

THE LAW REFORM COMMISSION OF HONG KONG

PRIVACY SUB-COMMITTEE

STALKING

Consultation Paper

May 1998

This Consultation Paper has been prepared by the Privacy sub-committee of the Law Reform Commission. It does not represent the final views of either the sub-committee or the Law Reform Commission, and is circulated for comment and criticism only.

The sub-committee would be grateful for comments on this Consultation Paper by 31st July 1998. All correspondence should be addressed to:

The Secretary
The Privacy sub-committee
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong

Fax : (852) 2865-2902

It may be helpful for the Commission and the sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

**The Law Reform Commission of Hong Kong
Privacy Sub-committee**

Consultation Paper on Stalking

Table of Contents

Introduction	Page
1. The menace of stalking	
What is stalking?	
Methods employed by stalkers	
The right of individuals in not being harassed by stalkers	
Types of stalkers	
Victims of stalking	
Impact of stalking behaviour on victims	
Effect of stalking behaviour on individual privacy	
2. Protection form harassment under existing law	
I. Civil law and stalking behaviour	
Intentional infliction of emotional distress	
Trespass to land	
Private nuisance	
Watching and besetting premises	
Intimidation	
Harassment on highway	
Defamation	
Assault	
Battery	
False imprisonment	
Involuntary admission under the Mental Health Ordinance	
Protection of Children and Juveniles Ordinance	
Sexual harassment	
Injunctive relief for plaintiffs in tort actions	
Is there a tort of harassment	
Power to grant injunctions in family proceedings	
Enforcement of injunctions	
Invasion of privacy	
Difficulties of dealing with stalking under existing civil law	

II. Criminal law and stalking behaviour

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

Assault and battery

Assault occasioning actual bodily harm

Wounding or inflicting grievous bodily harm

False imprisonment

Loitering

Telephone and post office statutes

Public nuisance

Intimidation

Criminal attempt

Difficulties of dealing with stalking under existing criminal law

3. Legislation in other jurisdictions

Canada

New Zealand

New South Wales

South Australia

England and Wales

United States

4. Proposed reform

Need for anti-stalking legislation

Need for criminal sanctions

Elements of the new offence

Penalty for stalking

Aggravated stalking

Defences

Potential for abuse

Restraining orders in criminal proceedings

Bail

Mental evaluation and treatment for stalkers

Education

Need for civil sanctions

Breach of injunction

Harassment of debtors by debt collection agencies

Harassment of tenants and licensees of leased premises

Conclusion

5. Summary of recommendations and proposals

Introduction

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:

The Hon Mr Justice Mortimer (Chairman)	Vice-President, Court of Appeal
Dr John Bacon-Shone	Director, Social Sciences Research Centre, The University of Hong Kong
Mr Don Brech	Principal Consultant, Records Management International Limited

Mrs Patricia Chu	Deputy Director of Social Welfare (Services), Social Welfare Department
Mr A F M Conway	Chairman, Great River Corporation Limited
Mr Edwin Lau	Assistant General Manager / Head of Personal Banking, Hongkong & Shanghai Banking Corporation
Mr James O' Neil	Principal Government Counsel (Elections), Department of Justice
Mr Peter So Lai-yin	General Manager, Hong Kong Note Printing Limited
Prof Raymond Wacks	Professor of Law and Legal Theory, The University of Hong Kong
Mr Wong Kwok-wah	Bureau Chief, Asia Times

The secretary to the sub-committee was initially Mr Mark Berthold, Consultant. He was succeeded by Mr Godfrey K F Kan, Senior Government Counsel, in March 1996.

3. The issues raised at 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 second Commission report on privacy was on the interception of communications. It was published in December 1996 entitled *Privacy: Regulating the Interception of Communications*.

4. The sub-committee submitted to the Commission in January 1998 a report on stalking behaviour. After considering the report, the Commission decided that the general public should be consulted on the subject. The text of the sub-committee report is therefore published here as a consultation paper for comment and criticism. All the conclusions and recommendations in this paper are made by the sub-committee. The Commission will reach its own conclusions and recommendations after it has considered the responses to the paper.

5. In addition to Stalking, the Privacy sub-committee has also studied the following topics: (a) civil liability and remedies for invasion of privacy; (b) the regulation of media intrusion; and (c) criminal sanctions for unlawful surveillance. Reports on these topics will be published in due course.

Chapter 1

The menace of stalking

What is stalking ?¹

1.1 Stalking, like shoplifting and vandalism, is a description rather than a legal concept.² Stalking is not a new phenomenon but it is only recently that such behaviour has been labelled as 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.”³ 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.” He says that the legal term for stalking is harassment or pestering.⁴

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.”⁵ 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.”⁶

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

¹ J M Welch, “Stalking and Anti-Stalking Legislation: A Guide to the Literature of a New Legal Concept”, [1995] *Reference Services Review* 53. This article contains a list of articles on anti-stalking legislation published in the United States law journals.

² “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.

³ C Wells, “Stalking: The Criminal Law Response” [1997] *Crim LR* 463.

⁴ T Lawson-Cruttenden, “Is There a Law against Stalking?” [1996] *NLJ* 418.

⁵ The Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home* (LAW COM No 207) (London: HMSO, 1992), para 2.3.

⁶ *Idem*.

“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 proposes 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.”⁷ 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.”⁸ 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

1.5 The methods employed by stalkers include various harassing behaviour such as unwelcome visits, repeated unwanted communications (whether oral, written or electronic); repeated followings; persistently sending or leaving at the doorstep unwanted gifts or bizarre articles such as pubic hair, used condoms and used sanitary napkins; paint daubing; putting up offensive notices in the street where the victim lives; watching or besetting a person’s home or place of work; damage or destruction of property; kidnapping of the victim, the victim’s family member, or pets; threatening conduct; physical and verbal abuse; rape; and murder.

1.6 Stalkers may employ unlawful means to harass their victim. For example, a stalker may make telephone calls which 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 penalized by existing criminal law. However, stalkers often engage in behaviour which is apparently harmless and entirely

⁷ R A Lingg, “Stopping Stalkers : A Critical Examination of Anti-Stalking Statutes” (1993) 67 *St John’s Law Review* 347 at 375.

⁸ The National Victim Center, “California, Penal Code 646.9. Stalking. 1990. Amended 1994” at <<http://www.nvc.org/hdir/stlkca.htm>>, (17/10/97).

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.⁹

1.7 The same kind of stalking behavior 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, they can escalate into relentless and unwanted contact. Since some stalkers use the victim's fear to achieve their object, they might resort to behaviour which can be threatening, dangerous or even fatal when their victim refuses to have any contact with them. Stalking behaviour should therefore be restrained at an early stage so as to prevent them from escalating into violence.

1.8 The National Victim Center in the United States describes the following behavioural pattern which is 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.”¹⁰

1.9 Stalking behaviour involves “a series of discrete, individual acts, each one building upon the next”.¹¹ A stalker may persist in stalking his victim for months or even years. One of the problems in developing an effective response to the menace of stalking is that it is difficult to predict what and when a stalker might do to his victim:

“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

⁹ Home Office, *Stalking - The Solutions : A Consultation Paper* (July 1996), para 1.6.

¹⁰ The National Victim Center, “Stalking - Questions and Answers” (No 43, 1995), at <<http://www:nvc.org/ddir/info43.htm>>, 4.

¹¹ 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.

*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.*¹²

The right of individuals in not being harassed by stalkers

1.10 As observed by the Manitoba Law Reform Commission, stalking interferes with the following interests of an individual:¹³

- *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.¹⁴
- *Interest in emotional or psychological security:* The victim should be protected against unjustifiable conduct which threatens self-esteem, emotional security and mental health.
- *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.

Types of stalkers

1.11 Stalking is gender neutral behaviour, with both male and female perpetrators and victims. However, most stalkers are men. Statistics indicate that 75-80 % of all stalking cases in the United States involve men stalking women.¹⁵

1.12 It has been said that stalkers range from cold-blooded killers to lovesick teens, exhibiting a variety of psychological syndromes such as paranoia, erotomania,

¹² *Idem.* 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 violent acts and which will not. 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.

¹³ Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997), 5 - 6.

¹⁴ *Frisby v Schultz*, 487 US 474, 484 (1988). Residential privacy has been the hallmark of a "free and civilized society": *Carey v Brown*, 447 US 455, 471 (1980).

¹⁵ The National Victim Center, "Stalking - Questions and Answers" (No 43, 1995) at <<http://www:nvc.org/ddir/info43.htm>>, p 2.

schizophrenia and manic depression.¹⁶ 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 complete stranger. Even lawyers and judges can be stalkers.¹⁷

1.13 A review of the literature on stalking reveals that at least five different categories of stalkers exist, namely, delusional erotomanics, borderline erotomanics, Former Intimate stalkers, sociopathic stalkers, and stalkers with false victimization syndrome.

(a) *Delusional erotomanics*

1.14 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.¹⁸ The erotomaniac believes that his object will return the affection if given the chance - despite the absence of any actual relationship or emotional reciprocity.¹⁹

(b) *Borderline erotomanics (or “love obsessives”)*

1.15 “Borderline erotomanics” 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.²⁰

¹⁶ M Tharp, “In the Mind of a Stalker”, *US News & World Rep*, Feb 17, 1992, at 28, referred to in R A Lingg, at 351, n 25.

¹⁷ 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.

¹⁸ See K G McAnaney *et al*, “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 ed, 1987), 199). In an empirical study of inappropriate communications sent to celebrities by 214 subjects, Park Dietz *et al* 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. *Ibid*, at 833.

¹⁹ *Ibid*, at 834.

²⁰ J R Meloy, “Unrequested Love and the Wish to Kill” (1989) 53 *Bull Menninger Clinic*, 477 at 480-481, cited in K G McAnaney *et al*, 835-836. Even a friendly, but innocuous glance may result in the development of borderline erotomania. *Idem*.

1.16 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 overidealizes and devalues another.²¹ They may express significant narcissistic or abandonment rage when their victims do not return their affection.

(c) “Former Intimate stalkers” (or “simple obsessionals”)

1.17 About 70 to 80% of stalking cases involve “Former Intimate stalkers”. 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 victim. They stalk their victim in an attempt to resurrect the broken relationship or to seek revenge.²²

1.18 Former Intimate stalkers are extremely insecure about themselves and suffer from low self-esteem.²³ They are often emotionally dependent on their partner and may treat them as personal possessions. Some stalkers are therefore jealous of real or imagined infidelities. 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, they may kill the victim rather than let the victim go. 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 seems to be that they “refuse to be rejected”.²⁴ 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.²⁵

(d) Sociopathic stalkers

1.19 Stalking behaviour is 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.²⁶ Sociopathic stalkers were usually abused or rejected during their childhood. When they find

²¹ K G McAnaney *et al*, at 837.

²² N Diacovo, “California’s Anti-Stalking Statute: Deterrent or False Sense of Security?” (1995) 24 *Southwestern University Law Review* 389 at 396.

²³ See The National Victim Center, “Stalking - Questions and Answers” (No 43, 1995), 3.

²⁴ K G McAnaney *et al*, 839 and 840.

²⁵ M A Zona *et al*, “A Comparative Study of Erotomaniac and Obsessional Subjects in a Forensic Sample”, *J of Forensic Sci*, July 1993, at 902, cited in N Diacovo, at 396.

²⁶ 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 *et al*, 842, n 100.

themselves unable to control their environment and experience rejection again as an adult, they displace their anger onto their victims.²⁷

(e) False victimization syndrome

1.20 This kind of stalker greatly admires his victim and may go to great lengths to imitate his habits and life style. In reality, 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, he would take revenge by harassing him. When confronted with the facts, he would try to rationalize his behaviour by claiming that he is the victim and that it is the individual targeted by him who is at fault. Such stalkers are usually of the same sex as their victims.

Victims of stalking

1.21 Stalking affects people ranging from ordinary citizens to celebrities.²⁸ 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 lovers and spouses. This category represents 80% of all stalking cases. According to the Federal Bureau of Investigation in the United States, domestic violence is the number one cause of women's injuries.²⁹

1.22 Since stalking is not a crime 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 for our reference.

England

1.23 In England, the Police Federation estimated that 3,000 people fall victim to stalkers every year and that the overwhelming majority of them are women.³⁰ 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 are women³¹.

²⁷ F H Leibman, "Serial Murderers: Four Case Histories", (1989) 53 *Fed Probation* 41, 42, cited in K G McAnaney *et al*, 843, n 101.

²⁸ Celebrities such as Theresa Saldana, Rebecca Schaeffer, David Letterman, Jodie Foster and Madonna have been victims of stalkers. 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).

²⁹ D Holmstron, "Halting the Clenched Fist of Abuse", (1992) *Christian Sc Monitor*, July 28, at 10, cited in J Fahnstock, "All Stalk and No Action: Pending Missouri Stalking Legislation" (1993) 61 *UMKC Law Review* 783 at 785.

³⁰ House of Commons Hansard 17 Dec 1996, col 813.

³¹ Home Office, *Stalking - The Solutions: A Consultation Paper* (1996), para 1.8.

Canada

1.24 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 1995.³²

- (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
 - 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 revealed 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.

³² Ministry of Women's Equality and Ministry of Attorney General, "Criminal Harassment Information Focuses on Safety" (21 April 1997), at <http://www.weq.gov.bc.ca/press_releases/stalking.pr.html>, 2-3. The offence of criminal harassment is defined in section 264 of the Canadian Criminal Code. See para 3.2 below.

1.25 About 75% of the incidents involved women being stalked by men. The Federal-Provincial/Territorial Ministers Responsible for the Status of Women emphasized that women subject to violence have rights to just, timely, and effective remedies for the harm they have suffered.³³

United States

1.26 A leading forensic psychiatrist and expert on behavioral sciences, Dr Park Dietz, estimated that there are 200,000 stalkers on the street and that 5% of women in the United States will be stalked at least once during their lifetimes.³⁴ According to 1994 statistics, one million people in the United States have been stalked. The majority of them are ordinary people, mostly women, who are being pursued and threatened by someone with whom they have had a previous relationship. Approximately 80% of cases involve women stalked by ex-boyfriends and former husbands.³⁵ Of all women murdered in the United States, one half are killed by their current or former husbands or boyfriends.³⁶ The co-director of Virginians Against Domestic Violence estimates that as many as 90% of the women killed by (former) husbands or boyfriends were stalked by the killer before a murder occurred.³⁷

Impact of stalking behaviour on victims

1.27 Stalking has a serious impact on the private life and safety of many people. A review of the victims' responses to their stalking experience indicates the presence of several Post-traumatic Stress Disorder symptoms, some of which persist for a long time even after stalking ceases.³⁸ In *R v Ireland*,³⁹ 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. Those 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. Other stalking cases show that the victims have difficulty in eating and sleeping or have nightmares over the events.

³³ 13th Annual FPT Conference of MRSW, Regina, Saskatchewan, June 8-9, 1994, cited in K L Walsh, at 397 n 160.

³⁴ See R A Lingg, 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." *Ibid*, n 19.

³⁵ Los Angeles Police Dept, Fact Sheet No 14, at <<http://www.privacyrights.org/fs/fs14-stk.htm>>, 1.

³⁶ Council on Scientific Affairs, American Medical Association, "Violence Against Women", *JAMA*, June 17, 1992, at 3184, cited in R A Lingg, at 355.

³⁷ J Fahnestock, "All Stalk and No Action: Pending Missouri Stalking Legislation", *UMKC Law Review* 61 (1993) 783 at 785 (citing M Beck *et al*, "Murderous Obsession", *Newsweek*, July 13, 1992, at 60).

³⁸ Post-traumatic Stress Disorder is a diagnosis for victims of emotional or physical trauma.

³⁹ [1997] 1 All ER 112.

1.28 As victims of stalking can be subjected to constant harassment at home, at 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.⁴⁰ Celia Brayfield, a novelist who was stalked for six years, said that -

*“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”.*⁴¹

1.29 Stalking behaviour may cause severe emotional trauma to the victim. Many stalking victims suffer psychological distress as a result. “They reach a ‘breaking point’ where they can find few areas in which to feel secure; they become nervous and then paranoid, and they go to great lengths to change their situation.”⁴² 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, the victims are forced to change their lifestyles. They 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 described stalking in the following terms:

*“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.”*⁴³

1.30 The Police Federation in England made a similar observation:

*“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.”*⁴⁴

⁴⁰ See 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).

⁴¹ Quoted in House of Lords Hansard, 24 Jan 1997, col 922.

⁴² K L Attinello, at 1952 n 62 (referring to A J R, Comment, “A Remedial Approach to Harassment”, 70 *Va L Rev* 507, 513 (1984)).

⁴³ 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.

⁴⁴ House of Commons Hansard, 17 Dec 1996, col 788.

1.31 A worrying characteristic of stalking is that it can escalate into violence. Some 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 could be deadly 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.

Effect of stalking behaviour on individual privacy

1.32 There is a divergence of opinion within the Privacy sub-committee as to whether stalking falls within the remit of the privacy reference. The minority opinion, which is represented by Professor Wacks, is that stalking behaviour does not lead to a loss of privacy. 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 which 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.”⁴⁵

1.33 Professor Wacks points out that the idea of “privacy” as applied in our proposals must be consistent and coherent. He says that the main concern of “privacy” is the use of personal information about an individual. All the proposals made or to be made by the Privacy sub-committee, whether they are on data protection, interception of communications, surveillance, intrusion upon seclusion, public disclosure of private facts, or media intrusion, 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

⁴⁵

R Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989), 18.

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 is rightly called for. However, he doubts whether proposals on stalking could properly be dealt with under the rubric of privacy. Although there is an element of privacy in stalking cases, stalking is an issue which goes beyond the remit of the sub-committee.

1.34 The sub-committee recognize that it is not easy to see at first sight the relationship between stalking and privacy. How can a stalker be accused of interfering with the privacy of his object when he merely follows him down the street or waits outside his residence or place of work? 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 a telephone call or sending a letter or gift 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.

1.35 Neither stalking nor harassment is included in one of the four specific areas mentioned in our terms of reference. Many stalkers have no intention to acquire 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. The task of the Privacy sub-committee, as we see it, is to examine whether legislative or other measures are required to provide protection against undue interference with the privacy of the individual. The reference to acquisition and disclosure of personal data, intrusion into private premises and interception of communications merely exemplifies the circumstances in which an undue interference with privacy may occur.

1.36 Whether stalking can be considered as a privacy concern depends very much 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 and 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.⁴⁶ No matter which definition we are talking about,

⁴⁶ R Gavison, "Privacy and the Limits of Law" (1980) 89:3 *Yale Law Journal* 421, 428 *et seq.*

it seems that stalking does not fit in well with the meaning of privacy described above. 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”.⁴⁷ 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.

1.37 The European Court of Human Rights did not give an exhaustive definition of the notion of “private life” under Article 8. However, it did give some guidance as to its meaning for the purposes of the Article. In *Niemietz v Germany*, the Court held that-⁴⁸

“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.”

1.38 According to *Harris et al*, the 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.”⁴⁹

⁴⁷ Both the Chinese and English texts of the ICCPR and the HK Bill of Rights Ordinance are authentic.

⁴⁸ Series A, No 251-B, para 29 (1992).

⁴⁹ 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. And in *X and Y v Netherlands*, Series A, No 91, para 22 (1985), the European Court held that “private life” covers “the physical and moral integrity of the person”. Thus an unwelcome physical contact by an individual can amount to an interference with private life.

1.39 Indeed the Nordic Conference on the Right of Privacy defined the right to privacy as covering the following matters:⁵⁰

- “harassing a person (e.g. watching and besetting him or subjecting him to nuisance calls on the telephone)”; and
- “importuning by the Press or by agents of other mass media”.

1.40 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:⁵¹

“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)

1.41 It is beyond dispute that an aspect 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.⁵²

1.42 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 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

⁵⁰ Para 3 (ix) and (xii); reproduced in JUSTICE, *Privacy and the Law* (London: Stevens and Sons, 1970), Appendix B.

⁵¹ Quoted in JUSTICE, *Privacy and the Law* (London: Stevens and Sons, 1970), Appendix B, at 49.

⁵² D J Harris *et al*, 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.”

*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.*⁵³

1.43 Following or observing another in a public place or in the common area of a building 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. Persistent following and observation is shattering to the subject particularly where it is accompanied with unwanted communications. The subject has no way of knowing when and where he will be put under surveillance. He simply loses control of his own life.

1.44 As pointed out by Gavison, attention alone can cause a loss of privacy to the subject even though no new personal information about him becomes known.⁵⁴ 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 someone he dislikes. We think 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 may be tracked by another.⁵⁵ It would be deplorable if the law of privacy 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 majority of the sub-committee therefore believe that harassment constitutes an undue interference with an individual's private life.

⁵³ A F Westin, *Privacy and Freedom* (New York: Atheneum, 1968), 31.

⁵⁴ R Gavison, "Privacy and the Limits of Law" (1980) 89:3 *Yale Law Journal*, 421 at 432.

⁵⁵ 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 September 1997, para 3.

Chapter 2

Protection from harassment under existing law

I. Civil law and stalking behaviour

2.1 Stalking activities cause psychological harm, emotional distress, or personal injury to the victims. They may have to incur therapy, removal and accommodation expenses, and suffer a loss of income. In carrying out their campaign of harassment, stalkers may commit a tort such as assault, intimidation, trespass to land, nuisance, or intentional infliction of emotional distress. The victim may, in such cases, bring a civil suit against the stalker in tort. The law of tort can provide a remedy in damages or by way of injunction.

Intentional infliction of emotional distress

2.2 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 *Wilkinson v Downton*.⁵⁶ This principle overcomes the limitations inherent in the tort of assault which requires that the threatened personal violence be immediate. In *Janvier v Sweeney*,⁵⁷ 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*⁵⁸ 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”. Judge Nigel Fricker QC suggested that the courts in *Janvier* and *Burnett* recognized 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.”⁵⁹

2.3 The tort recognized in the above cases is useful where there is no physical impact or threat of the application of force. However, many stalkers never intended 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 actual bodily harm. Although the term “nervous shock” is now

⁵⁶ [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.

⁵⁷ [1919] 2 KB 316.

⁵⁸ [1992] 1 FLR 525.

⁵⁹ N Fricker, “Harassment as a Tort” [1992] NLJ 247; M Brazier, “Personal Injury by Molestation - An Emergent or Established Tort” [1992] Fam Law 346.

understood as referring to “recognisable psychiatric illness with or without psychosomatic symptoms” or “recognisable and severe physical damage to the human body and system caused by the impact, through the senses, of external events on the mind”,⁶⁰ mere emotional distress is not actionable under this tort.⁶¹

Trespass to land

2.4 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 premises. Furthermore, the protection does not extend to persons who do not have any proprietary interests in the premises in question.

Private nuisance

2.5 Stalking behaviour may constitute the tort of private nuisance if it interferes with the ordinary and reasonable enjoyment of the victim’s property.⁶² Private nuisance covers unreasonable interference with the use and enjoyment of land by smoke, smell, smoke, noise, and vibrations.⁶³

2.6 The making of relentless and harassing telephone calls by stalkers may amount to a nuisance.⁶⁴ 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.⁶⁵ The number and frequency of calls and whether the calls are made at late hours of the night are relevant in determining liability.⁶⁶

2.7 As nuisance is based on the right to peaceful occupation of real property, it cannot provide the legal basis for personal 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 work or school. Furthermore, since nuisance is a tort to land, a person who has no right in the land cannot sue in private nuisance.⁶⁷ 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

⁶⁰ *Khorasandjian v Bush* [1993] 3 WLR 476, 482H - 483A.

⁶¹ 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).

⁶² *Hubbard v Pitt* [1976] 1 QB 142.

⁶³ Constant surveillance of a house from the air may amount to nuisance: *Berstein v Skyviews* [1978] 1 QB 479, 489.

⁶⁴ *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. [1993] 3 WLR 476 at 482B.

⁶⁵ See 58 Am Jur 2d § 225; 53 ALR4th 1153.

⁶⁷ *Malone v Laskey* [1907] 2 KB 141.

violence to, harassing, pestering or communicating with” the plaintiff. 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.”*⁶⁸

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.⁶⁹ However, this decision has been overruled by the House of Lords in *Hunter v Canary Wharf Ltd.*⁷⁰ 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.⁷¹ A mere licensee on the land has no right to sue.

Watching and besetting premises

2.8 A stalker may harass his victim by watching, besetting or obstructing the access to premises. In *Lyons & Sons v Wilkins*,⁷² 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.”*⁷³

Intimidation

2.9 The essence of the tort of intimidation is “intentional unlawful coercion”. It consists of two ingredients.⁷⁴

⁶⁸ [1993] 3 WLR 476 at 481B.

⁶⁹ See L Mountford, “Liberating Nuisance or a New Tort of Harassment?” *Law Teacher*, Winter 1994, 28 n 1, pp 91-95.

⁷⁰ [1997] 2 All ER 426.

⁷¹ Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally, this category may include a person in actual possession who has no right to be there. *Ibid*, at 438g.

⁷² [1899] 1 Ch 255.

⁷³ At 267.

⁷⁴ *Godwin v Uzoigwe* [1993] Fam Law 65 at 66. See also *Rookes v Barnard* [1964] AC 1129, 1167.

- 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
- the other person was coerced to act or refrain from acting by the threat or unlawful act.

2.10 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 crime or tort without the requisite element of coercion.

Harassment on highway

2.11 In *Thomas v National Union Mineworkers (South Wales Area)*,⁷⁵ 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:⁷⁶

*“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.”*⁷⁷

Defamation

2.12 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.

Assault

2.13 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

⁷⁵ [1985] 2 All ER 1.

⁷⁶ The existence of this tort was denied in *News Group Newspapers Ltd v SOGAT 1982* (1986) 130 SJ 407.

⁷⁷ [1985] 2 All ER 1, 22.

unless they are of such a nature as to put the victim in fear or apprehension of *immediate violence*.

Battery

2.14 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. Mere touching without consent or lawful excuse is actionable. An unwanted kiss, for example, may be a battery even though the defendant is not hostile.⁷⁸ 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 do not amount to a battery even though the object suffers psychiatric illness as a result.

False imprisonment

2.15 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 in which he is, e.g. 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 a false imprisonment.

Involuntary admission under the Mental Health Ordinance

2.16 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".⁷⁹ 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.⁸⁰ 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

⁷⁸ *R v Chief Constable of Devon and Cornwall, ex p CEGB* [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.

⁷⁹ Mental Health Ordinance (Cap 136), section 7 (as amended by Ord No 81 of 1997, section 6). A nominated public officer also has this right.

⁸⁰ Cap 136, section 26 (as amended by Ord No 81 of 1997, section 18).

managing his affairs. Such stringent requirements render the provisions ineffective in combating stalking activities.

Protection of Children and Juveniles Ordinance

2.17 The Director of Social Welfare has power to protect juveniles and children from “moral or physical danger” under the Protection of Children and Juveniles Ordinance (Cap 213). Whenever the Director of Social Welfare has reason to believe that any child or juvenile is likely to be exposed to any moral or physical danger, he may make any order regarding the control and custody of the child and may require any person into whose charge he shall place the child to enter into a bond to treat the child well. Any person who fails to perform any obligation imposed by the bond is guilty of an offence.⁸¹

Sexual harassment

2.18 Sexual harassment which is unlawful under the Sex Discrimination Ordinance (Cap 480) is actionable as a tort in the District Court.⁸² The Equal Opportunities Commission also has 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.⁸³ Persistent sexual harassment in breach of the enforcement notice may be restrained by an injunction granted by the District Court.⁸⁴ A person “sexually harasses” another if -

- 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
- the person engages in conduct of a sexual nature which creates a “sexually hostile or intimidating work environment for her”.⁸⁵

Injunctive relief for plaintiffs in tort actions

2.19 Injunction is the most effective form of remedy to prevent harassing behaviour. Section 21L of the Supreme Court Ordinance (Cap 4) provides that the court may grant an injunction, whether interlocutory⁸⁶ or final, in all cases in which it appears to be “just and convenient to do so”. In common law actions, an injunction will generally be granted only in support of a recognized legal or equitable right. There must also be a

⁸¹ Protection of Children and Juveniles Ordinance (Cap 213), section 35.

⁸² Section 76.

⁸³ Section 77.

⁸⁴ Section 81.

⁸⁵ Section 2(5).

⁸⁶ An interlocutory injunction can be granted *quia timet* before an actual tort has been committed against a plaintiff.

sufficient link between the cause of action and the relief sought by the injunction.⁸⁷ Lord Diplock stated that the authority to make interlocutory orders presupposes the existence of an action, actual or potential.⁸⁸

“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. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.”

2.20 The court will grant an injunction to protect victims from actual or threatened tortious behaviour if the injury is caused by a continuing wrong or a wrong which is reasonably believed to be likely to be repeated in the future. But a court will not grant an injunction in respect of behaviour which does not amount to a tort or a threatened tort, however greatly it may annoy or distress the person subjected to it.⁸⁹ A question arises as to whether a stalking victim can obtain an injunction on the basis that the defendant has engaged in behaviour which amounts to molestation or harassment.

Is there a tort of harassment ?⁹⁰

2.21 The traditional view is that there is no tort of molestation or harassment at common law.⁹¹ 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”.*⁹²

⁸⁷ *Siskina v Distos Compania Naviera S A* [1979] AC 210, 256.

⁸⁸ *Idem*.

⁸⁹ *Patel v Patel* [1988] 2 FLR 179 (CA).

⁹⁰ N Fricker, “Molestation and Harassment after *Patel v Patel*” [1988] Fam Law 395, 400; N Fricker, “Personal Molestation or Harassment” [1992] Fam Law 158; Philip Turl, “Protection of Privacy - The Common Law Gets a Grip” [1993] Fam Law 640.

⁹¹ *Patel v Patel* [1988] 2 FLR 179, 182 *per* Waterhouse J.

⁹² *Patel v Patel* [1988] 2 FLR 179, at 180 and 181. Cf *Khorasandjian v Bush* [1993] 3 WLR 476, 484H (noting that the reformulated injunctions which Waterhouse J approved in *Patel v Patel* included an injunction restraining the defendant from molesting the plaintiff).

2.22 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.

2.23 In *Burnett v George*,⁹³ 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*.⁹⁴ 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.⁹⁵

2.24 However, the court in *Pidduck v Molloy*⁹⁶ 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.⁹⁷ 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”.⁹⁸

2.25 Similarly, in *Burris v Azadani*,⁹⁹ 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

⁹³ [1992] 1 FLR 525 (CA).

⁹⁴ [1992] 1 FLR 525 at 527.

⁹⁵ See The Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home* (LAW COM No 207) (London: HMSO, 1992), para 3.15.

⁹⁶ [1992] 2 FLR 202.

⁹⁷ [1992] 2 FLR 202, 204.

⁹⁸ [1992] 2 FLR 202, 205G, *per* Lord Donaldson MR.

⁹⁹ [1995] 1 WLR 1372 (CA).

conduct which is not in itself tortious “if such an order is reasonably regarded as necessary for protection of a plaintiff’s legitimate interest”.¹⁰⁰ 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.”¹⁰¹

2.26 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*.¹⁰²

2.27 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. In *Wilde v Wilde*,¹⁰³ Bingham LJ said:

“The court may, of course, in a proper case grant an injunction to protect or support a party’s legal right under section 37(1) of the Supreme Court Act 1981 or under the overlapping inherent jurisdiction of the court if such exists. Thus the wife here, irrespective of any marriage or former marriage, could seek an injunction to restrain the husband from assaulting or molesting her because everyone has a right not to be assaulted or molested.”

2.28 Similarly, the Court of Appeal in *Khorasandjian v Bush*¹⁰⁴ accepted that there was a right for a person not to be molested. More recently, Sir Thomas Bingham MR stated in *Burris v Azadani*¹⁰⁵ that the view that there was no tort of harassment could not be upheld. Schiemann LJ also stated that an individual has an interest not to be harassed.¹⁰⁶

¹⁰⁰ 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.

¹⁰¹ [1995] 1 WLR 1372 at 1380 - 1381.

¹⁰² See T Lawson-Cruttenden, “Is There A Law Against Stalking?” [1996] NLJ 418.

¹⁰³ [1988] 2 FLR 83.

¹⁰⁴ [1993] QB 727.

¹⁰⁵ [1995] 1 WLR 1372 (CA).

¹⁰⁶ [1995] 1 WLR 1372, at 1378H and 1381H.

2.29 Yet, even if a tort of harassment is recognized at common law, the scope, requirements and defences to such a tort have never been argued before the courts. The components of the tort and the extent to which the courts are prepared to provide relief to victims of harassment remain unclear. It is therefore 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.

2.30 Since the law of harassment in England has been put on a statutory basis by the enactment of the Protection from Harassment Act 1997,¹⁰⁷ 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 made by Lord Goff in *Hunter v Canary Wharf Ltd*:¹⁰⁸

“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 Laskey¹⁰⁹, by which the court was bound.”

Power to grant injunctions in family proceedings¹¹⁰

2.31 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.¹¹¹ As between parties to a marriage to which the provisions of the Domestic Violence

¹⁰⁷ See Chapter 3.

¹⁰⁸ [1997] 2 All ER 426 at 438.

¹⁰⁹ [1907] 2 KB 141, [1904-7] All ER Rep 304.

¹¹⁰ The House of Lords in *Richards v Richards* [1984] 1 AC 175 reasserted that the principles stated in *Siskina, supra*, apply in family cases. See N Fricker, “Molestation and Harassment after *Patel v Patel*” [1988] Fam Law 395, 397; N Fricker, “Harassment as a Tort” (1992) NLJ 247.

¹¹¹ *Re W (a minor)* [1981] 3 All ER 401.

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”,¹¹² 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*¹¹³

2.32 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.¹¹⁴ 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 containing one or all of the following provisions:

- restraining the other party from molesting the applicant;
- restraining the other party from molesting any child living with the applicant;
- excluding the other party from the matrimonial home or from a specified area;
- requiring the other party to permit the applicant to enter and remain in the matrimonial home.¹¹⁵

2.33 “Molestation” is not defined in the Ordinance.¹¹⁶ It has been held that the word “molesting” in section 3(1) does not imply necessarily either

¹¹² *McGibbon v McGibbon* [1973] Fam 170 at 173.

¹¹³ Cf Domestic Violence and Matrimonial Proceedings Act 1979 (UK).

¹¹⁴ Domestic Violence Ordinance (Cap 189), sections 3 and 5.

¹¹⁵ The jurisdiction to grant a restraining order under the Domestic Violence Act 1994 (South Australia) is much wider. The court may grant a restraining order if there is reasonable apprehension that the defendant may commit “domestic violence”. A person commits “domestic violence” if, on two or more separate occasions, he follows a family member; loiters outside the place of residence of a family member or some other place frequented by a family member; gives offensive material to a family member; keeps a family member under surveillance; or engages in other conduct so as to reasonably arouse a family member’s apprehension or fear.

¹¹⁶ “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. *Ibid*, at 452E. Stephenson LJ said at 454G:

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 court.¹¹⁷ The courts noted that molestation without the threat or use of violence may still be serious and inimical to mental and physical health.¹¹⁸

2.34 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.¹¹⁹ 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.

2.35 Injunctive relief under the Ordinance is available to married persons and cohabitants only.¹²⁰ Victims of stalking who have never cohabited or have ceased to cohabit with the stalker at the time of the harassment in question cannot invoke the jurisdiction of the court. The requirement of marriage or cohabitation also deprives a party in other relationships (such as parent and child, relatives or a gay couple) the right to apply. The protection afforded by the Ordinance is therefore very limited. Victims who are harassed outside the family and domestic context have to seek relief in tort.

2.36 Where the person who has been molested is a child, the child himself has no standing to apply. An application must be made on the child’s behalf by a parent. The child receives no protection under the Ordinance if his parent is unwilling to bring an action against the other party. There is also a requirement that the child be *living with* the applicant. A child who is not living with his parent cannot apply.

2.37 The court in *Pidduck v Molloy*¹²¹ 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 child is very often even greater in cases where such a relationship has existed but has then broken down.”

“‘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.”

¹¹⁷ *Horner v Horner* [1983] 4 FLR 50, 51G *per* Ormrod LJ.

¹¹⁸ *Davis v Johnson* [1979] AC 264 at 334A, *per* Viscount Dilhorne.

¹¹⁹ *Johnson v Watson* [1990] 1 FLR 350, 352. Cf *Khorasandjian v Bush* [1993] 3 WLR 476, 486 (suggesting that an injunction needs not be qualified by adding words such as “by doing acts calculated to cause the plaintiff harm”).

¹²⁰ Cap 189, section 2(2).

¹²¹ [1992] 2 FLR 202 at 206.

Enforcement of injunctions

2.38 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.”¹²² As breach of injunction does not constitute a criminal offence, 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.¹²³ Such procedures fail to give speedy and effective redress for breaches of injunction which might have serious consequences for the victims.

2.39 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.¹²⁴ 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 confined to physical assault,¹²⁵ 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.”¹²⁶

Recommendations of the English Law Commission

2.40 In its report on *Domestic Violence and Occupation of the Family Home*,¹²⁷ the English Law Commission thought that the range of persons who were protected by the domestic violence legislation¹²⁸ was too narrow. It made a number of recommendations for reform of the 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 of the

¹²² *Ansah v Ansah* [1977] Fam 138, 144 *per* Ormrod LJ.

¹²³ Cap 4, RHC O 52.

¹²⁴ Section 5(1).

¹²⁵ 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. 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).

¹²⁶ *Lewis v Lewis* [1978] 1 All ER 729 at 731, *per* Ormrod LJ.

¹²⁷ The Law Commission, *Family Law: Domestic Violence and Occupation of the Family Home* (LAW COM No 207) (London: HMSO, 1992).

¹²⁸ I.e. Domestic Violence and Matrimonial Proceedings Act 1976 (UK).

Commission by enacting the Family Law Act 1996.¹²⁹ 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).¹³⁰

2.41 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.¹³¹ 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 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.

2.42 The provisions of the 1996 Act represent an improvement to the law protecting individuals from domestic violence. We believe that the private life of all parties to domestic relationship can be better protected if the Domestic Violence Ordinance can be reformed along the lines recommended by the English Law Commission, whether or not our recommendations on stalking are implemented.

¹²⁹ Part IV (sections 42 - 63).

¹³⁰ Section 62(3).

¹³¹ Section 62(2).

2.43 **We propose that the Administration should give consideration to amending the law relating to domestic violence with a view to providing better protection to the private life of individuals.**

Invasion of privacy

2.44 A stalker who creates an unwarranted interference in the victim's private life may be liable for the tort of "invasion of privacy by intrusion upon another's solitude or seclusion" to be proposed in our consultation paper on Civil Liability and Remedies for Invasion of Privacy, but no such liability exists at present¹³². As the intrusion need not be physical, constant harassment which is seriously objectionable and offensive to a reasonable person might give rise to liability for invasion of privacy. For instance, the plaintiff in a personal injury action may be subject to the surveillance of a private detective hired by the defendant to investigate the validity of the plaintiff's claim. If the surveillance, shadowing or trailing is conducted in an unreasonable and obtrusive manner which disturbs the sensibilities of an ordinary person, the person under surveillance would have a cause of action for invasion of privacy.¹³³ However, the tort might be 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. *Prosser and Keeton on Torts* states that the intrusion tort requires the plaintiff to establish that the defendant has done something in the nature of prying or intrusion. 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 follow him about and watch him there.¹³⁴

2.45 In theory, unsolicited mailings, distributions, house calls, or telephone calls may render the caller or sender liable in tort for an invasion of privacy by intrusion into another's seclusion. But *American Jurisprudence* states that the cases have run substantially in favour of non-liability overall, especially where only a single means of intrusion was used.¹³⁵ Liability for invasion of privacy seems to depend on a number of factors, including:

- the number of unsolicited calls made by the stalker;
- the time of day during which the calls were made;
- the particular means of intrusion employed by the stalker;
- whether more than one means of intrusion were used;
- whether the stalker persisted in making the calls regardless of the victim's responses or distressed condition; and
- whether the stalker had used vile, vicious, abusive or profane language toward the victim.

¹³² Unless the intrusion involves collection of personal data which is in breach of Data Protection Principle 1 under the Personal Data (Privacy) Ordinance (Cap 486).

¹³³ 62A Am Jur 2d, Privacy, § 55.

¹³⁴ W P Keeton (ed), *Prosser and Keeton on Torts* (Minn, St Paul, West Publishing Co, 5th ed, 1984), 855.

¹³⁵ 62A Am Jur 2d, Privacy, § 64; J F Ghent, "Unsolicited Mailing, Distribution, House Call, or Telephone Call as Invasion of Privacy", 56 ALR3d 457.

Difficulties of dealing with stalking under existing civil law

2.46 Although the law of tort provides a remedy to victims of stalking in some instances, the protection is neither complete nor adequate. It has been said that the protection under the law of tort is “fragmented, *ad hoc* and piecemeal”.¹³⁶ Although attempts have been made by the courts to stretch the law of torts to provide a remedy for victims of stalking, the fact remains that none of the torts captures the full extent and degree of a stalker’s behaviour. We note that some attempts to develop the law in this direction in England have been met with disapproval from the House of Lords.¹³⁷

2.47 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 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 explains the difficulties of dealing with stalking by way of injunctions:

“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

¹³⁶ Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997), 25.

¹³⁷ *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426 at 438; see the comment made by Lord Goff quoted above.

*potential for violence. Therefore, injunctions will not be very effective in protecting those victims who need the most protection.*¹³⁸

2.48 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 tell the women seeking restraining orders that the paper will not stop a bullet, knife, or car.¹³⁹ 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.¹⁴⁰

II. Criminal law and stalking behaviour

2.49 Where an aspect of stalking behaviour constitutes a criminal act, the criminal law may be invoked to restrain or punish the stalker.

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

Arrest for a breach of the peace

2.50 Although breach of the peace is not an offence at common law,¹⁴¹ a person may be arrested without warrant for a breach of the peace. The Court of Appeal in *R v Howell*¹⁴² 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
- b) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach; or
- c) where a breach has been committed and it is reasonably believed that a renewal is threatened.¹⁴³

2.51 A person arrested in this way may be charged with an offence which has "breach of the peace" as an element of the offence,¹⁴⁴ or bound over to keep the peace or to be of good behaviour, or simply released.

¹³⁸ K L Attinello, at 1960-1.

¹³⁹ J Fahnestock, "All Stalk and No Action: Pending Missouri Stalking Legislation", (1993) 61:4 *UMKC Law Review* 783, 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, 357 n 55.

¹⁴⁰ K L Walsh, at 381.

¹⁴¹ *R v County of London Quarter Sessions Appeals Committee, ex p Metropolitan Police Commissioner* [1948] 1 KB 670 at 673.

¹⁴² [1982] QB 416.

¹⁴³ At 426. See also *Albert v Lavin* [1981] 3 WLR 955 (HL).

Breach of the peace

2.52 The concept of breach of the peace is not clearly defined.¹⁴⁵ In *R v Howell*¹⁴⁶, Watkins LJ stated that there is a breach of the peace where:

*“there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done.”*¹⁴⁷

2.53 It is not clear what exactly is meant by “an act ... threatened to be done which ... actually harms a person, or in his presence his property”. This definition also conflicts with a later passage which states 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.*”¹⁴⁸ Nicolson points out that “[u]nless the reference to assault, affray, etc was meant simply to exemplify the types of violent conduct which can constitute breaches of the peace or were thought to cover all forms of violent action, rather than being intended to limit the relevant types of violent conduct, the two definitions conflict and it is then unclear whether the limit applies to all forms of harm or only feared harm.”¹⁴⁹

Power to make a binding over order

¹⁴⁴ E.g. Public Order Ordinance (Cap 245), section 17B(2) (disorderly conduct in public place); section 18 (unlawful assembly); section 24 (forcible detainer of premises). Section 17B(2) provides: “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, shall be guilty of an offence”.

¹⁴⁵ Breach of the peace is an offence in Scotland. In *Ferguson v Carnochan* (1889) 16 R (J) 93, Lord Justice-Clerk Macdonald held at p 94 that: “Breach of the peace consists in such acts as will reasonably produce alarm in the minds of the lieges [citizens], not necessarily alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking up of the social peace.” See also *Raffaelli v Heatley* [1949] JC 101, 104.

¹⁴⁶ At 426.

¹⁴⁷ In *HKSAR v YANG You-ching* MA 307/97 *Criminal Appeals Bulletin* 24, Pang J held that to constitute a breach of the peace in a charge of disorderly conduct under section 17B(2) of the Public Order Ordinance (Cap 245), there had to be threatened or actual violence. 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.

¹⁴⁸ At 427. (Emphasis added)

¹⁴⁹ D Nicolson, “Arrest for Breach of the Peace and the European Convention on Human Rights” [1996] Crim LR 764 at 767. The English Law Commission is of the opinion that the breach of the peace concept is “an unsatisfactory and potentially oppressive criterion both for determining whether a person should be bound over and for determining whether an order containing an undertaking to keep the peace has been broken.” It suggests that the powers are “fundamentally unconstitutional”. The Law Commission, *Binding Over* (LAW COM No 222) (London: HMSO, 1994), para 4.28.

2.54 The powers of judges and magistrates to bind over to keep the peace and to bind over to be of good behaviour derive from common law¹⁵⁰ 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.¹⁵¹ 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*.¹⁵²

2.55 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).¹⁵³ 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. They 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 promised in the recognizance be forfeited. The court does not have power to commit him to prison for breach of his recognizance.¹⁵⁴

2.56 Putting aside the difficulties with the concept of breach of the peace, it is inappropriate to deal with a stalker under the law of “sureties of the peace” which treats stalking as a prelude to crime instead of a crime in itself.¹⁵⁵ Stalking behaviour causes the victim mental and economic harm which is serious enough to warrant criminal sanctions. Although the law serves a useful purpose in preventing the commission of an unlawful act,

¹⁵⁰ 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.

¹⁵¹ *Hughes v Holley* (1988) 86 Cr App R 130 at 138. Blackstone said that “a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; ... or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all nightwalkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whore-masters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame.” Quoted in The Law Commission, *Binding Over* (LAW COM No 222) (London: HMSO, 1994), para 2.4.

¹⁵² I.e. 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.

¹⁵³ Justices of the Peace Ordinance (47 of 1997), sch 3, item 35.

¹⁵⁴ The English Law Commission is of the opinion that the procedures which govern the use of the powers “falls short of basic requirements of certainty and fair procedure that are taken for granted in other areas of English domestic law.” The Law Commission, 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. D Nicolson also argues that arrests for breach of the peace is contrary to the European Convention on Human Rights. *Op cit*.

¹⁵⁵ K G McAnaney *et al*, 874.

the punishment of stalkers for their harmful conduct is also essential in deterring them from engaging in activities which might have serious consequences.

Assault and battery

2.57 Assault and battery are offences at common law and under the Offences against the Person Ordinance (Cap 212).¹⁵⁶ 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.

2.58 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. 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.¹⁵⁷

Assault occasioning actual bodily harm

2.59 Section 39 of the Offences against the Person Ordinance (Cap 212) (“assault occasioning actual bodily harm”) 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.¹⁵⁸ “Bodily harm” in the Offences against the Person Ordinance includes recognisable psychiatric illness as well as physical injury.¹⁵⁹ But it is equally clear that it 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.”¹⁶⁰

2.60 In *R v Ireland*¹⁶¹, 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. Although

¹⁵⁶ 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.

¹⁵⁷ *Collins v Wilcock* [1984] 1 WLR 1172 at 1178B.

¹⁵⁸ 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).

¹⁵⁹ *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. See T Lawson-Cruttenden and B Hussain, “Psychological Assault and Harassment” [1996] NLJ 1326.

¹⁶⁰ *R v Chan-Fook* [1994] 1 WLR 689 at 696.

¹⁶¹ [1997] 1 All ER 112 (CA).

the impact of the calls was more remote than typical assaults, the Court of Appeal held that a series of silent telephone call could constitute an assault, and if psychiatric injury resulted therefrom, could constitute the offence of “assault occasioning actual bodily harm”:

“In our judgment, if the Crown can prove that the victims have sustained actual bodily harm, in this case psychological harm, and that the accused must have intended the victims to sustain such harm, or have been reckless as to whether they did sustain such harm, and that harm resulted from an act or acts of the appellant, namely telephone calls followed by silence, it is open to the jury to find that he has committed an assault.”¹⁶²

“To telephone a person in the early hours of the morning, not once but on many occasions, and to threaten him, not in a conversational tone but in an atmosphere of drama and suspense, is a matter that a jury could say was well calculated to not only instil fear into his mind but to constitute threatening acts, as distinct from mere words. If when threats in this manner are conveyed over the telephone, the recipient has been led to believe that he is being followed, kept under surveillance by persons hired to do him physical harm to the extent of killing him, then why is this not something to put him in fear or apprehension of immediate violence?”¹⁶³

2.61 This decision had been widely criticized by commentators. The court seemed to have confused causing fear (which the defendant did) with causing apprehension of immediate violence (which he did not), and had wrongly equated the causing of harm (which he did) with the infliction of violence (which he did not threaten). The causing of harm and the infliction of violence should not be confused.¹⁶⁴ The commentators further argued that since violence denoted a battery, the offence of assault was limited to causing the victim to fear an immediate battery. Since the making of silent telephone calls could not generally be regarded as causing the recipient fear of immediate unlawful violence, they held the view that such calls could not amount to an assault.¹⁶⁵ The defendant appealed to the House of Lords.

2.62 The House of Lords in *Ireland* was sympathetic to those who are 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:

¹⁶² At 115.

¹⁶³ At 117.

¹⁶⁴ [1997] Crim LR 434 at 435. “The *actus reus* of an assault typically occurs when P thinks, ‘ I am about to receive a punch on the nose.’ Are we to imagine that P, on picking up the telephone, thinks ‘ I am about to suffer a psychological injury’ ? Surely the idea is as ludicrous as that the appellant had *mens rea*, i.e. that he was thinking ‘ This ’ ll cause him to think he ’ s in for a nervous shock!’ ” *Ibid.*

¹⁶⁵ See *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.”¹⁶⁶

2.63 The House of Lords clarified the law by holding 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.”¹⁶⁷

2.64 Despite the positive statements from the House of Lords, 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 gifts. 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”,¹⁶⁸ a stalker who says “I will get you” cannot be charged with assault because there is no threat of *immediate* violence. 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

¹⁶⁶ *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 537H.

¹⁶⁷ *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. *Ibid*, at 546E.

¹⁶⁸ *R v Ireland; R v Burstow* [1997] 3 WLR 534 at 546G.

2.65 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, either with or without a weapon or instrument. A person may “inflict” psychiatric injury on another in an indirect way.¹⁶⁹ 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

2.66 False imprisonment is an offence at common law. It is committed where a defendant unlawfully and intentionally or recklessly restrains another’s freedom of movement from a particular place.

Loitering¹⁷⁰

2.67 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”.

2.68 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

¹⁶⁹ *R v Ireland; R v Burstow* [1997] 3 WLR 534 (HL). The offence may be committed even where the psychiatric injury is the result of physical violence applied directly or indirectly to the body of the victim: *R v Burstow* [1997] 1 Cr App R 144 at 149F (CA).

¹⁷⁰ 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.

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”.

Telephone and post office statutes

2.69 The stalker may harass the victim by making persistent telephone calls. Such conduct amounts to harassment regardless of their content. If the content is obscene, threatening or objectionable, the harassment is all the greater.¹⁷¹ 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”;¹⁷²
- 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”;¹⁷³
- c) persistently making telephone calls without reasonable cause and for the purpose of “causing annoyance, inconvenience or needless anxiety to any other person”;¹⁷⁴
- d) transmitting a “false distress, urgency, safety or identification signal” knowing it to be false or with intent to deceive;¹⁷⁵
- e) sending by post of any “obscene, immoral, indecent, offensive or libellous writing, picture or other thing”.¹⁷⁶

2.70 These provisions help the victim because the stalker may not threaten his victim but may merely be obscene or vulgar, or merely cause his victim annoyance or inconvenience. Prosecuting under such provisions would 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. 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 the three offences in (a) to (c) above carry 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.

Public nuisance

¹⁷¹ *Khorasandjian v Bush* [1993] 3 WLR 476, 482B; *Burnett v George* [1992] 1 FLR 525.

¹⁷² Summary Offences Ordinance (Cap 228), section 20(a).

¹⁷³ Summary Offences Ordinance (Cap 228), section 20(b).

¹⁷⁴ Summary Offences Ordinance (Cap 228), section 20(c).

¹⁷⁵ Telecommunication Ordinance (Cap 106), section 28 (as amended by the Telecommunications (Amendment) Ordinance (62 of 1996)).

¹⁷⁶ Post Office Ordinance (Cap 98), section 32(1)(f).

2.71 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.¹⁷⁷

Intimidation

Crimes Ordinance

2.72 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.

2.73 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.¹⁷⁸ 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).

2.74 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. Moreover, 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. 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

¹⁷⁷ *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.

¹⁷⁸ 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).

harassment or cause their victims to fear for their safety. Joel Fahnstock observes that unless there are laws to stop harassment, “women are forced into becoming psychological victims, helplessly waiting to be threatened or actually harmed.”¹⁷⁹

Trade Unions Ordinance

2.75 Section 47(1) of the Trade Unions Ordinance (Cap 332) provides:

“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 intimidates¹⁸⁰ 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”.*¹⁸¹

2.76 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.¹⁸² 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

¹⁷⁹ J Fahnstock, “All Stalk and No Action: Pending Missouri Stalking Legislation” (1993) 61:4 *UMKC Law Review* 783 at 799.

¹⁸⁰ “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.

¹⁸¹ 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.

¹⁸² 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.

conduct which would otherwise be lawful. It merely creates specific offences and makes conduct which is already tortious a criminal offence.¹⁸³ 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.

Criminal attempt

2.77 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 *et al.*:¹⁸⁴

“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.”

Difficulties of dealing with stalking under existing criminal law

2.78 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. As there are no provisions addressing the behaviour of persistent following which is not accompanied with any intention to threaten the victim, the victim is left helpless until he is physically or mentally harmed.

2.79 It is only obvious that the effectiveness of criminal remedies depends on adequate police enforcement. However, police officers sometimes 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, police are unwilling to intervene if the complaint arises out of a domestic context. Police and prosecutors in the United States had been criticized for their failure to enforce applicable criminal laws against domestic violence. Fromson observed that police officers seemed to view domestic violence as non-criminal, and that this

¹⁸³ *Thomas v National Union of Mineworkers (South Wales Area)* [1985] 2 All ER 1.

¹⁸⁴ K G McAnaney *et al.*, at 889.

attitude along with the physical danger posed by intervention had discouraged police involvement in cases involving abuse of woman.¹⁸⁵ Even when the police do respond, they rarely make an arrest or take any action to protect the woman from future harm.¹⁸⁶ The result is that stalkers feel that they can continue to harass their victims with impunity. We are concerned that the same may also apply to Hong Kong as far as domestic violence cases are concerned.¹⁸⁷

2.80 In a study in Hong Kong of domestic disputes and the police response,¹⁸⁸ 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, 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.¹⁸⁹ 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.¹⁹⁰

2.81 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

¹⁸⁵ T L Fromson, Note, “The Cure for Legal Remedies for Abused Women” (1977) 6 *NYU L Rev & Soc Change* 135 at 144, cited in K L Attinello, at 1970 n 178.

¹⁸⁶ *Ibid*, at 145.

¹⁸⁷ 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* [1997] 27 September. 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.

¹⁸⁸ F M S Fung, *An Examination of Domestic Disputes and the Police Response in Hong Kong* (Hong Kong: The University of Hong Kong, 1994).

¹⁸⁹ *Ibid*, 112. Fung concluded that: “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.” *Ibid*, 115.

¹⁹⁰ *Ibid*, 81-82.

societal sentiments that domestic violence and other 'private misconduct' should not be subject to public intervention."¹⁹¹

2.82 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 has failed to deal with stalking mainly "because it has tended to chop up the continuous film of persistent misbehaviour into individual, discrete snapshots".¹⁹² 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 infinitely worse than the sum of the parts or any individual part. It is inadequate in dealing with stalkers who follow their victims or harass them by video, fax, voice-mail or electronic 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 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."*¹⁹³

2.83 On the basis of this reasoning, McAnaney *et al* 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 offenses.¹⁹⁴ We examine in the next chapter how such a framework can be formulated and put into practice.

¹⁹¹ Quoted in R A Lingg, at 358 n 68 (citing E S Buzawa & C G Buzawa, *Domestic Violence: The Criminal Justice Response* (1990) 27-31).

¹⁹² House of Commons Hansard 17 Dec 1996, col 788.

¹⁹³ K L Walsh, at 381.

¹⁹⁴ K G McAnaney *et al*, at 883.

Chapter 3

Legislation in other jurisdictions

3.1 We have examined the experience of Canada, New Zealand, New South Wales, South Australia, the United Kingdom and the United States of America before arriving at our conclusions and recommendations.

Canada¹⁹⁵

3.2 In response to concern that the Criminal Code was inadequate in dealing with stalking, the federal government in Canada has created an offence of “criminal stalking” in Bill C-126. The bill was codified in section 264 of the Canadian Criminal Code.¹⁹⁶ 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.”*

3.3 The Canadian Minister of Justice declared that the objective of the Bill was to reinforce the provisions of the Criminal Code that deal with violence against women. The Minister noted with alarm the growing number of women being stalked by men with whom they had been involved and from whom they were trying to escape.¹⁹⁷

¹⁹⁵ See generally, Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997), 11-16.

¹⁹⁶ Act to Amend the Criminal Code and the Young Offenders Act, RSC C-126, § 264(1)(2), (1993).

¹⁹⁷ 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

3.4 It is not necessary for the prosecution to prove that the accused intended to cause the victim to fear 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.

3.5 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.

3.6 Conduct proscribed by the Bill is insufficient to ground a prosecution unless it causes the victim reasonably to fear for his safety or the safety of anyone known to him.¹⁹⁸ In other words, it must be shown that the victim himself did fear for his safety and the fear was reasonable in all the circumstances.

3.7 The Manitoba Law Reform Commission published a report on the civil aspects of stalking in 1997.¹⁹⁹ The report recommends that provincial legislation should be enacted to enable victims of stalking to obtain a Protection or Prevention Order. 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.

3.8 The proposed Act 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 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:

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.” 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.

¹⁹⁸ The view that “safety” includes not only freedom from physical harm but also freedom from fear of the mental or emotional or psychological trauma has been affirmed by the British Columbia Supreme Court in *R v Hau* [1996] BCJ No 1047. See Manitoba Law Reform Commission, *op cit*, at 14.

¹⁹⁹ Manitoba Law Reform Commission, *Stalking* (Report No 98, 1997).

“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.”

New Zealand

3.9 In August 1996, the New Zealand Minister of Justice introduced the Harassment and Criminal Associations Bill to restrict the activities of gangs and provide the public with better protection from harassment. The first part of the Bill seeks to provide greater protection for victims of stalking. The main provisions are as follows:

- It will be an offence punishable by imprisonment for a maximum of two years to harass another person so that he fears for his safety or the safety of a member of his family.
- It will be possible to obtain civil restraining orders to stop stalking.
- Breach of the civil order will be an offence punishable by six months imprisonment or where the offender has two previous convictions for breach within a three year period, a maximum of two years imprisonment.²⁰⁰

New South Wales

3.10 Stalking or intimidating another with the intention of causing him to fear personal injury is an offence under section 562AB of the Crimes Act 1900 (NSW).²⁰¹ 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.

3.11 Under the 1900 Act, “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 work or any place that a person frequents for the purposes of any social or leisure activity”.²⁰²

²⁰⁰ New Zealand Executive Government News Release Archive, “Harassment and Criminal Associations Bill introduced”, 20 August 1996, at <<http://www.executive.govt.nz/93-96/minister/graham/dgn2008.htm>>. The Bill has since been amended by a supplementary order paper changing some of its original provisions.

²⁰¹ See sections 562A to 562N; <http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s562a.html>.

²⁰² Sections 562A and 562AB.

3.12 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. It is not necessary to show that the victim fears that such conduct will be engaged if he is under the age of 16 or has mental problems. 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.”²⁰³

3.13 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.²⁰⁴ A person who knowingly contravenes a prohibition order is guilty of an offence.

South Australia

3.14 Section 19AA of the Criminal Law Consolidation Act 1935 (South Australia) creates the offence of stalking.²⁰⁵ It provides that a person stalks another if-

- “(a) *on at least two separate occasions, the person -*
 - (i) *follows the other person; or*
 - (ii) *loiters outside the place of residence of the other person or some other place frequented by the other person; or*
 - (iii) *enters or interferes with property in the possession of the other person; or*
 - (iv) *gives offensive material to the other person, or leaves offensive material where it will be found by, given to or brought to the attention of the other person; or*
 - (v) *keeps the other person under surveillance; or*
 - (vi) *acts in any other way that could reasonably be expected to arouse the other person’s apprehension or fear; and*
- (b) *the person -*
 - (i) *intends to cause serious physical or mental harm to the other person or a third person; or*

²⁰³ Section 562B.

²⁰⁴ Section 562BE.

²⁰⁵ See Criminal Law Consolidation (Stalking) Amendment Act 1994 (South Australia); M Goode, “Stalking: Crime of the Nineties?” (1995) 19 CLJ 21.

(ii) *intends to cause serious apprehension or fear.*”

3.15 A person who stalks another is guilty of an offence punishable with imprisonment for not more than five years if the offender’s conduct contravened an injunction granted by a court, or the offender was, on any occasion to which the charge relates, in possession of an offensive weapon; or to imprisonment for not more than three years in any other case.

England and Wales²⁰⁶

3.16 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.²⁰⁷ 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.*”²⁰⁸ 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”.²⁰⁹

Stalking Bill

3.17 The Stalking Bill introduced to the House of Commons by Janet Anderson in March 1996²¹⁰ provided that a person who stalks another is guilty of an offence. Clause 1(1) gave a definition of “stalking”:

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

²⁰⁶ The position in Northern Ireland is similar to that in England and Wales. See The Protection from Harassment (Northern Ireland) Order 1997. The Protection from Harassment Act 1997 (UK) applies to Scotland, except that the offence of putting people in fear of violence is restricted to England and Wales, presumably because stalking behaviour which causes, or is likely to cause, alarm to the public would fall within the scope of the common law offence of breach of the peace in Scotland. See M G A Christie, *Breach of the Peace* (Edinburgh: Butterworths, 1990).

²⁰⁷ *Infringement of Privacy* (1993), para 4.20.

²⁰⁸ *Ibid*, 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.

²⁰⁹ *Privacy and Media Intrusion* (London: Cm 2918, 1995), Annex B, para 2(i).

²¹⁰ This was followed by the Stalking (No 2) Bill introduced in the House of Lords.

- (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.”

3.18 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”.²¹¹

Shortcomings of the Stalking Bill

3.19 The Stalking Bill had been criticized both as being too wide and too narrow.²¹² 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.

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

²¹¹ Clause 2(4).

²¹² House of Commons Hansard, 17 Dec 1996, col 790.

generis rule, which requires such a list to be construed in accordance with the nature of the activities that are identified in the list.²¹³ 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.

3.21 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.

3.22 The Bill also reversed the burden of proof. Stalking under the Bill was a strict 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 to prove 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.

3.23 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 1996.²¹⁴ The Protection from Harassment Act 1997 represents the results of that consultation.

Protection from Harassment Act 1997

3.24 The UK Parliament enacted the Protection from Harassment Act in March 1997.²¹⁵ 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.

3.25 *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 that it amounts to harassment of the other.²¹⁶

²¹³ House of Commons Hansard, 17 Dec 1996, col 817.

²¹⁴ Home Office, *Stalking - The Solutions: A Consultation Paper* (July 1996).

²¹⁵ See House of Commons Debates on 17 Dec 1996 (col 781 - 851) and 18 Dec 1996 (col 965 - 989); House of Lords Debates on 24 Jan 1997 (col 917 - 943), 17 Feb 1997 (col 511 - 517) and 10 Mar 1997 (col 22 - 25). Also, T Lawson-Cruttenden & N Addison, *Blackstone's Guideline to the Protection from Harassment Act 1997* (London: Blackstone Press, 1997).

²¹⁶ 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.

“Harassment” includes “alarming the person or causing the person distress”.²¹⁷ The defendant is not guilty of an offence of harassment if -

- the course of conduct was pursued for the purpose of preventing or detecting crime;
- the course of conduct was pursued under lawful authority; or
- the pursuit of his course of conduct was reasonable in the particular circumstances.²¹⁸

3.26 *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.²¹⁹ The defendant is not guilty of this offence if -

- the course of conduct was pursued for the purpose of preventing or detecting crime;
- the course of conduct was pursued under lawful authority; or
- 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.²²⁰

3.27 *Penalty* - The maximum sentence for the offence of harassment is six months’ imprisonment and/or a level 5 fine. 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.²²¹ 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 unlimited fine.²²²

3.28 *Restraining orders* - For the purpose of protecting 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 pursuant to section 5 prohibiting the defendant from doing anything described in the order.

²¹⁷ Section 7(2).

²¹⁸ Section 1(3).

²¹⁹ 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.

²²⁰ Section 4(3). The defence of acting reasonably is not available because it cannot be reasonable to place someone in fear of violence.

²²¹ Police and Criminal Evidence Act 1984, section 18.

²²² Section 4(4).

3.29 *Civil remedy for harassment* - By virtue of section 3(1), an actual *or apprehended* breach of the provision prohibiting harassment may be 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.²²³ 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.²²⁴ The defendant is guilty of an offence if he has done anything in breach of the injunction without reasonable excuse.²²⁵

3.30 *Criticisms of the Act* - The following criticisms were levelled against the provisions of the Act when the Protection from Harassment Bill was debated in the Houses of Parliament:

- The Act fails to achieve clarity because it does not give details of the circumstances in which stalking may arise. A police officer or lawyer cannot say for sure whether or not certain behaviour amounts to harassment under the Act because it will have to be tested in the courts.
- The Act fails to achieve certainty. Under the terms of the Act, people are not clear as to what they are entitled to do. They should not 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.

United States²²⁶

3.31 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 United States. It defined a stalker as “any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury.” This definition became the model for many states. Within a four year period thereafter, every state had enacted some form of legislative measures to guard against stalking behaviour.

3.32 The National Criminal Justice Association, in conjunction with the National Institute of Justice, the National Victim Center, and other criminal justice and victim organizations, issued a report in 1996 that included a model stalking statute.²²⁷ The Model Antistalking Code for the States reads as follows:

²²³ See section 3(3)(a).

²²⁴ Section 3(3) & (5).

²²⁵ Section 3(6).

²²⁶ See generally, M A Caner, “Validity, Construction, and Application of Stalking Statutes,” 29 ALR5th 487.

²²⁷ US Department of Justice, National Institute of Justice Research Report, *Domestic Violence, Stalking, and Antistalking Legislation* (1996), at B-1 to B-3. See C A Marks, 488 n 125.

“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.”

3.33 As 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 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 fear, and “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.²²⁸

²²⁸ In contrast, Proposed House Rule 740 (i.e. the Federal Anti-Stalker Act of 1993, HR 740, 103d Congress, 1st Sess (1993)) included lists of specific behaviors categorized as stalking. According to the proposal, stalking was defined as “repeatedly following or harassing another person”. It further provided that one harasses a person if: “a) one knowingly engages in a

3.34 While some states require the existence of both a “credible threat”²²⁹ 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 maintain a visual or physical proximity to the victim, the prosecution can prove stalking without any evidence of a threat conveyed by the accused. The code also eliminates the requirement of specific intent on the part of the accused. It only requires that the accused knows or ought to know that the victim will be placed in reasonable fear for his or his family member’s safety. However, his conduct must have actually induced fear in the victim.

course of conduct directed specifically at that person; b) that conduct seriously alarms, annoys, or harasses that person but serves no legitimate purpose; and c) the course of conduct is such as would cause a reasonable person to suffer substantial emotional distress and does in fact cause substantial emotional distress to the person against whom it is directed ..The term ‘course of conduct’ means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.” See K L Walsh, at 388.

²²⁹ Generally defined as a verbal or written threat of violence made against a person by the perpetrator.

Chapter 4

Proposed reform

Need for anti-stalking legislation

4.1 Since stalking is not a crime under the existing law, there is no data on the number of stalking cases in Hong Kong. We are also unaware of any study on the extent to which stalking is a problem in Hong Kong.²³⁰ Indeed, even statistics on domestic violence in Hong Kong are lacking.²³¹ However, press reports of stalking of entertainers are not uncommon. A recent example was that of a “Miss Hong Kong” who was stalked by a middle-aged man. It was reported that the stalker lived in the same building as his victim. He was reported as having smiled foolishly at her, loitered at the common areas of the building and followed her down the street. She said she was so frightened that she seldom went out in the evening and was eventually forced to stay at other premises before she was able to move to a new flat.²³² A few celebrities in Hong Kong have also been stalked by journalists. The newspapers reported that Leslie Cheung, Maggie Cheung and Faye Wong have all been victims of stalking behaviour.²³³ 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.²³⁴

4.2 Ordinary citizens may also be stalked by persons who have mental problems. A documentary shown by a local television company reported that a man had harassed a female shop owner by persistently depositing used condoms and sanitary napkins at the front of her shop. More recently, a girl friend of a divorcee applied to the High Court for injunctive relief against the wife of the divorcee. The girl friend alleged that the defendant had harassed and molested her by persistently making and sending unwanted oral and written communications to her and her staff.

²³⁰ We note that about 70% of the victims admitted to the Harmony House had been subjected to psychological abuse: *Harmony House Annual Report 1995-96*, p 48.

²³¹ 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.

²³² *Wen Wei Po*, 30 November 1997.

²³³ E.g. *Ming Pao*, 3 September 1997.

²³⁴ *Eastweek*, 18 September 1997.

4.3 Although there are no statistics on the prevalence of stalking in Hong Kong, statistics in other jurisdictions and the anecdotal evidence described above illustrate that harassment is a problem in Hong Kong and that there is a need for an anti-stalking statute here.²³⁵ We have seen that the existing law is inadequate to protect victims of stalking from harassing behaviour. What is needed is a law which can protect victims before their 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. Criminal sanctions are necessary in order to deter perpetrators and to punish those who engage in stalking behaviour. As most victims are women, an anti-stalking law may also be seen as a step towards greater protection for women in society.

4.4 We think that anti-stalking legislation should serve the following purposes:

- it should stop threatening and harassing behaviour which disrupts normal life for the victim;
- it should prevent such behaviour from escalating into violence, thus protecting victims before it is too late;
- it should apprehend the stalker before his conduct reaches a serious level; and
- it should deter stalkers from committing the crime.

Need for criminal sanctions

4.5 Anecdotal and psychological evidence shows that stalking is serious enough to be a crime. Stalking is disruptive to the private and family life of its victims. It has a long term and devastating effect on the victim's mental and physical health. Such reprehensible behaviour should be penalized, whether on the ground of retribution or deterrence. Confining stalkers to prison could give their victims time to change address, seek help from relatives or social workers, and prepare for the stalker's release.

4.6 Stalking cannot be dealt with by relying wholly on the civil law. There are cases where the stalker is unknown to the victim. The civil law cannot require the police to assist in this respect nor do they have authority to do so. It is therefore essential that the investigative powers of the police are made available to identify the stalker and bring him to justice. Richard Lingg summarizes the major advantages of anti-stalking statutes over the traditional remedies:

²³⁵ Many victims in Hong Kong who are physically, mentally or sexually abused by their spouses are unwilling to lodge a complaint with the police for fear that their plight would be made known to their friends and relatives.

“First, stalking statutes will be more uniform than existing protection.²³⁶ 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, 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.”²³⁷

4.7 If stalking is a crime in its own right, complaints about harassment will be responded to quickly and the police can intervene before another crime such as intimidation, assault, criminal damage, or even murder is committed. Enacting anti-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. Not only prosecutors would be able to invoke a dedicated offence to deal with such conduct but the courts would no longer have to stretch existing legal concepts to find a remedy.²³⁸ We therefore conclude that a new offence should be created to tackle the problem of stalking.

Elements of the new offence

Course of Conduct

4.8 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 analysis shows that the mischief which is the target of anti-stalking legislation is repetitive behaviour which is lawful in itself

²³⁶ It has been pointed out that stalkers slip through the cracks of law enforcement and mental health agencies.

²³⁷ R A Lingg, at 360-1.

²³⁸ “Academic writers have indicated that judges should not stretch the ambit of specific crimes beyond their proper limits in order to punish behaviour which members of the public would consider ought to be punished.” G L Williams, *Criminal Law : The General Part* (2nd ed, 1961), 176.

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.

4.9 A dominant characteristic of anti-stalking laws in the United States is the requirement that the stalker's threatening behaviour occur more than once. Furthermore, the subsequent acts need not be the same as the original. The Penal Code of California defines "course of conduct" as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose."²³⁹ Other statutes are more specific and list the actual number of stalking incidents required for a course of conduct. The number is two or three in most cases²⁴⁰. 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.

4.10 We have decided that the concept of persistence should be introduced into the formulation of the new offence by utilizing the phrase "course of conduct". In order to achieve certainty, conduct on two occasions should suffice to constitute a "course of conduct". However, it has been suggested that a higher threshold, such as conduct on more than two occasions, should be required. This suggestion is made on the basis that Hong Kong is a crowded place whose residents live and work in close proximity to one another. Any views on this matter would be welcome.

Harm to the Victim

4.11 Some activities of stalkers are harmless in themselves. It is legal for someone to walk up and down a street or hang about in the street outside a house. But seemingly innocuous activities such as "following", when done repeatedly for a long time and targeted at the same individual, would generate fear or cause substantial emotional distress. The victim's state of mind is therefore an important component of anti-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.

4.12 The United States model code requires reasonable fear of bodily injury or death. The alternative would be to attach liability when the behaviour causes "substantial emotional distress" or "a reasonable fear for one's safety". The "reasonable fear for one's safety" standard would criminalize a broader range of behaviour than a statute requiring a fear of "bodily injury or death".

4.13 We think that the effect of stalking activities must amount to at least harassment before the stalker's conduct can be said to be culpable. A person who pursues a course of conduct which amounts to harassment of another should be guilty of an offence. It is unnecessary to define harassment in the legislation, "harassment" being an ordinary word which can easily be understood by the courts and the ordinary public. As observed

²³⁹ Cal Penal Code § 646.9(d) (West Supp 1994).

²⁴⁰ 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 *et al*, at 907.

by the English Law Commission, the concept of harassment is well established and recognized by the courts. Concepts like molestation and pestering are familiar to the family courts. The offence of harassment in section 264 of the Canadian Criminal Code also contains no definition of the word “harass”. The Manitoba Law Reform Commission notes that the Canadian courts have resorted to the ordinary or dictionary definition of the word.²⁴¹ Although a definition of harassment is not required, it might be useful to spell out in the legislation that harassment includes causing someone alarm or distress.

4.14 The alternative to making harassment an offence is to define in the legislation all the stalking activities that people can think of. Examples can be found in the Canadian and South Australian statutes. 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. We think that it is inadvisable to specify prescribed behaviour in the legislation. It is impossible to enumerate all the behaviour that could constitute harassing conduct. The law should be widely enough to provide maximum protection to victims. By criminalizing 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.

The threat requirement

4.15 Many anti-stalking statutes in the United States 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 for his or her safety”. 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 victims.”²⁴² This is unsatisfactory because the victim will remain unprotected until the stalker becomes violent. Callie Marks says that 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.²⁴³

4.16 Since the requirement for the stalker to make a “credible threat” had rendered the California statute ineffective in the apprehension and conviction of stalkers, the

²⁴¹ The Manitoba Law Reform Commission Report on Stalking states 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.)

²⁴² C A Marks, at 482 & 498.

²⁴³ C A Marks, at 476.

1994 version of the statute lowers the threshold of the credible threat standard from “fear of death or great bodily injury” to “fear for his or her safety.”²⁴⁴ This amendment provides greater protection because the stalker can be stopped before his conduct escalates to a serious level. However, the lower threshold does not greatly improve the situation of victims. Many of the more serious consequences of stalking are not preceded by any threat. If a stalker does not threaten his victim, but instead relentlessly makes telephone calls, follows his victim down the street, waits near the approach to the victim’s home, or sends unwanted articles, the stalker cannot be prosecuted until the stalker becomes violent. But sending a dozen roses to the office of the victim every day or walking near the victim’s home every day at a certain time could be threatening even though the stalker has not made any oral or written threat.²⁴⁵ Stalkers who are familiar with the elements of the crime would also refrain from communicating any threat, and so avoiding apprehension by the police.²⁴⁶

4.17 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. For example, the stalking statute of Delaware provides that “any person who willfully, 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.”

4.18 Another option is to omit any reference to the making of a threat.²⁴⁷ The 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.

4.19 We think 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. We therefore conclude that the making of a threat should not be included as an element of the proposed offence.

Mental element of the crime

²⁴⁴ Cal Penal Code § 646.9(a) (West Supp 1994).

²⁴⁵ N Diacovo, at 408.

²⁴⁶ See R A Lingg, at 371 n 149; N Diacovo, at 410-411.

²⁴⁷ “In *State v Culmo* (1993) 43 Conn Supp 46, 642 A2d 90, the antistalking statute ... which provided that, to be charged with a violation of the statute, the perpetrator must ‘follow’ or ‘lay in wait’ for the victim, was construed to mean conduct which has a ‘predatory thrust’ to it, and does not encompass following that is aimless, unintentional, accidental, or undertaken for a lawful purpose, upholding an indictment charging the defendant with second-degree stalking.” 29 ALR5th 487 § 8.

4.20 Some American statutes require that the stalker have had the specific intent to cause the victim to fear death or injury or to place him in fear of his safety. The South Australian statute requires that the stalker intended to cause physical or mental harm to his object or a third person or to cause serious apprehension or fear. It is common ground that if the stalking offence requires specific intent on the part of the stalker, the anti-stalking provisions will not help victims who, because the stalkers are delusional or otherwise, are not capable of forming the intent.²⁴⁸ For instance, a deluded stalker may truly believe that his object is deeply in love with him or 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.”*²⁴⁹

4.21 Dillon LJ echoed this view when he said that it was both undesirable and unnecessary that the order of the court restraining the defendant 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”.²⁵⁰

“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

²⁴⁸ “The delusional offender may be acting out of ‘love’ for the victim, or out of a belief that she is, or is meant to be, bonded to the victim.” K G McAnaney *et al*, at 907.

²⁴⁹ See C A Marks, 483. 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, 495.

²⁵⁰ *Khorasandjian v Bush* [1993] 3 WLR 476 at 486.

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.”

4.22 Existing offences (such as those under sections 24 and 61 of the Crimes Ordinance) which require proof of specific intent are not effective in convicting stalkers because many stalkers would claim that they have no intention of harassing their victims. Indeed, a stalker may never have intended to cause harm or distress to his victim. Some stalkers may claim that their actions are motivated by love or a desire to protect another. Others may claim that they are motivated by a belief that their activities are welcomed by their victims. Nevertheless, they usually know that they are harassing another person. Both the US model code and the Canadian Criminal Code therefore make knowledge an element of the crime. Instead of requiring specific intent on the part of the defendant, the US model code requires that (i) the defendant purposefully engages in a course of conduct that would cause a reasonable person fear, and (ii) knows or ought to know that the victim will be placed in reasonable fear. The harassment offence in the Canadian Criminal Code also requires no proof of specific intent.

4.23 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 long as the victim feels harassed by the stalker, it is not necessary to show that the pursuit also amounts to harassment of a reasonable person. 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 in possession of such information. Applying a subjective test of liability 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 guilty of the proposed offence.

4.24 There are also stalkers who do not turn their mind to the feelings of their victim. They may be aware of a risk that their conduct amounts to harassment but nevertheless persist in harassing the victim. In order to catch stalkers who are reckless as to whether their victims feel harassed, the offence should ensure that those who pursue a course of conduct which a reasonable person would realize amounts to harassment of the victim would not escape liability. Thus, if the victim has indicated that the stalker's conduct is unwelcome but the stalker nevertheless continues to act in a harassing way, the stalker would be deemed to have the necessary knowledge which would render him liable in respect of the subsequent conduct.

4.25 These considerations lead to us to the conclusion 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.

Proposed offence

4.26 **We recommend that 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, be guilty of a criminal offence. For the purposes of this offence, “harassment” of a person includes causing the person alarm or distress; and a “course of conduct” must involve conduct on at least two occasions. 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.**

Penalty for stalking

4.27 In most jurisdictions in the United States, the penalty for the first conviction is a maximum sentence of either six months or one year, and for second convictions within a specified period of time, generally five to ten years.²⁵¹ McAnaney *et al* think that the proper penal goal of anti-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.”*²⁵²

4.28 Incarceration not only prevents 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 safe at least while the stalker is in prison.²⁵³ 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 anti-stalking legislation is justified as long as a few stalkers can be deterred or a few lives can be saved. A commentator points out that such laws make 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.²⁵⁴

4.29 In determining the appropriate custodial sentence for the proposed offence, we have made reference to the maximum punishment imposed on related offences as prescribed in the statutes:

²⁵¹ R A Lingg, 374.

²⁵² K G McAnaney *et al*, 906.

²⁵³ 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.

²⁵⁴ J Fahnstock, at 804.

- Common assault (Cap 212, section 40)
1 year imprisonment
- 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 (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

4.30 **We recommend that a person who is guilty of the proposed offence be liable to imprisonment for two years.**

4.31 Since the maximum sentence a magistrate can impose is generally two years, the new offence of harassment may be tried by magistrates. We think that the magistrates' courts are the most appropriate level to deal with stalkers who are charged with harassment.

4.32 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 will deter and prevent the stalker from intimidating or assaulting the victim.²⁵⁵ The Administration may wish to consider if this is a viable alternative to imprisonment, bearing in mind that it would not afford sufficient protection where the stalker is determined to continue with his harassment against the victim.

Aggravated stalking

4.33 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.

4.34 The conduct of stalkers has a serious impact on victims where their pursuit not only causes them distress or anxiety but also places them in fear of their safety or in fear of bodily injury or death. The American model code suggests that 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 or his family member. The Protection from Harassment Act 1997 in the UK imposes heavier penalty on such conduct by creating an additional offence of putting another in fear of violence. Whereas the maximum custodial penalty is six months' imprisonment for the

²⁵⁵

N Diacovo, 420.

lesser offence of harassment, a person who commits the offence of putting another in fear of violence is liable to five years' imprisonment.

4.35 We think 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 on 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, section 24 of the Crimes Ordinance and 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 whose course of conduct places another in fear of safety or violence cannot be prosecuted or restrained under existing criminal law only if the stalker 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 his target. He may, however, be charged with the new offence of harassment because a person who fears for his safety is bound to feel harassed. 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. We therefore 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.

Defences

4.36 We have to ensure that the law would not put in jeopardy the freedom of others to pursue legitimate activities. Law enforcement officers may follow suspects and keep them under surveillance. Ordinary citizens may also pursue a course of conduct which has as its object the prevention or detection of crime. The defences of lawful authority and prevention or detection of crime should therefore be available so as to exclude such activities from the scope of the offence.

4.37 Furthermore, normal news gathering activities of reporters should not be affected by our proposals. Likewise, the activities of door to door salesmen, religious activists, debt collectors, security guards, private investigators²⁵⁶ and political canvassers may cause harassment but are legitimate if undertaken reasonably. In order to safeguard all these activities, there should be a defence of acting reasonably in the circumstances of the case.

²⁵⁶ E.g. *Shannon v Skeen* (1977) SCCR SUPP 180 (private detectives followed a woman who had been carrying out her job of collecting cash from vending machines; acquitted because no *mens rea* to commit crime of breach of the peace); cited in A Bonnington, "Stalking and the Scottish Courts" [1996] NLJ 1394.

4.38 **We recommend that it be a defence for the defendant who is charged with the offence of harassment to show -**

- (a) that the conduct was pursued for the purpose of preventing or detecting crime;**
- (b) that the conduct was pursued under lawful authority; or**
- (c) that the pursuit of the course of conduct was reasonable in the particular circumstances.**

4.39 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. We think that similar procedures should be in place to facilitate proof of a specified defence where the pursuit related to serious crime or security matters.

4.40 **We recommend 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 Hong Kong Special Administrative Region or the prevention or detection of serious crime and was carried out on behalf of the Hong Kong Special Administrative Region Government shall be evidence that the provisions of the anti-stalking legislation do not apply to the conduct of that person on that occasion.**

Potential for abuse

4.41 Although the proposed offence is broadly defined, it is by no means vague or uncertain. 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. We think that a person of ordinary intelligence should be able to understand what conduct amounts to harassment of another, just as the litigants in family proceedings have no difficulty in understanding what a non-molestation order is all about.

4.42 We are aware of the danger that anti-stalking legislation may be misused by unscrupulous individuals. There is a possibility that a spouse or rejected suitor uses the procedure under the scheme as a tool of harassment. We are, however, satisfied that our proposals will not lead to abuse or arbitrary enforcement. Firstly, the prosecution or the plaintiff must show that the defendant has engaged in a course of conduct. Secondly, the

course of conduct must have caused harassment to the victim. Thirdly, the defendant must have knowledge or constructive knowledge that the course of conduct amounts to harassment. Lastly, the defendant will not be punished if he can show that he had lawful authority or the pursuit of the course of conduct was reasonable in the circumstances. These elements will ensure that innocent and legitimate activities will not be affected by the proposed legislation and any possibility of abuse can be minimized.

Restraining orders in criminal proceedings

4.43 It is necessary not only to punish stalkers for their actions but also to reassure the victim that it will not happen again. But criminal proceedings can deal only 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,²⁵⁷ 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. After all, the stalker has already been found guilty of harassment by a criminal court.

4.44 We think that the court sentencing a stalker who is convicted of harassment should be given power to make an order restraining him from harassing the victim if the stalker is likely to commit harassment in the future. 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.”²⁵⁸

4.45 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 which 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.

4.46 In order to provide for flexibility, the courts should have power to make a restraining order for a specified period *or until further notice*. An open-ended order is appropriate where the harassment was serious and the stalker is recalcitrant, or where the

²⁵⁷ The victim may use the criminal conviction to support his claim in civil proceedings.

²⁵⁸ Manitoba Law Reform Commission, 66.

court is not yet in a position to judge how long the restraint should last. This would save the victims from 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.

4.47 To provide for maximum protection to the victims and those mentioned in the order, a breach of the restraining order without reasonable excuse should be an arrestable offence.²⁵⁹ The benefit of having an additional offence of breach of a restraining order is that the victim would not 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 2. 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 harassed the victim a second time before they could charge him with harassment again. It is hoped that this would enable breaches to be dealt with promptly with the assistance of the police before the stalker turns violent.

4.48 **We recommend that -**

- (a) a court sentencing a person convicted of the offence of harassment may make an order restraining him from doing anything which amounts to harassment of the victim of the offence or any other person as the court thinks fit;**
- (b) the restraining order may have effect for a specified period or until further notice;**
- (c) 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**
- (d) a person who, without reasonable excuse, does anything which he is prohibited from doing by a restraining order shall be guilty of an arrestable offence, punishable by imprisonment for 6 months.**

Bail

4.49 Some jurisdictions attempt to protect victims from stalkers after the stalker's arrest by providing for limitations on bail for the accused or convicted stalker. For example, the Illinois statute provides that the court may deny bail if: (i) there is evidence that

²⁵⁹ See Protection from Harassment Act 1997 (UK), section 5.

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.²⁶⁰ In Ohio, the victim may ask for an "anti-stalking protection order" as a condition of bail. The court may issue such an order if the continued presence of the accused stalker threatens the victim. The order may include a requirement that the accused stalker not enter the residence, school, or workplace of the alleged victim.²⁶¹

4.50 We think 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.²⁶² 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.²⁶³ 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;
- shall not contact directly or indirectly a specified person.²⁶⁴

4.51 The court may exercise such 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.

Mental evaluation and treatment for stalkers²⁶⁵

4.52 Since many stalkers are suffering from mental disorders,²⁶⁶ there is a likelihood that they would keep harassing their victims after conviction or imprisonment. Mental evaluation and psychiatric treatment are therefore essential to prevent recurrences of harassment. A study carried out by McAnaney *et al* revealed that there are at least three treatment options available to the psychiatrists:

- (a) The psychiatrist has to consider whether the stalker needs to be hospitalized. Kaplan and Sadock stated that if the stalker is a delusional erotomaniac, borderline erotomaniac or Former Intimate stalker, the possibility of suicide or homicide, severe impairment in occupational or social

²⁶⁰ See 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).

²⁶¹ See R N Miller, at 1311, referring to Ohio Rev Code Ann §§ 2903.211-.215 (Baldwin Supp 1992).

²⁶² Cap 221, section 9G.

²⁶³ Cap 221, section 9D(2).

²⁶⁴ Cap 221, section 9D(3).

²⁶⁵ See H Kaplan & B Sadock, *Synopsis of Psychiatry*, (6th ed, 1991) 348-350, cited in K G McAnaney *et al*, at 853-854.

²⁶⁶ See Chapter 1.

functioning, and the need for a diagnostic workup are strong indications for hospitalization. The prospect of incarceration does not deter sociopathic stalkers.

- (b) The psychiatrist's second treatment option is to use medication. There is, however, inadequate proof that antipsychotic drugs are effective. Another difficulty is that delusional patients are generally noncompliant with physicians' instructions to take medications. The use of antipsychotic medications to cure borderline erotomanics may be inappropriate because their diagnosis does not involve any delusional process.
- (c) The third treatment option is psychotherapy. A "good therapeutic outcome depends on the psychiatrist's ability to respond to the patient's mistrust of others and the resulting interpersonal conflicts, frustrations, and failures."²⁶⁷

4.53 McAnaney *et al* note that some American jurisdictions have provisions on counselling. For instance, Hawaii's anti-stalking law enables courts to order a convicted stalker to undergo counselling; California requires mandatory counselling upon probation; and Michigan gives the courts discretion to order counselling upon probation.²⁶⁸ In their opinion, 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."*²⁶⁹

4.54 Nannette Diacovo agrees that in order to deter stalking, the focus of anti-stalking legislation should be on rehabilitation and mental evaluation:²⁷⁰

²⁶⁷ Kaplan and Sadock, at 350.

²⁶⁸ K G McAnaney *et al*, 902-903.

²⁶⁹ *Ibid*, at 908.

²⁷⁰ N Diacovo, 416-7.

“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 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.”

4.55 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.²⁷¹ Where a mentally disordered stalker 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 authorize his detention in the Centre or hospital by making a hospital order.²⁷² If the court considers that the 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.²⁷³ We think 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 mandatory requirement that all persons who are charged with or convicted of the proposed offence must be subject to mental evaluation or psychiatric treatment.

Education

²⁷¹ Mental Health Ordinance (Cap 136), section 51.

²⁷² Cap 136, section 45(1).

²⁷³ Probation of Offenders Ordinance (Cap 298), section 3(2).

4.56 Diacovo advocates that law enforcement officers, judges and the general public must be educated in 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.”²⁷⁴

Need for civil sanctions

4.57 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 were 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.²⁷⁵ However, a victim who has suffered only emotional distress but not personal injury or loss of property is not entitled to receive any compensation in criminal proceedings. He has to recover his loss by bringing a civil action in tort.

4.58 Relying on existing torts to provide an effective remedy for victims of stalking has its limitations. We have explained that 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. Nor do we think that the development of a remedy for stalking victims could be left to the civil courts. Even if it is 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. The enactment of the Protection from Harassment Act 1997 in the UK has stifled development of the law of harassment at common law. Any further development of the civil law to protect victims of harassment in Hong Kong is likely to take a long time.

²⁷⁴ N Diacovo, 418-419.

²⁷⁵ Criminal Procedure Ordinance (Cap 221), section 73 and Magistrates Ordinance (Cap 227), section 98. The amount of compensation to be awarded by magistrates cannot exceed \$100,000.

4.59 It may be argued that creating a new offence of harassment would be sufficient to deter stalkers from harassing their objects. However, criminal law should not be the exclusive method for preventing and restraining harassment. One has to accept that the threat of a jail sentence will not deter all stalkers. Where stalking occurs in a domestic context, arresting the stalker may worsen an already volatile situation within the family. It may also provoke him to take more aggressive actions against his object. 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. Indeed, consultations conducted by the Manitoba Law Reform Commission revealed that many victims are not interested in punishing their stalker:

“Some are concerned that punishment will further anger the stalker, making matters worse, while others receive financial support from their stalker and therefore do not want him incarcerated. Most simply desire that the stalking come to an end. The Commission has concluded that the best way to achieve this objective is through a provincial statute under which subjects of stalking can obtain civil orders designed to protect them, prevent further incidents of stalking and compensate them for their losses.”²⁷⁶

4.60 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 harassment would therefore provide greater protection since more victims would be able to gain access to the lesser test.

4.61 Creating a distinct tort of harassment which protects the interests of individuals would not be 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 distress or anxiety caused by harassment would suffice.

4.62 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 obtain 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 something serious or violent.

²⁷⁶

Manitoba Law Reform Commission, 54.

4.63 **We recommend that a person who pursues a course of conduct which constitutes the offence of harassment shall be liable in tort to the victim of the course of conduct in question. Damages may be recovered for any distress, anxiety and financial loss resulting from the harassment. The courts may grant an injunction restraining the defendant from pursuing any conduct which amounts to harassment.**

Breach of injunction

4.64 The difficulties of enforcing an injunction have been noted in Chapter 2. 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. Although committal proceedings may be instituted against the offender for contempt of court, the procedure is slow and expensive. Even if the court eventually decided to impose a prison sentence on the offender, the length of imprisonment may not be long enough to have any deterrent effect.

4.65 One way to tighten enforcement against breaches of injunction is to make any breach of an injunction granted by a civil court in a stalking case an arrestable offence. The Protection from Harassment Act 1997 in the UK follows this approach. 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.

4.66 In some circumstances, civil proceedings for contempt might be brought instead of prosecution under section 3(6).²⁷⁷ 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 would be that there was no longer 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.

4.67 We believe that it is unnecessary to create a further offence to deal with breaches of injunction granted in civil proceedings. Whereas a person would commit the offence of harassment only if he has engaged in harassing behaviour on at least two occasions, a single act would suffice to constitute a breach of a civil injunction. Imposing criminal sanctions for breach of a civil injunction would be too harsh for the defendant who has committed only one act of stalking. The absence of an additional offence of breach of injunction would not expose the victim to a significant risk of harm because it is still open to

²⁷⁷ 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 (8).

him to institute contempt of court proceedings. If the defendant were to act in breach of an injunction on two occasions, he would have committed the offence of harassment under our proposals.²⁷⁸ The police may then be called upon to arrest the defendant and put him on trial.

Harassment of debtors by debt collection agencies

4.68 A creditor may use reasonable means to collect his accounts.²⁷⁹ 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.²⁸⁰

4.69 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.²⁸¹ It should not be overlooked that most complaints about harassment by debt collection agencies received by the Hong Kong Monetary Authority were made by persons other than the debtor, such as referees, family members or friends of the debtor.

4.70 In a survey conducted by John Bacon-Shone and Harold Traver, 82% of the respondents said that they would be very concerned or extremely worried if a debt collecting agency posted notices in their neighbourhood saying that they owed money. 89% of them thought that such activities should be controlled or limited by law.²⁸²

4.71 Pressures employed by debt collecting agencies include the following:²⁸³

- frequent calls at the home of the debtor leaving threatening cards;

²⁷⁸ Where the stalker had already committed an act of stalking when an injunction was granted in civil proceedings, a breach of the injunction would be regarded by the criminal courts as another act of stalking which supports a conviction of the harassment offence.

²⁷⁹ 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. See J F Ghent, "Unsolicited Mailing, Distribution, House Call, or Telephone Call as Invasion of Privacy", 56 ALR3d 457 at 467.

²⁸⁰ Restatement 2d, Torts, § 652B, comment d.

²⁸¹ 17 Am Jur 2d § 193 n 12.

²⁸² The Law Reform Commission of Hong Kong, *Report on Reform of the Law Relating to the Protection of Personal Data* (Topic 27, 1994), Appendix 2, Question 49. A similar survey conducted in 1996 confirmed this finding.

²⁸³ See *Payne Committee Report* (London: Cmnd 3909, 1969), paras. 1232 - 1234.

- writing characters with red paint on the wall of the debtor's premises;
- informing neighbours or workmates of the debtor about his indebtedness by putting up notices or the debtor's photograph near his home or place of work;
- informing local shopkeepers of the indebtedness of the debtor under the guise of seeking information;
- demanding payment from the debtor in the presence of his customers or family members;
- sending obvious demand notes for debts but wrongly addressed to the debtor's neighbours; and
- making threatening telephone calls or sending facsimiles to the debtor's home or place of work.

4.72 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.²⁸⁴ The offence of blackmail in the Theft Ordinance (Cap 210) is also useful in appropriate circumstances. There is, however, no specific legal control over the activities of debt collection agencies.

4.73 Security Branch were of the opinion in 1996 that there were adequate provisions under the general criminal law to deal with the various illegal tactics employed by debt collectors.²⁸⁵ They said that -

*"[the] problem in dealing with the nuisance related offences is not [in]adequate legislation but rather the difficulties in enforcement, particularly in the identification of the offender. If the victim does not know who made the threatening phone call or who posted the repayment demands on the door of the victim's home, it would be difficult for the Police to make an arrest."*²⁸⁶

4.74 Recently, the Hong Kong Association of Banks and the DTC Association issued a Code of Banking Practice. The Code was endorsed by the Hong Kong Monetary Authority. It is non-statutory and issued on a voluntary basis. With respect to debt collection by third party agencies, the Code seeks to control by way of self-regulation the

²⁸⁴ Note that the maximum penalty for an offence under section 20 of the Summary Offences Ordinance is only 2 months' imprisonment and a fine of \$1,000.

²⁸⁵ Such tactics include blackmail, intimidation, assault, criminal damage and false imprisonment.

²⁸⁶ Security Branch, *Nuisances Caused by Debt Collection Agencies* (1996), para 14. This paper was prepared for the Panel on Security of the Legislative Council in June 1996. See also minutes of meeting of Legislative Council's Security Panel on 10 June 1996.

methods adopted by the debt collection agencies appointed by banks and deposit-taking companies. Paragraph 36.2 of the Code provides:

“institutions should specify, either in the contract or by means of written instructions, that their debt collection agencies must not resort to intimidation or violence, either verbal or physical, against any person in their debt recovery actions. This includes actions designed to humiliate debtors publicly, for example, by putting up posters or writing on the walls of their residence, and harass debtors, for example, by making telephone calls at unsociable hours.”

4.75 Collection methods employed by other businesses in terms of business-to-business collection and business-to-consumer collection remain totally unregulated. Insofar as the banks have felt the need to regulate themselves, there is a prima facie case for regulating all debt collection activities.

United States : Fair Debt Collection Practices Act

4.76 Debt collection agencies in the United States are subject to a variety of federal and state regulations, the most important of which is the Fair Debt Collection Practices Act.²⁸⁷ This Act applies only to obligations of a consumer to pay money arising out of a transaction in which the money, property or services which are the subject of the transaction are primarily for personal, family, or household purposes. The Act has no application to the collection of commercial accounts.

4.77 The Act declares that: “Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”²⁸⁸ It states that its purpose is to eliminate abusive debt collection practices by debt collectors, and to protect “consumers” against debt collection abuses. The term “consumer” includes the consumer’s spouse, parent (if the consumer is a minor), guardian, executor or administrator. The Act regulates, *inter alia*, communications in connection with debt collection, acquisition of “location information” and harassment or abuse of debtors by debt collection agencies.

(a) Communications in connection with debt collection

4.78 *Communications with the consumer* : Without the prior consent of the consumer given directly to the debt collector or the permission of a court, a debt collector may not communicate with a consumer in connection with the collection of any debt -

²⁸⁷ 15 USC § 1692.

²⁸⁸ 15 USC § 1692(a).

- at any unusual time or place or a time or place known to be inconvenient to the consumer;²⁸⁹
- if the debt collector knows that the consumer is represented by an attorney and has knowledge of the attorney's name and address, unless the attorney fails to respond within a reasonable time to a communication from the collector or unless the attorney consents to direct communication;
- at the consumer's place of employment if the collector knows or has reason to know that the employer prohibits the consumer from receiving such communication.²⁹⁰

4.79 *Communications with third parties* : Without the prior consent of the consumer given directly to the debt collector or the permission of a court, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate in connection with the collection of the debt with any person other than the consumer, his attorney, a consumer reporting agency, the creditor, the creditor's attorney, or the collector's attorney.²⁹¹

4.80 *Ceasing communications* : If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that he wishes the collector to cease further communication with him, the collector must not communicate further with the consumer with respect to such debt except to advise the consumer that the collector's further efforts are being terminated, to notify the consumer that the collector or creditor may invoke specified remedies ordinarily invoked by them, or to notify the consumer that the collector or creditor intends to invoke a specified remedy.²⁹²

(b) Acquisition of location information

4.81 A debt collector who seeks to communicate with any person other than the consumer for the purpose of acquiring "location information"²⁹³ about the consumer has to comply with the following requirements:²⁹⁴

- identify himself and state that he is confirming or correcting location information concerning the consumer;
- not state that the consumer owes any debt;
- not communicate with any such person more than once unless requested to do so by such person;
- not communicate by post card;

²⁸⁹ This usually means 8 pm to 9 am.

²⁹⁰ 15 USC § 1692c(a).

²⁹¹ 15 USC § 1692c(b).

²⁹² 15 USC § 1692c(c).

²⁹³ I.e. information about a consumer's place of abode and his telephone number at such place, or his place of employment.

²⁹⁴ 15 USC § 1692b.

- not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and
- after the debt collector knows the consumer is represented by an attorney with regard to the subject debt, not communicate with any person other than that attorney.

(c) Harassment or abuse

4.82 A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. This prohibition includes the following specific conduct:

- “(1) *The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.*
- (2) *The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.*
- (3) *The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency*
- (4) *The advertisement for sale of any debt to coerce payment of the debt.*
- (5) *Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.*
- (6) *... the placement of telephone calls without meaningful disclosure of the caller’s identity.’²⁹⁵*

4.83 The Act also prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of a debt.

(d) Civil liability

4.84 A debt collector may be subject to civil liability under the Act. A debt collector who fails to comply with any provision of the Act with respect to any person is

²⁹⁵ 15 USC § 1692d, at <<http://www.law.cornell.edu/uscode/15/1692d.html>>.

liable for the actual damage sustained by that person as a result of such failure.²⁹⁶ A person allegedly harmed by proscribed debt collection practices directed towards the collection of another person's debt has standing to sue under the Act.

United Kingdom : Administration of Justice Act 1970

4.85 Section 40 of the Administration of Justice Act 1970 (UK) makes harassment of debtors an offence. It provides:

“(1) A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he -

- (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation;*
- (b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;*
- (c) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or*
- (d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not.*

(2) A person may be guilty of an offence by virtue of subsection (1)(a) above if he concert with others in the taking of such action as is described in that paragraph, notwithstanding that his own course of conduct does not by itself amount to harassment.

(3) Subsection (1)(a) above does not apply to anything done by a person which is reasonable (and otherwise permissible in law) for the purpose -

- (a) of securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them, from future loss; or*

(b) *of the enforcement of any liability by legal process.”*

4.86 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. We believe that specific legislation over and above the general provisions proposed in this paper is not only desirable but also necessary if we are to deal effectively with the problems created by unscrupulous debt collectors and to afford effective protection to innocent individuals as well as debtors who fail to pay their debts. However, any legislation in this area should not impinge on the legitimate activities of debt collection agencies. It should contain safeguards which prevent debtors from abusing the protection afforded under its provisions in order to evade their legal obligations.

4.87 **We propose that the Administration should give consideration to proposing legislation which is designed to ensure that abusive debt collection practices would not be used by debt collection agencies.**

Harassment of tenants and licensees of leased premises

4.88 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. Section 70B of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) therefore makes unlawful deprivation and harassment of tenants a crime. The section provides:

“(1) Any person who unlawfully deprives a tenant or sub-tenant of occupation of any premises commits an offence and is liable on conviction on indictment to a fine of \$500,000 and, in addition, on a second or subsequent conviction, to imprisonment for 12 months.

(2) Any person who, with intent to cause a tenant or sub-tenant-

(a) to give up occupation of any premises or part of premises;
or

(b) to refrain from exercising any right or pursuing any remedy in respect of any premises or part of premises,

does any act calculated to interfere with the peace or comfort of the tenant or sub-tenant or members of his household or persistently withdraws or withholds services reasonably required for occupation of the premises as a dwelling commits an offence and is liable on

conviction on indictment to a fine of \$500,000 and, in addition, on a second or subsequent conviction, to imprisonment for 12 months.”

4.89 Section 70B(2) of the Ordinance is based on section 1(3) of the UK Protection from Eviction Act 1977, but the scope of the former is narrower than that of the latter. Whereas the Ordinance affords protection to only tenants and sub-tenants, the 1977 Act extends the protection to licensees occupying premises as a residence.²⁹⁷ The main problem in utilizing section 70B(2) 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.

4.90 In an attempt to overcome such problems, section 29 of the Housing Act 1988 re-defines the *actus reus* of the offence under section 1(3) of the 1977 Act²⁹⁸ 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.²⁹⁹ That subsection provides that:

“... 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.”*³⁰⁰

²⁹⁷ 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.

²⁹⁸ The English equivalent of section 70B(2) of the Landlord and Tenant (Consolidation) Ordinance.

²⁹⁹ Housing Act 1988, section 29.

³⁰⁰ The defendant is not liable if he had reasonable grounds for doing the acts or withdrawing or withholding the services in question, e.g. for the purpose of carrying out essential repair work. Section 1(3B).

4.91 Tenants and licensees who are illegally evicted or driven out by harassment are entitled to claim compensation in the civil courts under section 27 of the Housing Act 1988. Compensation is based on the financial gain to the landlord of securing vacant possession of his property. The Secretary of State explained that “this will be a very powerful deterrent to landlords who have always been tempted to realize substantial profits by driving out their tenants by harassment or illegal eviction”.³⁰¹

4.92 **We propose that the Administration should give consideration to amending section 70B of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) with a view to affording better protection to tenants and licensees from harassment by landlords.**

Conclusion

4.93 We believe that our proposals will offer a satisfactory solution to the shortcomings of traditional remedies by providing more comprehensive and effective protection. The victims would be given a choice of civil and criminal measures. The proposed tort of harassment would entitle him to claim compensation and 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 criminal courts would also be strengthened by allowing them to grant a restraining order breach of which would be an offence. Such civil and criminal measures will complement each other and afford immediate protection to victims of stalking. And both the police and the courts will be able to intervene at an early stage to prevent the 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 remedies. We trust that by implementing our proposals victims of stalking will stand a better chance of regaining their private life.

³⁰¹ 123 *House of Commons Official Report* 624, 30 Nov 1987.

Chapter 5

Summary of recommendations and proposals

5.1 We recommend that 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, be guilty of a criminal offence. For the purposes of this offence, “harassment” of a person includes causing the person alarm or distress; and a “course of conduct” must involve conduct on at least two occasions. 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. *(Paragraph 4.26)*

5.2 We recommend that a person who is guilty of the proposed offence be liable to imprisonment for two years. *(Paragraph 4.30)*

5.3 We recommend that it be a defence for the defendant who is charged with the offence of harassment to show -

- (a) that the conduct was pursued for the purpose of preventing or detecting crime;
- (b) that the conduct was pursued under lawful authority; or
- (c) that the pursuit of the course of conduct was reasonable in the particular circumstances. *(Paragraph 4.38)*

5.4 We recommend 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 Hong Kong Special Administrative Region or the prevention or detection of serious crime and was carried out on behalf of the Hong Kong Special Administrative Region Government shall be evidence that the provisions of the anti-stalking legislation do not apply to the conduct of that person on that occasion. *(Paragraph 4.40)*

5.5 We recommend that -

- (a) a court sentencing a person convicted of the offence of harassment may make an order restraining him from doing anything which amounts to harassment of the victim of the offence or any other person as the court thinks fit;

- (b) the restraining order may have effect for a specified period or until further notice;**
- (c) 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**
- (d) a person who, without reasonable excuse, does anything which he is prohibited from doing by a restraining order shall be guilty of an arrestable offence, punishable by imprisonment for 6 months. (Paragraph 4.48)**

5.6 We recommend that a person who pursues a course of conduct which constitutes the offence of harassment shall be liable in tort to the victim of the course of conduct in question. Damages may be recovered for any distress, anxiety and financial loss resulting from the harassment. The courts may grant an injunction restraining the defendant from pursuing any conduct which amounts to harassment. (Paragraph 4.63)

5.7 We propose that the Administration should give consideration to amending the law relating to domestic violence with a view to providing better protection to the private life of individuals. (Paragraph 2.43)

5.8 We propose that the Administration should give consideration to proposing legislation which is designed to ensure that abusive debt collection practices would not be used by debt collection agencies. (Paragraph 4.87)

5.9 We propose that the Administration should give consideration to amending section 70B of the Landlord and Tenant (Consolidation) Ordinance (Cap 7) with a view to affording better protection to tenants and licensees from harassment by landlords. (Paragraph 4.92)