common assault", "assault occasioning actual bodily harm", or attempted battery. Loitering in a public place or common area of a building which causes a person to be concerned for his safety or well-being is already an offence under section 160 of the Crimes Ordinance (Cap 200). As regards other stalking behaviour which causes another to fear for his safety, the offence of intimidation under section 24 of the Crimes Ordinance or section 47 of the Trade Unions Ordinance (Cap 332) may be used provided that the stalker has the requisite intent. As a preventive measure, a stalker who has put someone in fear of violence may be arrested and bound over to keep the peace. It appears that a stalker who puts another in fear of violence cannot be prosecuted or restrained under existing criminal law if he engages in behaviour other than loitering in a public place or a common area, the violence feared by the victim is not immediate, and the stalker lacks any specific intent to harm the victim. He may, however, be charged with the new offence of harassment because a person who fears for his safety is bound to feel

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<sup>10</sup> N Diacovo, above, 420.

alarmed or distressed. A maximum penalty of two years imprisonment under the new offence should be sufficient to deter this conduct which would otherwise slip through the net of the criminal law. This is particularly so in the light of our recommendation below that the courts should have a power to make a restraining order which may have effect for a specified period of time. Such a power would enable the courts to make a restraining order which is valid for more than two years in appropriate circumstances. Where the pursuit of a stalker is serious enough to warrant a sentence of more than two years' imprisonment, his conduct is likely to be caught by one of the existing offences such as intimidation or assault occasioning actual bodily harm.

8.26 We conclude that it is unnecessary to create an additional offence of pursuing a course of conduct which causes another to fear violence or to fear for his safety. However, consideration may be given to creating a more serious offence of aggravated stalking if it becomes clear that the offence of harassment is not adequate to deal with the more serious types of stalking behaviour.

## **Restraining orders in criminal proceedings**

8.27 It is necessary not only to punish stalkers for their actions but also to reassure the victim that the conduct will not happen again. But criminal proceedings can only deal with offences that have already been committed. There are no procedures under which the criminal courts can provide protection for victims of crime who might reasonably expect that they might be harmed by the convicted criminal in the future. Although the victim may seek injunctive relief in the civil courts,<sup>11</sup> it would be unfair to him if he is required to go through another hearing in order to obtain an injunction to protect his legitimate interests. This would not only be a duplication of judicial procedure, but would also be an additional burden on the victim in both emotional and financial terms. After all, the stalker has already been found guilty of harassment by a criminal court.

8.28 We decide that the court sentencing a person convicted of harassment should have power to make an order restraining him from harassing the victim if the court believes that the convicted person is likely to commit harassment in the future.<sup>12</sup> Such an order would protect the victim after the stalker has been released from prison. It should be in addition to any sentence imposed in respect of the offence of harassment, or in addition to any probation order or any order discharging the defendant absolutely or conditionally.<sup>13</sup>

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<sup>11</sup> The victim may use the criminal conviction to support his claim in civil proceedings.

<sup>12</sup> See the draft Magistrates' Courts (Protection from Harassment Act 1997) (Restraining Orders) Rules 1998, reproduced in N Addison & T Lawson-Cruttenden, *Harassment Law and Practice* (London: Blackstone Press, 1999), Appendix 2.

<sup>13</sup> Cf Public Order Act 1986 (UK), section 30. Where a court makes an exclusion order under section 30 of the Public Order Act 1986, an officer of the court is required to give a copy of it to the person to whom it relates, send a copy of it to the chief officer of police for the police area in which the offence leading to the order was committed, and (as soon as practicable) send a copy of it to any prescribed person.



8.29 We agree with the Manitoba Law Reform Commission that it is essential to include a blanket provision in the order which is designed to prohibit all future incidents of stalking by the defendant:

*“Since many stalkers are both determined and clever, this provision will prevent a stalker from complying with an order by simply changing the method of stalking. If, for example, a stalker repeatedly followed the subject and an order was made preventing the respondent from coming within 100 metres of the subject, he could then start phoning or mailing the subject without breaching the order. If, however, the initial order contained a provision prohibiting the respondent from stalking the subject, the telephone calls would be a violation of the order”.*<sup>14</sup>

8.30 Since stalkers may seek to avoid breaching the order by harassing the victim’s children, relatives or current partner instead of the victim, the courts should have power to make a restraining order which protects not only the victim but also any other person, as the court thinks fit. The power to make a restraining order arises upon sentencing because up until that stage the restraint can be provided by conditions of bail.

8.31 In order to provide for flexibility, the courts should have power to make a restraining order for a specified period *or until further order*.<sup>15</sup> An open-ended order is appropriate where the harassment was serious and the stalker is recalcitrant, or where the court is not yet in a position to judge how long the restraint should last. This would avoid victims having to return to the courts to have the order renewed. Since the circumstances may change over time, all the interested parties, including the prosecutor, the defendant, the victim and any other persons protected by the order, should be able to apply for the order to be varied or discharged.

8.32 We are aware that restraining orders may make a situation worse. This is particularly so if the stalker is a former intimate partner who has invested heavily in the relationship with his victim. Delusional stalkers who are psychopathic or paranoid are also unlikely to respond to restraining orders. A restraining order which is difficult to enforce will not be a deterrent to these types of stalkers. In order to provide maximum protection to the victims and those mentioned in the restraining order, a breach of the restraining order without reasonable excuse should be an arrestable offence.<sup>16</sup> The benefit of having an additional offence of breach of a restraining order is that the victim would not

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<sup>14</sup> Manitoba Law Reform Commission, above, 66.

<sup>15</sup> See P Tain, “Restraining orders: the focus of summary stalker cases”, *Solicitors Journal* 22 May 1998, p 465.

<sup>16</sup> See Protection from Harassment Act 1997 (UK), section 5. A citizen may arrest without warrant any person whom he may reasonably suspect may be guilty of an arrestable offence. “Arrestable offence” is “an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term exceeding 12 months”: Cap 1, section 3.

have to bring proceedings himself to enforce the order. The difficulties of enforcing an injunction granted under the Domestic Violence Ordinance have been noted in Chapter 4. Creating an offence of breach of a restraining order would accord greater protection to battered spouses in domestic violence cases. Furthermore, a single act of stalking would entitle the victim to seek protection from the police and the courts. Early intervention is essential to the well-being and safety of the victim where the stalker has previously been convicted of harassment. The police would not have to wait until the stalker has repeatedly harassed the victim before they could charge him with harassment again. The effect is that breaches can be dealt with promptly with the assistance of the police before the stalker turns violent.

8.33 Two respondents supported our recommendation in relation to restraining orders. They remarked that this would accord greater protection to stalking victims, especially those involved in domestic violence.

#### **Recommendation 7**

##### **We recommend that:**

- (a) a court sentencing a person convicted of the offence of harassment may make an order prohibiting him from doing anything which causes alarm or distress to the victim of the offence or any other person, as the court thinks fit;**
- (b) the restraining order may be made in addition to a sentence imposed on the defendant convicted of the offence of harassment, or in addition to a probation order or an order discharging him absolutely or conditionally;**
- (c) the restraining order may have effect for a specified period or until further notice;**
- (d) the prosecutor, the defendant or any other person mentioned in the restraining order may apply to the court for it to be varied or discharged; and**
- (e) a person who, without reasonable excuse, does anything which he is prohibited from doing by a restraining order should be guilty of an offence, which is punishable by imprisonment for 12 months.**

## Chapter 9

### Miscellaneous matters

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#### Bail

9.1 Some jurisdictions attempt to protect victims from stalking after the stalker's arrest by providing for limitations on bail for the accused. For example, the Illinois statute provides that the court may deny bail if: (i) there is evidence that the defendant committed the stalking offence; (ii) the defendant poses a real and present threat to the physical safety of the alleged victim; (iii) denial of bail is necessary to prevent fulfillment of the threat; and (iv) no combination of conditions can reasonably assure the victim's safety.<sup>1</sup>

9.2 We consider that it is unnecessary to legislate in this matter because the bail procedure in the Criminal Procedure Ordinance (Cap 221) already enables the courts to refuse bail if the defendant would commit an offence while on bail or interfere with a witness.<sup>2</sup> Furthermore, where the court orders an accused to be admitted to bail, the order may be subject to such conditions as appear to the court to be necessary to secure that he will not commit an offence while on bail or interfere with a witness. Thus, the court may make it a condition of admission to bail that the defendant:

- shall reside at a specified address for a specified period;
- shall not enter any specified place or premises;
- shall not go within such distance of any specified place or premises;
- and
- shall not contact directly or indirectly a specified person.

9.3 The court may exercise these powers where a person is apprehended for the harassment offence and there are substantial grounds for believing that he would continue to harass or interfere with the victim.

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<sup>1</sup> R N Miller, " ' Stalk Talk' : A First Look At Anti-Stalking Legislation" (1993) 50 *Washington and Lee Law Review* 1303, 1309-1313, referring to Ill Ann Stat, ch 725, para 5/110-6.3(b).

<sup>2</sup> Cap 221, section 9G & 9D.



## Mental evaluation and treatment for stalkers<sup>3</sup>

9.4 Where a stalker has mental problems, it is likely that he would continue to harass his victim after conviction or imprisonment. Mental evaluation and psychiatric treatment for these stalkers are therefore essential to prevent recurrences of harassment.

9.5 The Project to Develop a Model Anti-Stalking Code in the US recommends that States should consider requiring evaluation and offering counselling as part of any sentence imposed upon a convicted stalker, and consider requiring counselling as a condition of release for convicted stalkers placed on probation or parole.

9.6 In the opinion of McAnaney and others, it is in the best interests of the state to mandate a comprehensive evaluation of a defendant who is charged with stalking:

*“Ideally, this evaluation should include both a medical and a psychiatric or psychological evaluation. A medical evaluation could alert the court to underlying medical problems that increase the stalker’s risk of violent behavior. In addition, a psychiatric or psychological evaluation could test the defendant for organic brain damage, delusional disorders, and personality disturbances that influence the stalker’s behavior - and importantly, the stalker’s intent. Based on these evaluations, the court could determine the best course of pretrial action, and if warranted, appropriate sentencing. If the state fails to adequately assess the mental and emotional status of the stalker, it may jeopardize the right of the stalker to fair sentencing and appropriate treatment and the need of the victim for safety and privacy. In addition, because stalking victims often exhibit symptoms of post-traumatic stress disorder or other emotional disturbances, they may need counseling or other supportive services after the stalker is incapacitated.”<sup>4</sup>*

9.7 Nannette Diacovo also agrees that in order to deter stalking, the focus of stalking legislation should be on rehabilitation and mental evaluation:<sup>5</sup>

*“First, the stalking statute should provide for exact procedures to be followed once the stalker is convicted. Once convicted, it should be mandatory that the stalker undergo a mental evaluation and be placed within one of the three categories of obsessive behavior. Once the stalker is categorized, it should*

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<sup>3</sup> See H Kaplan & B Sadock, *Synopsis of Psychiatry*, (6th edn, 1991) 348-350, cited in K G McAnaney and others, above, at 853-854.

<sup>4</sup> Above, at 908.

<sup>5</sup> N Diacovo, above, 416-7.

*then be mandatory that the stalker be placed in a treatment program specifically designed to treat the stalker's mental infirmities. Although there may be no cure for stalking behavior, providing the stalker with the most effective mental health treatment available is a step in the right direction.*

*Second, once the stalker has been placed in a treatment program, there should be mandatory reports of the stalker's progress throughout the treatment process. These evaluations should be used to determine parole issues. If, at the time of parole the stalker has not shown improvement, parole should be denied.*

*Third, the sentencing provision should provide a probationary mental health release program. Once released, there should be a probationary period in which the stalker is placed in a 'half-way' facility. The facility can be modeled after existing drug rehabilitation facilities. In this respect, the stalker will be observed and monitored, which will help in the effort to cease his stalking behavior."*

9.8 In Hong Kong, the court may remand an accused person who "may be or is alleged to be a mentally disordered person" to a mental hospital or prison for observation, investigation and treatment. In the case of any such person admitted to bail, it shall be a condition of the recognizance that he shall undergo observation, investigation and treatment by a medical practitioner.<sup>6</sup> Where a mentally disordered person is convicted of the proposed offence and the nature or degree of the mental disorder warrants his detention in the Correctional Services Department Psychiatric Centre or a mental hospital for treatment, the court may authorise his detention in the Centre or hospital by making a hospital order.<sup>7</sup> There must be clear evidence of mental disorder to convince the court that compulsory treatment is required. The fact that there is reason to suspect an accused's mental stability, or that there is evidence of mental illness in the sense of disturbance, will not suffice.<sup>8</sup> Where the court considers that the convicted stalker should be put on probation, it may require him to undergo psychiatric treatment for the purpose of preventing a repetition by him of the proposed offence or the commission of other offences.<sup>9</sup>

9.9 The sub-committee expressed the view that the existing powers of the courts to require psychiatric treatment as part of a probation order or to make hospital orders for the mentally disordered are sufficient and that it is unnecessary for legislation to impose a requirement that all persons charged with or convicted of the proposed offence must be subject to mental evaluation or psychiatric treatment.

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<sup>6</sup> Mental Health Ordinance (Cap 136), section 51.

<sup>7</sup> Cap 136, section 45(1).

<sup>8</sup> *R v Leung Tong-fat*, Cr App 8/91.

<sup>9</sup> Probation of Offenders Ordinance (Cap 298), section 3(2).

9.10 The Hong Kong Human Rights Commission observes that although the law should protect victims of stalking by putting stalkers in jail, it is “very likely” that innocent persons are “indiscriminately” prosecuted for the offence of harassment. It therefore suggests that persons accused of harassment should be evaluated by registered clinical psychologists or recognised professionals before they may be convicted by the court. In this connection, we note that the courts have a common law power to adjourn sentence to enable background reports to be prepared, and medical reports may be sought in appropriate circumstances, such as in offences involving indecency or of a sexual nature, or where the medical condition of the accused may be a factor in mitigation of sentence.

9.11 Harmony House comments that imprisonment can only partially solve the problem of stalking by preventing the stalker to impose threats on the victim. They think that a more in-depth intervention in terms of counselling and psychiatric treatment would cure the problem and minimise the long-term social cost. They therefore urge that stalkers should receive compulsory counselling whether they are put in jail or not. They add that well designed and sufficient counselling is essential to educate the stalkers, as well as the victims, to avoid reoccurrence of similar incidents. The Working Group on Battered Spouses holds a similar view. They agree that counselling and psychiatric treatment are helpful.

9.12 The police comment that those who are not imprisoned may very well not receive the urgent psychiatric treatment which is essential to provide a lasting end to the harassment of the victim. They consider it important that stalkers convicted of harassment should be given psychiatric help that they are clearly in need of and that such help should in some way be enforceable.

9.13 The Hong Kong Federation of Women Lawyers comments that some stalkers may need an order for psychiatric treatment rather than a jail sentence. They propose that all stalkers be given a comprehensive evaluation, which includes both a medical and a psychiatric or psychological evaluation.

#### **Recommendation 8**

**We recommend that the courts may require any person convicted of the offence of harassment to receive counselling, undergo medical, psychiatric or psychological evaluation, and receive such treatment as is appropriate in the circumstances.**

9.14 **Anger management programmes** - The Hong Kong Federation of Women Lawyers proposes that the court should be given a power to adjourn



proceedings, civil or criminal, and order the defendant to attend anger management programmes which would teach behaviour control and modification techniques. They invite the Commission to consider “stopping violence programmes” similar to those introduced in New Zealand by the Domestic Violence (Programmes) Regulations 1996. The programmes are mandatory for offenders under the domestic violence legislation.

9.15 The primary objective of the programmes in New Zealand is to stop or prevent domestic violence on the part of respondents in domestic violence cases. These programmes must have the goal of changing the behaviour of the respondents by:<sup>10</sup>

- (a) increasing understanding about the nature and effects of domestic violence;
- (b) increasing understanding about the object of the Domestic Violence Act 1995 and the way in which the Act operates, including the effect of protection orders and the consequences of breaching protection orders;
- (c) increasing understanding about the social, cultural, and historical context in which domestic violence occurs;
- (d) increasing understanding about the impact of domestic violence on the victim, including its effect on children;
- (e) increasing understanding about the effect that patterns of abusive behaviour have on the victim; and
- (f) developing skills to deal with potential conflicts in non-abusive ways.

9.16 Evaluations of batterer treatment programmes in New Zealand show that these programmes have not achieved much.<sup>11</sup> Ruth Busch and Neville Robertson observe that in most studies, the calculated “success rate” tends to overestimate the effectiveness of the treatment programme. They note that:<sup>12</sup>

*“treatment programmes may make things worse for women. This has been a consistent concern within the battered women’s movement. For example, the batterer may expect his partner to be more understanding of him because he is trying to change. Skills-based programmes run the risk of increasing the repertoire of skills by which the batterer can dominate his partner. Our earlier research identified cases in which men compared the violence of other group members with their own ‘mild’ violence in an attempt to convince their partners that they had nothing to complain about. Moreover, the batterer may use participation in the programme to bargain his way back into the relationship. There is empirical evidence of this. Research by*

<sup>10</sup> Domestic Violence (Programmes) Regulations 1996 (New Zealand), regulation 32.

<sup>11</sup> R Busch & N Robertson, “The Gap Goes On: An Analysis of Issues under the Domestic Violence Act 1995” 17 NZULR 337 at 363-364.

<sup>12</sup> R Busch & N Robertson, above, at 366-367.

*Gondolf has demonstrated that the batterer's participation in treatment is a major factor in refuge residents' decisions to reconcile. From this perspective, treatment programmes may raise false hopes in women, encouraging them to remain in relationships where they will be further abused. It is unfortunate if the Courts, by placing undue weight on programme participation, provide an official imprimatur for such false hopes.*

*This is not to say that programmes are never effective. Clearly, there are a proportion of men who do change their behaviour. However, even here, it would be naive to believe that programmes, by themselves, have been the decisive factor. 'Success' is likely to be attributable to a range of factors such as victim action (separation or the threat of separation), police contact (especially arrest), prosecution, adverse publicity, and the disapproval of others."*

9.17        **DNA profiling** - In recognition of the heavy sexual overtones frequently apparent in stalking, which manifest themselves in very diverse ways from nuisance to serious sexual assault on the victim, the police consider that significant improvements in the detection of stalkers could be achieved if convicted stalkers were to be made the subject of DNA profiling. The Hong Kong Federation of Women Lawyers also suggests that personality profiles that are predisposed to be stalkers or domestic violence offenders need to be formulated to assist judges, police and social workers in risk and strategic management, and framing treatment options for these cases. We have misgivings about asking all convicted stalkers to accede to a DNA test. Since the legislature has passed an ordinance which provides for the maintaining of a DNA database and sets out limitations on the access, disclosure and use of the DNA information stored in the database,<sup>13</sup> the subject of DNA profiling for convicted stalkers should be considered in that context.

9.18        **Referral to welfare organisations** - The Association for the Advancement of Feminism and the Anti-Sexual Harassment Alliance propose that even if a stalker is not prosecuted for the offence of harassment, the police should refer the case to the Social Welfare Department or other social welfare organisations for follow-up action. They consider that such referral could prevent a recurrence of the event or prevent the situation getting worse. We believe that a better approach is for the police to advise victims of the services provided by the Social Welfare Department and other welfare organisations and let them decide whether to approach them for assistance.

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<sup>13</sup> The Dangerous Drugs, Independent Commission Against Corruption and Police Force (Amendment) Ordinance 2000.

## Education

9.19 Diacovo advocates that law enforcement officers, judges and the general public be made more aware of the crime of stalking in order to effectuate policies that will help deter this crime:

*“First, all law enforcement personnel must be trained to understand the crime of stalking. Law enforcement must eschew the notion that female stalking victims ‘ask’ to be followed or harassed. ... Until we train our law enforcement personnel to act swiftly, promptly, and seriously to this crime, we will not be able to deter it. Second, judges must also be educated. ... One of the biggest problems facing judges is understanding the seriousness of the crime when the stalker has no prior record. Many times, the stalker is an average-looking individual with no criminal record. Judges do not perceive these individuals to be a serious threat. Rather, they are seen as ‘pests.’ Therefore, judges must be educated as to the serious nature of these individuals and their propensity to become violent and kill their victims. ... Once judges are aware of the seriousness and complexities of stalking crimes, they will be better equipped to handle the subject and pass sentences accordingly.”<sup>14</sup>*

9.20 In the US, 20 State agencies setting standards for training police require specific training in handling stalking cases; another 24 agencies may include such training as part of their domestic violence curriculum.<sup>15</sup> The American Model Code Project recommends that police officials should receive training in the following areas:<sup>16</sup>

- the provisions and evidentiary requirements of stalking laws;
- the characteristics of stalkers and their behaviour;
- identifying and monitoring stalking incidents;
- assessing the potential dangerousness of suspected stalkers; and
- assisting stalking victims.

9.21 The following are comments made by respondents to our Consultation Paper:

- (a) The Hong Kong Federation of Women Lawyers proposes that a special judge should be assigned to deal with stalking offences (and domestic violence) unless and until an expanded Family Court is established, and that the judge handling stalking cases should be given specialist training

<sup>14</sup> N Diacovo, above, 418-419.

<sup>15</sup> *The Third Annual Report to Congress under the Violence Against Women Act*, above, fn 45.

<sup>16</sup> National Institute of Justice, Office of Justice Programs, US Department of Justice, *Domestic Violence, Stalking, and Antistalking Legislation – Annual Report to Congress* (1996), Appendix C (Principal Recommendations of the Project to Develop an Antistalking Model Code), at <<http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/appendc.htm>>, p 2.



on the dynamics of relationship breakdown, including information on mental disorders which may predispose a person to be a stalker. They propose that law enforcement officers and the general public be educated about the crime of stalking.

- (b) Both Harmony House and the Working Group on Battered Spouses point out that frontline law enforcement officers' assessment and judgment of whether a case is criminal and whether the stalker ought to be prosecuted is pivotal in determining whether the case should be brought to court. They therefore think that training for these officers is extremely important. They further remark that community education to inform the general public about the provisions of the stalking legislation and their right to the protection of that legislation is essential.
- (c) Safetalk Domestic Violence Support Group recommends that judges and lawyers should receive special awareness training on the implementation of the law. They think that judges should be sensitive to gender issues.
- (d) The Association for the Advancement of Feminism suggests raising the consciousness and sensitivity of law enforcement officers, urging them to discard mainstream attitudes which are anachronistic, such as the view that spouses who have separated or divorced are still members of the same family, or that to continue sending gifts is not harassment. The Anti-Sexual Harassment Alliance suggests that attitudes such as the view that stalking by a separated or divorced spouse is a domestic affair or that stalking by a male suitor is reasonable should also be discarded. They point out that these attitudes have legitimised the behaviour of stalkers and resulted in stalkers being treated leniently by law enforcement officers.
- (e) The Hong Kong Human Rights Commission states that when women lodge a complaint with the police concerning a domestic dispute, the police officers often respond by saying that domestic disputes should be resolved by the parties themselves. The officers treat the dispute as a trivial matter and suggest that the women should not bother them with these matters. It therefore considers that police officers' attitude towards a stalking case hinges on their understanding of the situation faced by women. Even if stalking legislation were introduced, training should be given to police officers to acquaint them with the correct attitude towards stalking cases.

9.22 We agree that training for law enforcement officers is essential for proper identification and investigation of stalking cases. The police should develop policies related to the handling of stalking cases.<sup>17</sup> For example, they may embark on stalker profiling with the assistance of psychologists and psychiatrists. Such work could highlight patterns of stalking behaviour and result

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<sup>17</sup> S G White & J S Cawood, "Threat Management of Stalking Cases" in J R Meloy (ed), *The Psychology of Stalking*, above, ch 15.

in initial typologies which assist the police in classifying stalkers and so facilitate timely intervention. Further, the Judiciary may wish to consider organising seminars run by mental health professionals so as to familiarise judicial officers with the background to stalking legislation and, in particular, the effects of stalking on victims.

## **Need for civil remedies**

9.23 We believe that a person who suffers distress or financial loss as a result of having been harassed by a stalker should have a remedy at civil law. If a stalker is convicted of the proposed offence of harassment, the court may, in addition to passing the appropriate sentence, order him to pay to the victim compensation for personal injury or loss of property.<sup>18</sup> However, a victim who has suffered only emotional distress or loss of earnings but not personal injury or loss of property is not entitled to receive any compensation in a criminal court. Likewise, a victim who has incurred removal expenses or counselling fees in consequence of his or her being stalked could not recover these expenses in criminal proceedings. He or she has to seek remedies in tort.

9.24 Furthermore, not all victims are interested in punishing stalkers. A victim may not wish to put the stalker in jail and may not want to see the stalker's career and future ruined by a criminal conviction. Moreover, arresting the stalker might worsen an already volatile situation and provoke him to take aggressive action against the victim and his or her family members. Where the victim is the wife of the stalker, she may wish to continue to live with him or maintain a relationship with him before she decides whether to proceed with divorce proceedings. She may also be financially dependent upon him particularly when she has children to look after. Imprisonment results in loss of employment and may lead to financial hardship for her. Prosecution may do more harm than good in these cases and may precipitate the final break up of the family with all the adverse consequences for any children. Some victims therefore prefer civil remedies that are designed to protect them from further harassment and to compensate for their losses. The criminal law should not be the exclusive method for preventing and restraining harassment.

9.25 However, relying on existing torts to provide an effective remedy for victims of stalking has its limitations. We have observed in Chapter 4 that protection under existing civil law is "fragmented, *ad hoc* and piecemeal", and that none of the torts recognised by the courts captures the full extent and degree of a stalker's behaviour.

9.26 Reforming the law relating to domestic violence would not be an adequate response because it will not cover stalking cases which occur outside the domestic context. It is inadequate to rely solely on reform of the domestic violence legislation. Many stalking victims have relationships with their stalkers

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<sup>18</sup> Criminal Procedure Ordinance (Cap 221), section 73 and Magistrates Ordinance (Cap 227), section 98.

that have not led to marriage, agreements to marry, cohabitation or living in the same household. The law should protect individuals from harassment whatever its causes in a particular case. The ability of the court to provide a remedy should not depend on the relationship of the parties if the object is to protect victims of harassment. Restricting protection to victims who have a family relationship with the stalkers would deprive other victims of the protection of the law.

9.27 Nor do we think that the development of a remedy for stalking victims could be left to the civil courts. Even if it were accepted that a tort of molestation or harassment exists at common law, the exact parameters of the tort have yet to be defined and clarified on a case by case basis by the courts. JUSTICE argues that Hong Kong courts should be at liberty to develop the common law in this area by looking to other jurisdictions in the Commonwealth. However, the enactment of the Protection from Harassment Act 1997 in the UK has stifled development of the law of harassment at common law as far as England is concerned. Any further development of the civil law to protect victims of harassment in Hong Kong is likely to take a long time.

9.28 Creating a distinct tort of harassment that protects the interests of individuals has the advantage that it is not dependent on property interests. It would enable the victim to claim relief even though he has no family or other relationship with the stalker. Furthermore, the victim would not be required to show bodily harm or psychiatric illness before he can obtain relief. Proof of alarm or distress caused by harassment would suffice. Under existing law, aggravated damages may be awarded in civil proceedings to compensate a plaintiff for suffering to his feelings, dignity and pride, and for his mental discomfort and distress.<sup>19</sup>

9.29 Providing a civil remedy by way of a tort of harassment would not only enable a victim to claim compensation in respect of his loss, it would also allow him to apply for an injunction to restrain the defendant from engaging in harassing behaviour in the future. A victim who fears or apprehends that the stalker will harass him may then apply for an injunction in a *quia timet* action to prevent the stalker from harassing him even though the stalker has not yet committed a tortious act. Such an injunctive remedy would prevent stalking behaviour from developing into violence in some cases. A civil remedy would be more appropriate in circumstances where the stalker's behaviour is not sufficiently serious to warrant the intervention of criminal law.

9.30 An added advantage of providing a civil remedy for harassment is that the standard of proof is lower in civil cases. A conviction in criminal proceedings requires the courts to be satisfied beyond reasonable doubt that the defendant committed the offence. Criminal law cannot provide protection where the evidence does not satisfy the criminal standard of proof. In civil proceedings, the courts need only be satisfied on the balance of probabilities that the defendant committed the wrongful act. The creation of a tort of

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<sup>19</sup> *Wong Kwai Fun v Li Fung* [1994] 1 HKC 549, 581.



harassment would therefore provide greater protection since more victims would be able to gain access to the lesser test.

9.31 The Hong Kong Press Photographers Association comments that providing a “convenient” way for victims to prove the fault of a stalker (in the sense that it would be easier for a victim to obtain remedies by bringing civil proceedings) is against the principle of fairness and would lead to abuse of process. However, the plaintiff in a civil action would still have the burden of proving his case on a balance of probabilities. There is no question of a stalking victim abusing court process simply by filing a civil claim in court.

9.32 The Legal Aid Department invites the Commission to consider when time for the purposes of the Limitation Ordinance (Cap 347) begins to run in cases where an accumulation of acts are involved. Section 4 of the Limitation Ordinance provides that actions founded on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. We believe that time would begin to run when the actions taken by the stalker constitute a course of action and the cumulative effect of these actions is such that the victim is alarmed or put in a state of distress.

9.33 The Legal Aid Department further comments that stalkers may not have the financial means to satisfy any judgment obtained against them, making it quite pointless for a plaintiff to institute expensive civil proceedings. 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.

9.34 JUSTICE suggests that consideration should be given to the enactment of a statutory scheme of summary injunctions, such as the one set up under the Justices Act Amendment Act (No 2) 1982 in South Australia. They submit that section 40 of the Magistrates Ordinance (Cap 227) appears to be a provision for a rudimentary form of restraint order, and that there is a need for a statute empowering magistrates to make restraint orders. JUSTICE argues that if such a scheme is put in place, then there is no need to consider the creation of a statutory tort of harassment “since the remedy of damages, which traditionally requires proof of harm, is available through the existing common law tort of assault”. Although we have concluded in Chapter 4 that the law of assault is inadequate to protect individuals from stalking, we examine below whether the proposal put forward by JUSTICE is workable.

9.35 Section 40(1) of the Magistrates Ordinance provides:

*“Where a power is given by any future enactment to a magistrate of requiring any person to do or to abstain from doing any act or thing, other than the payment of money, or of requiring any act or thing to be done or left undone, other than the payment of money, and no mode is prescribed of enforcing such requisition, a magistrate may exercise such power by an order and may*

*annex thereto any conditions as to time or mode of action which he may think just, and may suspend or rescind any such order on such undertaking being given or condition being performed as he may think just, and generally may make such arrangements for carrying into effect such power as to him may seem meet.”*

9.36 This provision comes into play if a person is convicted of a crime and the law empowers a magistrate to require the defendant to do or abstain from doing any act or thing but no mode is prescribed of enforcing such requisition.

9.37 Under section 99 of the South Australian Justices Act referred to in JUSTICE’ s submission, where a court of summary jurisdiction is satisfied on the balance of probabilities that (i) the defendant has behaved in a provocative or offensive manner; (ii) the behaviour is such as is likely to lead to a breach of the peace; and (iii) the defendant is, unless restrained, likely again to behave in the same or a similar manner, the court may make an order imposing such restraints upon the defendant as are necessary or desirable to prevent him from acting in the apprehended manner. A defendant who fails to comply with the order is guilty of an offence. The purpose of the Justices Act is not to mete out punishment but to prevent breaches of the peace.<sup>20</sup>

9.38 The mischief that a stalking statute is intended to cure is stalking behaviour that does not constitute a crime or a breach of the peace under current law. Neither section 40 of the Magistrates Ordinance nor the law of breach of the peace could assist unless the stalker has committed an offence or a breach of the peace. The inadequacy of existing criminal law in dealing with the menace of stalking has been explained in detail in Chapter 4 above. It is telling that South Australia found it necessary to create the stalking offence by enacting the Criminal Law Consolidation (Stalking) Amendment Act in 1994 even though they have the mechanism to prevent breaches of the peace.

## **Recommendation 9**

### **We recommend that:**

- (a) a person who pursues a course of conduct which would have constituted the offence of harassment should be liable in tort to the object of the pursuit; and**
- (b) the plaintiff in an action for harassment should be able to claim damages for any distress, anxiety and financial loss resulting from the pursuit and to apply for an injunction to prohibit the defendant from**

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*Brunsgard v Daire* (1984) 36 SASR 391, 395.

**doing anything which causes the plaintiff alarm or distress.**

## **Breach of injunction**

9.39 The difficulties of enforcing an injunction have been noted in Chapter 4 above. Police officers cannot arrest a person who is acting in breach of an injunction unless it is necessary to prevent a breach of the peace or a criminal offence has been committed. A person who wants to enforce an injunction obtained pursuant to stalking legislation has to apply to the court to commit the defendant to prison for contempt of court, and to serve the notice to commit on the defendant. This procedure is expensive and cumbersome and the stalker may evade service of court documents. Offenders who are in breach of a non-harassment order are likely to repeat the breach. Even if the court eventually decided to impose a prison sentence on the offender, the length of imprisonment for contempt of court may not be long enough to have any deterrent effect. Given that victims of stalking are in a similar position as victims of domestic violence, the law should assist the former in enforcing injunctions granted in their favour.

9.40 The UK Protection from Harassment Act 1997 tightens enforcement against breaches of injunction granted in harassment proceedings by making such breaches arrestable offences. Under section 3(6) of the Act, a defendant who is found to have done anything which he is prohibited from doing by an injunction is guilty of a criminal offence. This enables the police to arrest the defendant, to investigate the circumstances of the breach and to collect the necessary evidence. Invoking the investigative powers of the police and their assistance in the prosecution of those who are in breach of an injunction are essential to the effective protection of victims of stalking.

9.41 In some circumstances, civil proceedings for contempt might be brought instead of prosecution under section 3(6) of the UK Act.<sup>21</sup> That could happen if there were a decision that the arrested person should not be charged, or, if he has already been charged, that criminal proceedings should be discontinued. The effect of that decision is that there would no longer be any power to hold him, or to bring him before another court. In order to plug the gap, section 3(3) enables the plaintiff to apply for the issue of a warrant for the arrest of the defendant if the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction.

9.42 The sub-committee argued in the Consultation Paper that it is unnecessary to create a further offence to deal with breaches of injunction granted in harassment proceedings. Whereas a person would commit the offence of harassment only if he has engaged in a series of acts which amounts to harassment of another, one single act would suffice to constitute a breach of a

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<sup>21</sup> Contempt of court proceedings are still available but punishment for contempt and punishment for the offence of harassment are mutually exclusive: section 3(7) and 3(8).



civil injunction. Imposing criminal sanctions for breach of a civil injunction would be too harsh for the defendant who has committed no more than one act. The sub-committee held the view that the absence of an additional offence of breach of injunction would not expose the victim to a significant risk of harm because he would still be able to institute contempt of court proceedings. If the defendant persists in breaching an injunction, the plaintiff in whose favour the injunction was granted would be entitled to seek assistance from the police. The police may then arrest the defendant and put him on trial if there is evidence that he has committed the offence of harassment. None of the submissions comments on the above observation.

9.43 The Domestic Violence Ordinance (Cap 189) seeks to assist victims of domestic violence by enabling judges in certain circumstances to attach a power of arrest to injunctions.<sup>22</sup> By virtue of section 5 of the Ordinance, a party to a marriage may apply to the Court of First Instance or the District Court to attach a power of arrest to an injunction which restrains the other party from using violence against the applicant (or a child living with the applicant) or excludes that other party from the matrimonial home or a specified area, whether the injunction is granted pursuant to jurisdiction conferred by the Domestic Violence Ordinance or pursuant to any other jurisdiction. Where a power of arrest is attached to an injunction, a police officer may arrest without warrant any person whom he reasonably suspects of being in breach of the injunction. A person arrested in such circumstances must be brought before the Court of First Instance or the District Court, as the case may be, before the expiry of the day after the day of his arrest and not be released except on the direction of the court. These provisions do not change the nature of arrest and the subsequent proceedings. Breach of an injunction to which a power of arrest is attached is not a criminal offence. The role of the police is strictly confined to bringing the person in breach of the injunction before the court. The police have no power to investigate the breach nor are they involved in the proceedings for contempt of court. Since these proceedings are civil in nature, the court does not have power to remand the defendants in custody or release them on bail even though there is reason to believe that they will continue to harass or interfere with the persons protected by the injunctions.

9.44 We consider that where a civil court grants an injunction in an action for harassment restraining the defendant from pursuing any conduct which causes alarm or distress, it should have the power to attach a power of arrest to the injunction. A police officer should be able to arrest without warrant any person whom he reasonably suspects to be in breach of an injunction to which a power of arrest is attached. A person arrested under such circumstances should be brought before the court within a relatively short period of time, such as within 24 or 48 hours of the time of his arrest. To protect the applicant in contempt proceedings from interference by the defendant, the court dealing with the

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<sup>22</sup> Cf Family Law Act 1996 (UK), sections 47 and 48.

breach should have the power to remand the defendant in custody or release him on bail unless the action is disposed of forthwith.<sup>23</sup>

9.45 Where the court has not attached a power of arrest to the injunction, the plaintiff should be able to apply for the issue of a warrant for the arrest of the defendant if the plaintiff considers that the defendant has failed to comply with the injunction. The court should not issue a warrant unless the application is substantiated on oath and the court has reasonable grounds for believing that the defendant has failed to comply with the injunction.<sup>24</sup> If a person is arrested under such a warrant, the court dealing with the contempt proceedings should have the power to remand him in custody or release him on bail if the matter is not disposed of forthwith. The court may exercise the power to remand the defendant for the purpose of enabling a medical examination and report to be made on him if his mental state is at issue.

#### **Recommendation 10**

**We recommend that:**

- (a) where a civil court grants an injunction in an action for harassment, it should have the power to attach a power of arrest to the injunction;**
- (b) a police officer should be able to arrest without warrant any person whom he reasonably suspects to be in breach of an injunction to which a power of arrest is attached; and**
- (c) the court dealing with the breach should have the power to remand the defendant in custody or release him on bail.**

#### **Recommendation 11**

**We recommend that:**

- (a) where the court has not attached a power of arrest to the injunction, the plaintiff should be able to apply to the court for the issue of a warrant for the arrest**

<sup>23</sup> Cf Family Law Act 1996, section 47. See generally, N Addison & T Lawson-Cruttenden, *Harassment Law and Practice* (London: Blackstone Press, 1999), chapter 7.

<sup>24</sup> Cf Protection from Harassment Act 1997 (UK), section 3(3) & 3(5).

**of the defendant if the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction; and**

**(b) if the defendant is arrested under such a warrant, the court dealing with the breach should have the power to remand him in custody or release him on bail.**

9.46 We agree with the suggestion of the Hong Kong Federation of Women Lawyers that the impact of the proposed legislation should be evaluated by the Administration after it has been in force for, say, three years. It would also be helpful if the Judiciary could keep statistics on its use to facilitate future review and research.

## **Harassment of debtors by debt collection agencies**

9.47 A creditor may use reasonable means to collect his accounts.<sup>25</sup> The American *Restatement of the Law of Torts* provides, by way of example, that there is no liability for invasion of privacy simply by knocking at the plaintiff's door or calling him to the telephone on two or three occasions to demand payment of a debt, and that it is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding of the plaintiff, which becomes a substantial burden to his existence, that his privacy is invaded.<sup>26</sup>

9.48 Although debt collection is a lawful business, debt collection agencies often exert pressure on debtors in order to obtain payment of their debts. Under existing law, so long as the creditors or their representatives do not employ illegal means to collect debts, they may resort to any device to obtain payment. However, the use of a device which is unfair or callous has harmful effects on the private lives of debtors and their family. The law should protect people from unscrupulous debt collectors. Every individual, whether or not he owes a debt, has a right to be treated in a reasonable and civil manner.<sup>27</sup>

9.49 Sections 24 and 25 of the Crimes Ordinance on intimidation may be used against collectors who threaten debtors with personal injury or property damage. Collectors who make abusive or threatening calls may also be prosecuted under section 20 of the Summary Offences Ordinance. The offence

<sup>25</sup> In *Guthridge v Pen-Mod, Inc.* (1967, Del Sup) 239 A2d 709, the court held that when a person accepts credit he impliedly consents to the creditor taking reasonable steps to attempt to collect the amount loaned.

<sup>26</sup> Restatement 2d, Torts, § 652B, comment d.

<sup>27</sup> 17 Am Jur 2d § 193 n 12.



of blackmail is also useful in appropriate circumstances. There is, however, no specific legal control over the activities of debt collection agencies.

9.50 The Consultation Paper noted that debt collection agencies in the US are subject to a variety of federal and state regulations, the most important of which is the Fair Debt Collection Practices Act. It also noted that section 40 of the Administration of Justice Act 1970 in the UK makes harassment of debtors a specific offence.

9.51 Although the regulation of the debt collection industry gives rise to concerns beyond our privacy reference, the use of abusive debt collection practices is nevertheless a serious social problem which ought to be addressed by legislation. Many people are affected by such practices, not only because it is now extremely easy to obtain credit facilities from financial institutions, but also because innocent persons such as the friends, relatives, tenants and neighbours of the debtors may also be harassed by debt collectors. The Consultation Paper therefore proposed that the Administration should consider introducing legislation which is designed to ensure that abusive debt collection practices would not be used by debt collection agencies.

9.52 The Office of the Privacy Commissioner supports the sub-committee's proposal. It agrees that abusive debt collection practices are a serious social problem. It comments that out of 286 complaints against private sector bodies received by the Office up to 30 June 1998, about 20% related to debt collection activities. The Office points out that the requirements of the Personal Data (Privacy) Ordinance do not apply to the whole range of abusive behaviour engaged in by some debt collection agencies. Even where the requirements do apply, the Ordinance may not always be effective in protecting individuals from the abusive practices.

9.53 The member agencies of the Hong Kong Council of Social Service agree that the Administration should look into the problem of harassment by debt collectors. They point out that abusive debt collection practices have caused many disturbances to the families concerned.

9.54 One debt collection agency comments that "indiscriminate shoe-horning" of the US or the UK legislation would be dangerous. They think that setting up a self-regulatory body such as those in the US and the UK is the preferred solution. The Hong Kong Monetary Authority welcomes the proposal of the sub-committee. The Hong Kong Association of Banks prefers self-regulation. The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies (the DTC Association) states that there are already guidelines in place governing the relationship between an Authorised Institution and the debt collection agencies the Institution employs.

9.55 Although the proposal to introduce anti-stalking legislation would impose some constraint on debt collectors whose conduct has exceeded the bounds of reasonableness, the primary object of the privacy reference is not to

examine the problem of abusive debt collection practices. Nonetheless, in response to such calls for reform, the Law Reform Commission has set up a sub-committee to examine the problem of abusive debt collection practices. As far as debt collection practices are concerned, anything outside the harassing behaviour of debt collectors would be dealt with by that sub-committee.

## Harassment of tenants in leased premises

9.56 There have been reports that tenants in old buildings are harassed by developers who wish to evict them in order to make way for the redevelopment of the site. These tenants are often disadvantaged and are not in a position to protect themselves. Criminal sanctions are necessary to safeguard their lawful interests in the property. Under section 45 of the Landlord and Tenant (Consolidation) Ordinance (Cap 7), it is an offence for a person to maliciously do any act with intent to induce a lessee of any premises to give up possession thereof. However, the defendant is liable to a fine of no more than \$2,000.

9.57 Section 70B of the Landlord and Tenant (Consolidation) Ordinance makes both unlawful deprivation and harassment of tenants of a domestic tenancy under Part II of the Ordinance an offence. Section 119V of the Ordinance contains a similar provision in respect of domestic tenancies under Part IV of the Ordinance. Both sections are based on section 1(3) of the UK Protection from Eviction Act 1977, but the scope of the Hong Kong provisions is narrower than that of the equivalent provisions in the UK Act. Whereas the Ordinance affords protection only to tenants and sub-tenants, the 1977 Act extends the protection to licensees occupying premises as a residence.<sup>28</sup> The main problem in utilising section 70B(2) and section 119V to deal with harassment by landlords or developers lies with the difficulty of proving specific intent on the part of the defendant. There must be an intent to cause the tenant either to give up the premises or to refrain from exercising some right in respect of the premises. Furthermore, the defendant must have committed an act which was “calculated” to interfere with the peace or comfort of the tenant or have persistently withdrawn or withheld services reasonably required for occupation of the premises as a dwelling.

9.58 In an attempt to overcome such problems, section 29 of the UK Housing Act 1988 re-defined the *actus reus* of the offence under section 1(3) of the 1977 Act as the commission of acts which are “likely” to have the prescribed effect. It further created a new offence which does not require proof of specific intent by adding section 1(3A) to the 1977 Act.<sup>29</sup> That subsection provides that:

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<sup>28</sup> The Act defines “residential occupier” as “a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises”: section 1(1). Both tenants and licensees occupying the premises as a residence are therefore protected under the Act.

<sup>29</sup> Housing Act 1988, section 29.

*“the landlord of a residential occupier or an agent of the landlord shall be guilty of an offence if -*

- (a) he does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or*
- (b) he persistently withdraws or withholds services reasonably required for the occupation of the premises in question as a residence,*

*and (in either case) he knows, or has reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises.”*

9.59 The Consultation Paper proposed that the Administration should give consideration to amending the Landlord and Tenant (Consolidation) Ordinance with a view to affording better protection to tenants and licensees from harassment by landlords.

9.60 The Housing Bureau has advised that it is considering amending sections 45, 70B and 119V of the Ordinance with a view to introducing heavier penalties and removing the need to prove intent. The Landlord and Tenant (Consolidation) (Amendment) Bill 1999, which contains a clause on section 119V, has already been introduced into the Legislative Council in December 1999.<sup>30</sup>

9.61 As regards the proposal that the protection under sections 70B and 119V be extended to domestic licensees as well as tenants, the Secretary for Housing advises that there are very few domestic licensees in Hong Kong. He is also not aware of any harassment cases related to domestic licensees; the reason being only tenants are entitled to rebuilding compensation and security of tenure under the Ordinance, but not licensees. It appears that there is no pressing need for the protection to be extended as originally proposed in the Consultation Paper.

9.62 **Organized and Serious Crimes Ordinance** - In their submission, the police categorise the harassing behaviour of debt collectors and landlords as “harassment for financial gain”. To address the problems arising from such harassment, the police suggest that offences in this category should fall within the scope of the Organized and Serious Crimes Ordinance (Cap 455). They explain that this will have the effect of sending a clear message to those corporate concerns which employ abusive debt collectors, and to the organised criminal gangs which terrorise older residents, that their abusive practices may incur severe financial penalties if they are caught harassing debtors or tenants. The Working Group on Battered Spouses holds the same view as the police.

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Clause 25.



9.63 By virtue of the Organized and Serious Crimes Ordinance, the court may authorise the Secretary for Justice to require a person to furnish information or produce material relating to any matter relevant to the investigation of an “organized crime”, or order a particular person to make certain material available to an authorised officer. The court may also make an order confiscating the proceeds of an offence specified in the Schedules to the Ordinance. Confiscation orders are enforceable under the Ordinance. We agree in principle with the view expressed by the Police and the Working Group on Battered Spouses.

#### **Recommendation 12**

**We recommend that the Administration should give consideration to including the offences created under sections 70B and 119V of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) as specified offences under the Organized and Serious Crimes Ordinance (Cap 455).**

### **Potential for abuse**

9.64 Some of the stalking laws in other jurisdictions have been criticised as vague on the ground that they do not provide possible offenders with sufficient notice of what the legislation prohibits. Critics are concerned that certain lawful behaviour will be indistinguishable from unlawful behaviour, and that people conducting legitimate surveillance, such as journalists, insurance adjusters and private investigators, might be liable under the law. A similar line of attack is that the proposal would criminalise innocent behaviour which is constitutionally protected.

9.65 In discussing the “doctrine of vagueness” within the context of the Canadian Charter of Rights and Freedoms, the Canadian courts noted that the major concerns are: whether the legislation in question is overbroad, whether its terms are so wide as to include expression which does not relate to Parliament’s objective, and whether there is a lack of clarity and precision in its words such that individuals are prevented from discerning its meaning with any accuracy. A law will be found unconstitutionally vague if it is so lacking in precision that it does not provide an adequate basis for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. The Canadian courts held that the threshold for finding a law vague is relatively high, and that it is not necessary that the relevant provisions carry a precise technical meaning or

provide certainty as to the result.<sup>31</sup> Among the factors with which courts should be concerned when the vagueness of a law is at issue are:<sup>32</sup>

- (a) the need for flexibility and the interpretive role of the courts;
- (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate; and
- (c) the possibility that many varying judicial interpretations of a given disposition may exist, and perhaps co-exist.

9.66 In the US, the contention that words such as “annoy”, “molest”, or “obstruct” as used in statutes dealing with disorderly persons or conduct are so vague as to render the statutes invalid has been consistently rejected.<sup>33</sup> In Michigan, the statute proscribes a wilful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel threatened, harassed or molested, and would cause a reasonable person in the victim’s position to suffer emotional distress.<sup>34</sup> When it was challenged on the ground of overbreadth, the Michigan Court of Appeal held that the statute in question “could not be applied to entirely innocent conduct.”<sup>35</sup>

9.67 We agree that a criminal offence should be defined with certainty. The public is entitled to be informed as to what conduct is forbidden, and should not be required to speculate as to the meaning of criminal law. But a statute is sufficiently certain if it employs words of long usage or with a common law meaning, or which can be made reasonably certain by reference to a dictionary.

9.68 In our opinion, the elements of the proposed offence are sufficiently certain. The meaning to be given to expressions such as “course of conduct”, “alarm” and “distress” is capable of definition by using either case law or an appropriate dictionary definition. A person of ordinary intelligence should be able to understand what course of conduct causes alarm or distress, just as the litigants in family proceedings have no difficulty in understanding what a non-molestation order is all about.

9.69 We are aware of the risk that stalking legislation may be misused by unscrupulous individuals. There is a possibility that a spouse or rejected suitor uses the procedure as a tool of harassment. JUSTICE submits that people may initiate private prosecutions in order to take revenge on others. Whilst it is true that a private individual may initiate prosecution without prior permission, private prosecutions are expensive and investigations to obtain proof are difficult without the assistance of the police. Moreover, the Secretary for Justice may, at any stage of the proceedings, intervene and assume the conduct of the proceedings if the evidence is insufficient, or if the proceedings

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<sup>31</sup> *R v Morales* (1992) 3 SCR 711; *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4<sup>th</sup>) 36; *R v Sillipp* (1995) 99 CCC (3d) 394.

<sup>32</sup> *R v Nova Scotia Pharmaceutical Society* (1992) 93 DLR (4<sup>th</sup>) 36 at 48.

<sup>33</sup> “Vagueness as Invalidating Statutes or Ordinances Dealing with Disorderly Persons or Conduct”, 12 ALR 3d 1448, § 3[d].

<sup>34</sup> Mich Stat Ann § 28.643(8) (Callaghan Supp 1996), quoted in C A Marks, above, p 491.

<sup>35</sup> *People v White*, 536 NW 2d 876 at 883 (1995), cited in C A Marks, above, p 497, n 156.

would be contrary to public interest, or for any other good reason.<sup>36</sup> The criminal court also has a general and inherent power to protect its process from abuse. This power includes a power to safeguard an accused from oppression or prejudice.

9.70 The Hong Kong Journalists Association argues that many of those who wish to escape media attention are not victims, but “victimisers”. In their opinion, these people could afford to retain good lawyers and should not be given a new weapon to “harass” journalists who are merely doing their job in an ethical way. This comment overlooks the fact that the vast majority of victims of stalking are ordinary citizens who lack the means to retain private investigators and take legal action against the stalkers. Further, the civil court also has an inherent jurisdiction to stay proceedings before it which are obviously frivolous or vexatious or an abuse of its process.

9.71 Some respondents are concerned that the legislation would not guard against arbitrary or discriminatory enforcement. We are satisfied that our proposals would not lead to abuse or arbitrary enforcement because the legislation would be sufficiently specific about the type of conduct it prohibits:

- (a) The prosecution or the plaintiff must show that the defendant has performed some affirmative acts which constitute a course of conduct. Omission on the part of the defendant would not suffice. Nor would isolated incidents or a series of acts which do not evidence a continuity of purpose suffice.
- (b) The victim must have been harassed as a result of the pursuit.
- (c) The harassment must be serious enough to cause the victim alarm or distress. The requirements in (b) and (c) would negate the risk that someone who is merely conducting surveillance would be subject to liability.
- (d) The defendant must have pursued the course of conduct knowingly in the sense that he must have actual or constructive knowledge that his pursuit amounted to harassment of the victim.
- (e) The defendant must have been acting without lawful authority.
- (f) The defendant cannot offer any reasonable excuse.

9.72 We consider that the ingredients and defences of the offence would leave little discretion to the police and the courts and would ensure that innocent and legitimate conduct would not be caught.

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<sup>36</sup> Magistrates Ordinance (Cap 227), section 14.



## Conclusion

9.73 We believe that our proposals offer a satisfactory solution to the shortcomings of traditional remedies by providing more comprehensive and effective protection. Victims would be given a choice of civil and criminal measures. The proposed tort of harassment would entitle victims to claim compensation and to apply for an injunction to restrain the stalker from engaging in harassing behaviour. The proposed offence of harassment would provide retribution and deterrence. A stalker who is convicted of the offence may be asked to undergo counselling or receive mental treatment. If he were sentenced to imprisonment, the victim would have time to take precautions to protect his safety. The power of the criminal courts would also be strengthened by allowing them to make a restraining order, breach of which would be an offence. Such civil and criminal measures complement each other and afford immediate protection to victims of stalking. In addition, both the police and the courts will be able to intervene at an early stage to prevent a campaign of harassment from escalating into a more serious crime. We believe that the protection afforded by our proposals represents a significant improvement to that available under existing law. We trust that by implementing our proposals victims of stalking will stand a better chance of regaining their private lives.

# **Chapter 10**

## **Summary of recommendations**

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### **Recommendation 1**

**We recommend that the Administration should give consideration to reforming the law relating to domestic violence. (*Chapter 4*)**

### **Recommendation 2**

**We recommend that:**

- (a) a person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;**
- (b) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and**
- (c) a person ought to know that his course of conduct amounts to harassment of another if a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other. (*Chapter 6*)**

### **Recommendation 3**

**We recommend that it be a defence for a defendant who is charged with the offence of harassment to show that:**

- (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. (*Chapter 7*)**

### **Recommendation 4**

We recommend that the courts should take into account the rights and freedoms provided in Article 17 (privacy, family, home and correspondence), Article 19 (freedom of expression) and Article 21 (peaceful assembly) of the International Covenant on Civil and Political Rights when determining whether the pursuit in question was reasonable in the particular circumstances. *(Chapter 7)*

#### **Recommendation 5**

We recommend that:

- (a) a certificate issued by the Chief Executive or his designate stating that anything carried out by a specified person on a specified occasion related to security or the prevention or detection of serious crime should be conclusive evidence that the provisions of the anti-stalking legislation do not apply to the conduct of that person on that occasion; and
- (b) the term “serious crime” referred to in (a) above should be defined in the legislation with reference to the maximum sentence applicable to the offences that could be considered as falling within that description. *(Chapter 7)*

#### **Recommendation 6**

We recommend that:

- (a) a person who is guilty of the proposed offence of pursuing a course of conduct which amounted to harassment of another, and which he knew amounted to harassment of the other, should be liable to a fine and to imprisonment for two years; and
- (b) a person who is guilty of the proposed offence of pursuing a course of conduct which amounted to harassment of another, and which he ought to have known amounted to harassment of the other, should be liable to a fine and to imprisonment for 12 months. *(Chapter 8)*

#### **Recommendation 7**

We recommend that:

- (a) a court sentencing a person convicted of the offence of harassment may make an order prohibiting him from doing anything which causes alarm or distress to the victim of the offence or any other person, as the court thinks fit;



- (b) the restraining order may be made in addition to a sentence imposed on the defendant convicted of the offence of harassment, or in addition to a probation order or an order discharging him absolutely or conditionally;
- (c) the restraining order may have effect for a specified period or until further notice;
- (d) the prosecutor, the defendant or any other person mentioned in the restraining order may apply to the court for it to be varied or discharged; and
- (e) a person who, without reasonable excuse, does anything which he is prohibited from doing by a restraining order should be guilty of an offence, which is punishable by imprisonment for 12 months. (*Chapter 8*)

#### **Recommendation 8**

We recommend that the courts may require any person convicted of the offence of harassment to receive counselling, undergo medical, psychiatric or psychological evaluation, and receive such treatment as is appropriate in the circumstances. (*Chapter 9*)

#### **Recommendation 9**

We recommend that:

- (a) a person who pursues a course of conduct which would have constituted the offence of harassment should be liable in tort to the object of the pursuit; and
- (b) the plaintiff in an action for harassment should be able to claim damages for any distress, anxiety and financial loss resulting from the pursuit and to apply for an injunction to prohibit the defendant from doing anything which causes the plaintiff alarm or distress. (*Chapter 9*)

#### **Recommendation 10**

We recommend that:

- (a) where a civil court grants an injunction in an action for harassment, it should have the power to attach a power of arrest to the injunction;

- (b) a police officer should be able to arrest without warrant any person whom he reasonably suspects to be in breach of an injunction to which a power of arrest is attached; and
- (c) the court dealing with the breach should have the power to remand the defendant in custody or release him on bail.  
*(Chapter 9)*

### **Recommendation 11**

**We recommend that:**

- (a) where the court has not attached a power of arrest to the injunction, the plaintiff should be able to apply to the court for the issue of a warrant for the arrest of the defendant if the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction; and
- (b) if the defendant is arrested under such a warrant, the court dealing with the breach should have the power to remand him in custody or release him on bail. *(Chapter 9)*

### **Recommendation 12**

**We recommend that the Administration should give consideration to including the offences created under sections 70B and 119V of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) as specified offences under the Organized and Serious Crimes Ordinance (Cap 455). *(Chapter 9)***

## List of respondents to the Consultation Paper on Stalking

1. Hong Kong Bar Association
2. The Law Society of Hong Kong
3. Hong Kong Federation of Women Lawyers
4. Hong Kong Young Legal Professionals Association Limited
5. JUSTICE (The Hong Kong Section of the International Commission of Jurists)
6. Department of Justice, Prosecutions Division
7. Department of Justice, Civil Division
8. Director of Legal Aid
9. Secretary for Security
10. Commissioner of Police
11. The Commissioner, Independent Commission Against Corruption
12. Commissioner of Correctional Services
13. Director of Social Welfare
14. Secretary for Housing
15. Privacy Commissioner for Personal Data
16. The Ombudsman
17. Working Group on Battered Spouses, Social Welfare Department
18. Hong Kong Family Welfare Society
19. Safetalk Domestic Violence Support Group
20. The Hong Kong Council of Social Service
21. Harmony House
22. Hong Kong Federation of Women
23. The Association for the Advancement of Feminism
24. Anti-Sexual Harassment Alliance
25. Hong Kong Human Rights Commission
26. Hong Kong Democratic Foundation
27. Hong Kong Journalists Association
28. Hong Kong News Executives' Association
29. Hong Kong Press Photographers Association
30. Television Broadcasts Limited
31. Asia Television Limited
32. Hong Kong Commercial Broadcasting Co Ltd
33. Metro Broadcast Corporation Ltd
34. Professor Kenneth W Y Leung, The Chinese University of Hong Kong
35. Lingnan College
36. Mr George Wilson
37. Mr Peter Lee
38. Mr C K Cheung
39. Mr Lee Chin Fai
40. Mr Cheng
41. Mr Chan Man Chung
42. Mr Choi Kim Wah
43. A reader of Oriental Daily News
44. Mr Wei
45. Mr Andrew Ho
46. Ms K F Chau
47. The Hong Kong Association of Banks
48. Banking Policy Department, Hong Kong Monetary Authority
49. The DTC Association
50. Standard Chartered Bank
51. Messrs Robertson Double & Lee (instructed by a debt collection agency)
52. Citibank, N. A.
53. Judiciary Administrator's Office
54. Zonta Club of Victoria