

立法會政制事務委員會

外地實施反纏擾行為法例的經驗

引言

本文件概述政府當局委聘香港大學比較法與公法研究中心（下稱“顧問”）就海外司法管轄區實施反纏擾行為法例的經驗而進行的研究（下稱“研究”）結果。

背景

2. 我們在2011年12月19日發表《有關纏擾行為的諮詢文件》（下稱“諮詢文件”），載述法律改革委員會（下稱“法改會”）在《纏擾行為》報告書中所提出的各項建議，並邀請公眾就所涉的事宜，包括以下事宜，發表意見：

- (a) 應否根據法改會提出的下述建議將纏擾行為定為刑事罪行：
 - (i) 一個人如做出一連串的行為，而這一連串的行為對另一人造成騷擾，他亦知道或應該知道這一連串的行為對該另一人造成騷擾，即屬犯刑事罪行；
 - (ii) 就此罪而言，所造成的騷擾應該嚴重至足以使該人驚恐或困擾；以及
 - (iii) 如果一名持有相同資料的合理的人會認為該一連串行為對該另一人造成騷擾，做出該一連串行為的人便會被認為應該知道他的一連串行為對該另一人造成騷擾；
- (b) 應否將新聞採訪活動包含在“在案中的情況下做出該一連串行為是合理的”這項免責辯護（即“合理行為”免

責辯護)之內。除以“合理行為”作為免責辯護外，法改會並建議應訂明以下免責辯護：(i) 有關行為是為了防止或偵查罪行的目的而做的；以及(ii) 有關行為是在合法權限之下做的。

諮詢期於 2012 年 3 月 31 日結束，我們並於 2012 年 11 月向立法會政制事務委員會匯報所收到的意見¹。

對新聞自由及表達／示威自由的關注

3. 在收到的 506 份意見書中，約 46% 支持引入制約纏擾行為的法例，約 35% 表示反對，其餘的沒有表明支持或反對，或只給予有條件支持，即所擬定的罪行及／或免責辯護須經實質修訂方予支持。諮詢期內的討論主要集中在擬定的罪行可能對新聞自由及表達／示威自由造成的影響。在 506 份意見書中，逾 40% 有就新聞自由及／或擬議免責辯護發表意見。當中約 15% 支持以“合理行為”為抗辯理由，認為這應已足夠，另外 85% 則認為“合理行為”這抗辯理由不足以保障新聞自由及表達／示威自由。提交意見書的傳媒機構／記者組織，全都反對諮詢文件所載立法制約纏擾行為的建議，並認為諮詢文件所建議的“合理行為”免責辯護不足以保障新聞自由。

4. 有見及公眾對新聞自由及表達／示威自由的關注，我們認為先研究海外司法管轄區實施反纏擾行為法例的經驗是審慎的做法²。有關研究現已完成。

¹ 所收到的意見摘要載於政府當局的文件：《有關纏擾行為的諮詢文件—收集到的意見摘要》(立法會 CB(2)196/12-13(04)號文件)。

² 我們於 2013 年 1 月 21 日政制事務委員會會議上告知委員我們會進行有關研究，並於 2013 年 4 月 10 日的財務委員會特別會議中承諾在 2013 年下半年向政制事務委員會匯報研究結果。

研究的主要結果

主要目的

5. 研究包括以下司法管轄區執行反纏擾行為法例的情況：英國、澳洲昆士蘭州和維多利亞州、新西蘭、加拿大、美國加利福尼亞州及內華達州，以及南非³。研究結果的要點在下文各段概述，詳情載於附件 A。報告全文可瀏覽政制及內地事務局網頁(網址：<http://www.cmab.gov.hk/tc/issues/stalking.htm>)⁴。

各司法管轄區概覽

6. 在探討的司法管轄區中，除南非外，全部都有制約纏擾行為的刑事法和民事法。南非的法例只訂明民事補救。這些司法管轄區的法例雖然在範圍和形式上有所不同，但方向相若。英國、昆士蘭州及維多利亞州、新西蘭、加拿大及南非的法例臚列構成纏擾／騷擾的行為，而加利福尼亞州及內華達州的法例則沒有臚列這些行為。內華達州、加利福尼亞州、昆士蘭州及維多利亞州的法例就包括新聞採訪及／或示威活動在內的合法活動特設豁免，而英國、新西蘭、加拿大及南非的法例則訂明一般性的免責辯護。有關上述司法管轄區反纏擾行為法例的相關條文載於附件 B⁵。

英國：《1997 年保障免受騷擾法令》

7. 英國的《1997 年保障免受騷擾法令》(下稱“《保障免受騷擾法令》”)訂有兩種刑事罪行，即 (i) 禁止一個人做出一連串構成騷擾的行為，包括引致另一人驚恐或困擾的行為(較輕微的罪行)；以及(ii) 禁止一個人做出一連串行為，令另一人擔心會受暴力對待(較嚴重的罪行)。由於所訂的罪行範圍廣泛，同時只有一般性的免責辯護，顧問察悉《保障免受騷擾法令》是這次研究所探討的司法管轄區反纏擾法例中，涵蓋範圍最廣的法例。

³ 選定這些司法管轄區是考慮到其對新聞自由和權利的保障、其法律制度(例如實行普通法，市民的權利受憲法保障)，以及較容易取得有關司法管轄區的有關資料。

⁴ 附件 A 及報告全文只有英文版本。

⁵ 附件 B 只有英文版本。

8. 在 2006 至 2010 年期間，每年根據《保障免受騷擾法令》的主要條文⁶提出的起訴個案大概有 7 000 至 10 000 宗。顧問發現十宗針對新聞採訪活動的個案⁷，這些個案全都是民事個案，大多以強制令的形式處理。顧問注意到，根據《保障免受騷擾法令》申請強制令安排簡便⁸，而且法例涵蓋的範圍廣泛，受禁制的行為幾乎可以包括任何行為。顧問並留意到，《保障免受騷擾法令》中的“在案中的情況下做出該一連串行為是合理的”及“有關行為是為了防止或偵查罪行而做的”的一般性免責辯護，未能對傳媒起保障作用。

9. 顧問發現五宗刑事個案和九宗民事個案涉及示威人士。在這些刑事個案中，一宗涉及示威人士發出死亡威脅，其後承認干犯騷擾罪，另外兩宗涉及示威人士違反禁制示威活動的強制令⁹¹⁰。在九宗民事個案中，有八宗獲發強制令，禁止或限制在指定的禁區進行示威活動，或禁制被告人騷擾指定受保護的人¹¹。餘下一宗是根據《保障免受騷擾法令》申請強制令，但未獲批准的個案。顧問留意到，上述涉及新聞採訪及示威活動的個案引起社會對表達自由的高度關注。

10. 《保障免受騷擾法令》先後在 2001 及 2005 年經修訂，分別增訂了有關“集體騷擾行為”（即有關行為由兩個或以上的人

⁶ 即《保障免受騷擾法令》第 2 條“騷擾罪行”；第 3 條“民事補救(違反強制令)”；第 4 條“使人擔心遭暴力對待”；以及第 5 條“禁制令(違反禁制令)”。

⁷ 本文件引述的個案數目只反映顧問從各可行的資料來源所取得的個案。

⁸ 首先，英國一些個案的聆訊無須公開進行。第二，英國的《民事程序規則》容許“不給予通知而申請強制令”，即無須給予被告人正式通知。此外，在處理強制令的申請時，個案的是非曲直未必經過全面爭辯。第三，有些強制令不單止禁制某些資訊的發布，還禁止披露強制令的存在。

⁹ 根據英國的《保障免受騷擾法令》，違反強制令屬刑事罪行。

¹⁰ 至於其餘個案，一宗涉及一名示威人士，惟資料不全，未能確定該人士是被控以騷擾罪，抑或被控違反強制令；另一宗被法庭裁定受害人羣組的定義過於含糊，控罪有欠妥之處，示威人士獲裁定無罪。

¹¹ 其中一宗個案涉及臨時強制令，案中的申索人與被告人因被告人作出某些承諾而達成庭外和解，強制令得以撤銷。

做出)及“阻嚇合法活動的騷擾行為”(即在不同時候騷擾兩個或以上的人)的罪行。《保障免受騷擾法令》並於2012年引入纏擾罪行，首次於法例中表列受禁止的行為。

澳洲：《1899年刑事法典法令》(昆士蘭州)；《1958年刑事罪行法令》(維多利亞州)

11. 昆士蘭州及維多利亞州的反纏擾行為法例以“擔心人身安全”為定罪門檻，並以表列方式載明受禁制的各項行為，且為新聞採訪及示威活動特設免責辯護／豁免。

12. 顧問並無發現任何涉及新聞採訪活動的個案。維多利亞州有兩宗引用《1958年刑事罪行法令》提出起訴的刑事個案涉及示威人士。就其中一宗個案，一名示威人士進行示威活動，包括把載有受害人資料的傳單派發給受害人的鄰居，在受害人住所附近集會和致電受害人，結果被裁定纏擾行為罪名成立¹²；在另一宗個案中，一名示威人士在一所廟宇示威，並派發傳單、豎設橫額和行車時太貼近受害人的車輛，被判纏擾行為罪名成立。這宗個案的判罪經上訴後被推翻，原因是示威是針對較廣大的羣眾而非指稱的受害人，而在示威中作出的行為不構成法例所界定的纏擾行為，且亦非旨在使人受傷害或惶恐。

13. 顧問未有發現就有關法例的制訂以及在立法後社會對新聞自由及表達／示威自由表達重大關注。

新西蘭：《1997年騷擾行為法令》

14. 一如澳洲的昆士蘭州及維多利亞州，新西蘭的《1997年騷擾行為法令》以“擔心人身安全”為定罪門檻，並在法例中以表列方式載明受禁制的行為。不過，有別於該兩個澳洲司法管轄區，新西蘭只在民事騷擾方面訂定“合法目的”的一般性免責辯護。顧問並無發現涉及新聞採訪活動的個案；涉及示威人士的民事個案則有三宗，全都根據《1997年騷擾行為法令》發出禁制令，以禁止示威活動。顧問未有發現就有關法例的制訂以及在立法後社會對新聞自由及表達／示威自由表達重大關注。

¹² 雖然維多利亞州的《1958年刑事罪行法令》有以政治活動作為免責辯護，但法庭認為有關示威人士的行為基於個人目的。

加拿大：1985 年加拿大修訂本法規中的《刑事法典》

15. 加拿大的《刑事法典》亦是以“擔心人身安全”為定罪門檻，以表列方式載明構成罪行的受禁制行為，且以合法權限作為一般性的免責辯護。

16. 顧問並無發現任何涉及新聞採訪及示威活動的個案，亦未見在立法後社會就有關法例對表達自由及其他相關自由造成的負面影響表達重大關注。顧問注意到，加拿大最大的兩個記者協會—加拿大記者協會及加拿大記者言論自由協會—都沒有對傳媒可能受起訴刑事騷擾表達關注。

美國：加利福尼亞州《刑事法典》及《民事法典》；內華達州《修訂法規》

17. 加利福尼亞州的《刑事法典》及《民事法典》以及內華達州的《修訂法規》以“擔心人身安全”為定罪門檻，但沒有特別以表列方式訂明構成罪行的受禁制行為。加利福尼亞州的《刑事法典》將勞工糾察行動中出現的行為定為特定的豁免，而內華達州的《修訂法規》則為新聞採訪及示威活動特設豁免。

18. 顧問並無發現加利福尼亞州和內華達州有任何涉及新聞採訪活動及示威活動的個案，亦未見社會就有關法例對表達自由及其他相關自由造成的負面影響表達重大關注。

南非：《2011 年免受騷擾保護法令》

19. 南非的《2011 年免受騷擾保護法令》只訂定民事責任制度，採取“擔心人身安全”的規定，以表列方式載明受禁制的行為，並訂明一般性的免責辯護。該法令在 2013 年 4 月才生效。顧問並無發現任何涉及新聞採訪及示威活動的個案。

顧問建議¹³

20. 據顧問從上述個案觀察所得，如反纏擾行為法例的罪行涵蓋範圍較清晰、採用主觀性的犯罪意念標準，及提供特設免責辯護或豁免，則新聞採訪及示威活動被打擊的機會較低。顧問因此就有關罪行和豁免提出了以下建議：

罪行

21. 顧問建議，新的纏擾行為罪行應把以下情況刑事化：一個人做出一連串行為¹⁴，而這些行為包括表列四類受禁制行為中的最少兩項（相同或不同行為），致使另一人在當時的情況下合理地擔心自身或他認識的人的人身安全。顧問參考所探討的司法管轄區中可構成纏擾的行為種類後，建議下列可見於這些司法管轄區法例的受禁制行為：

- (a) 注視一個人居住、工作、營業、上課或所在的地方或建築物，或在這些地方或建築物外面或附近徘徊；
- (b) 以電話、郵件、傳真、電子郵件或利用任何科技，直接或間接與一個人接觸；
- (c) 將信件、電報、傳真、電子郵件，或包裹或其他物件寄交、交付或促使信件、電報、電子郵件，或包裹或其他物件交付予一個人；及/或
- (d) 從一處至另一處跟蹤或尾隨一個人，或與該人搭訕。

22. 做出有關行為的一方應有蓄意使一個人擔心自身或他認識的人的人身安全的犯罪意念，或罔顧¹⁵其行為是否可能導致該人如此擔心自身或他認識的人的安全。

¹³ 全部建議載於附件 A 的行政摘要。

¹⁴ 一連串行為是英國、維多利亞州、加利福尼亞州及內華達州等司法管轄區的用語。

¹⁵ 在此，罔顧後果應該理解為知道有使他人擔心安全的不合理風險；或不理會該等風險。

23. 顧問的建議與法改會的建議主要在三方面有不同之處。第一，顧問以表列對另一人的行為這方式界定纏擾行為的涵義，以提高法例的明確性。第二，以“擔心人身安全”為定罪門檻，而法改會則建議以使他人“驚恐或困擾”為定罪門檻。所有這次研究所探討的司法管轄區均採用“擔心人身安全”為定罪門檻。第三，顧問建議的犯罪意念（即蓄意及罔顧後果）屬主觀性，而法改會的建議則屬客觀合理的標準（即“知道或應該知道”有關行為構成騷擾）。顧問希望藉此避免擬議罪行涵蓋無犯罪意圖的無辜者。客觀合理的標準要求當事人持虛構的“合理的人”的準則行事，但於某些情況當中（包括受年齡、心智未成熟或心理不健全等所限），當事人未必能預視合理的人所見有關行為構成的風險。

豁免

24. 顧問認為有必要為新聞採訪及與公共事務有關的表達性活動特設豁免。從案例顯示，英國的反纏擾法例曾應用於傳媒及示威活動，而法例當中較含糊的合理行為免責辯護亦可視為未能為傳媒及示威者提供足夠保障。此外，公眾在諮詢期間就新聞及表達自由所表達的關注亦需處理。顧問因此建議下述各類活動獲豁免¹⁶於新訂纏擾罪行的範圍內：

- (a) 按照合法權限作出的行為：目的是釐清獲法律授權作出的行為不會納入新罪行的範圍內，作用是確保按照合法權限作出的行為可以繼續，無須擔心會干犯新的罪行。
- (b) 一個人為蒐集向公眾傳布的資料而進行的活動，而該等活動是以與報章、期刊、報業組織、電台或電視台，或其他媒體機構的合約安排為依據而進行的：就這個類別的活動，任何人凡“蒐集向公眾傳布的資料”，而此舉是以與媒體機構的“合約安排為依據”¹⁷，均可獲豁免。這樣應可回應傳媒的關注。

¹⁶ 顧問認為在刑事法中，“豁免”的法定釋義與“免責辯護”相同。顧問於報告中使用“豁免”一詞而非“免責辯護”，以示將有關活動豁除於刑事罪行的範圍之外。

¹⁷ 使用“合約安排”一詞而非合約訂明的責任，以便將特約撰稿人包括在內，這些撰稿人與媒體公司之間可能沒有很正式的僱傭關係。

- (c) 一個人如常執行其合法受僱的工作時進行的活動：效法內華達州的法例，為執行合法職務的人提供保證，即使他們的工作有時或會導致他人困擾，甚至驚恐，也不會因此而以新的纏擾行為罪名起訴他們。
- (d) 一個人純粹為討論公共事務議題或就這些議題進行交流的單一目的而進行的活動：給予這類活動豁免是為了保障表達自由，包括示威活動自由。不過，如一個人試圖就基於討論公共事務議題或就這些議題進行交流以外的目的（例如因本身與某人有嫌隙而在該人家門前示威）而進行的活動援用豁免，則因就公共事務進行交流不可說是該活動的“單一”目的，以致該人不得援用此豁免。

25. 顧問與法改會的建議的分別主要在於顧問為新聞採訪及示威活動，以及在如常執行合法受僱的工作時進行的活動特設豁免，以取代法改會所建議以“合理行為”以及為防止或偵查罪行而作出的行為作為免責辯護。

徵詢意見

26. 政府當局尊重新聞自由及表達自由，亦理解公眾在2011-12年的諮詢期間就反纏擾行為法例對這些自由的影響所表達的關注。在決定未來路向時，必須在為備受纏擾的受害人提供更佳保障，與確保正當的新聞採訪活動和公眾示威等正當活動不受影響之間取得適當的平衡。

27. 是次研究探討海外反纏擾行為法例的運作，並評估這些法例於相應的司法管轄區對所涉的自由的影響。我們會審慎研議研究結果和建議。於現階段，政府當局就未來路向未有既定立場。我們希望向委員報告研究結果和建議，並聽取委員的意見。

政制及內地事務局
2013年12月

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

Executive Summary

October 2013

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

Executive Summary

Introduction

1. The Law Reform Commission proposed anti-stalking legislation in Hong Kong in the year 2000. A prudent approach has been adopted in this difficult area of the law by consulting the community and relying on further developments overseas in order to avoid unintended consequences and interference with innocent behaviour.

2. The purpose of this study was to examine the development and operation of anti-stalking legislation in the United Kingdom, Australia, New Zealand, Canada, the United States and South Africa. While most of these jurisdictions have had both criminal and civil forms of anti-stalking legislation for many years, South Africa's general civil regime came into force only on 27 April 2013. The study specifically aimed to evaluate the anti-stalking legislation's impact on freedom of the press, freedom of demonstration/protest and freedom of expression as perceived by people in the respective jurisdictions.

3. Both key findings and recommendations are highlighted in this Executive Summary.

4. References to "Parts" and "Appendices" are to those in the Final Report.

Current Anti-Stalking Legislation

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

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

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

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

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

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

- “intentionally directed at a person” - Queensland

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

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

(Part 1, Part 6.5.3 are referred).

Surveys and Statistics on Stalking

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

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

- (a) Most victims know their stalkers; i.e. stalking occurs more often when the victim and the offender know each other, including when they have been in a relationship (Part 2.1 US; Part 2.2 UK²; Part 2.3 Canada, Part 2.8.1’s second table Victoria³ are referred).
- (b) The majority of stalking victims tend to be female while the majority of perpetrators male (Part 2.2. UK⁴; Part 2.3 Canada, Part 2.11.1. US are referred).
- (c) The number of reported stalking complaints and the number of prosecutions vary from year to year without suggesting that either stalking is on the rise or that it has

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

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

⁴ Footnote 2 above applies.

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

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

Cases Involving News-gathering Activities

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

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

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

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

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

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

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

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

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

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

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

20. The UK PHA general defences of “in the particular circumstances the pursuit of the course of conduct is reasonable” and “conduct was pursued for the prevention or detection of crime” have not assisted the media⁵ (Part 4.1 is referred).

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

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

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

(Part 4.2 is referred).

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

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

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

(Part 4.5 is referred).

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

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

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

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

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

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

(Part 4.4 Introduction is referred).

Cases Involving Demonstration / Protest Activities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations for the Way Forward in Hong Kong

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

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

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

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

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

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

The list of prohibited acts is :

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

- (c) Activities of a person carried out in the normal course of his or her lawful employment.
- (d) Activities of a person carried out for the sole purpose of discussing or communicating matters that concern public affairs.

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

**Extracts of provisions (offences and defences/exemptions)
of the anti-stalking legislation in the six jurisdictions**

<p>United Kingdom (England and Wales)</p>	<p>The Protection from Harassment Act 1997 (PHA)</p> <p>1 Prohibition of harassment.</p> <p>(1) A person must not pursue a course of conduct – (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.</p> <p>(1A) A person must not pursue a course of conduct – (a) which involves harassment of two or more persons, and (b) which he knows or ought to know involves harassment of those persons, and (c) by which he intends to persuade any person (whether or not one of those mentioned above) – (i) not to do something that he is entitled or required to do, or (ii) to do something that he is not under any obligation to do.</p> <p>2 Offence of harassment.</p> <p>(1) A person who pursues a course of conduct in breach of section 1(1) or (1A) is guilty of an offence.</p> <p>(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.</p> <p>2A Offence of stalking</p> <p>(1) A person is guilty of an offence if – (a) the person pursues a course of conduct in breach of section 1(1), and (b) the course of conduct amounts to stalking.</p> <p>(2) For the purposes of subsection (1)(b) (and section 4A(1)(a)) a person's course of conduct amounts to stalking of another person if – (a) it amounts to harassment of that person, (b) the acts or omissions involved are ones associated with stalking, and (c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.</p> <p>(3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking – (a) following a person, (b) contacting, or attempting to contact, a person by any means, (c) publishing any statement or other material – (i) relating or purporting to relate to a person, or (ii) purporting to originate from a person, (d) monitoring the use by a person of the internet, email or any other form</p>
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- of electronic communication,
- (e) loitering in any place (whether public or private),
- (f) interfering with any property in the possession of a person,
- (g) watching or spying on a person.

(6) This section is without prejudice to the generality of section 2.

4 Putting people in fear of violence.

(1) 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 an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

4A Stalking involving fear of violence or serious alarm or distress

(1) A person (“A”) whose course of conduct –
(a) amounts to stalking, and
(b) either –
(i) causes another (“B”) to fear, on at least two occasions, that violence will be used against B, or
(ii) causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities,
is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

(2) For the purposes of this section A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause B so to fear on that occasion.

(3) For the purposes of this section A ought to know that A's course of conduct will cause B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities if a reasonable person in possession of the same information would think the course of conduct would cause B such alarm or distress.

7 Interpretation of this group of sections.

(1) This section applies for the interpretation of sections 1 to 5.

(2) References to harassing a person include alarming the person or causing the person distress.

(3) A “course of conduct” must involve –

	<p>(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or</p> <p>(b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.</p> <p>(3A) A person’s conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another –</p> <p>(a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and</p> <p>(b) to be conduct in relation to which the other’s knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.</p> <p>(4) “Conduct” includes speech.</p> <p>(5) References to a person, in the context of the harassment of a person, are references to a person who is an individual.</p>
<p>United Kingdom (England and Wales)</p> <p>Defence</p>	<p>The provisions of the PHA would not apply to criminal or civil harassment if the conduct in question:</p> <ul style="list-style-type: none"> • was pursued for the purpose of prevention or detection of crime; • the conduct was pursued by those required to act under any enactment or rule of law; and • where in the particular circumstances the pursuit of the course of conduct is reasonable. In the context of the criminal harassment, this defence is only available for the lower-levels of causing harassment and stalking offences; not for the higher-levels of harassment and stalking offences.
<p>Australia (Queensland)</p> <p>Offence</p>	<p>Criminal Code Act 1899</p> <p>359B What is unlawful stalking</p> <p><i>Unlawful stalking</i> is conduct –</p> <p>(a) intentionally directed at a person (the <i>stalked person</i>); and</p> <p>(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and</p> <p>(c) consisting of 1 or more acts of the following, or a similar, type –</p> <p>(i) following, loitering near, watching or approaching a person;</p> <p>(ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;</p> <p>(iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;</p> <p>(iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;</p> <p>(v) giving offensive material to a person, directly or indirectly;</p> <p>(vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;</p> <p>(vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and</p>

	<p>(d) that –</p> <p>(i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or</p> <p>(ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.</p> <p>359C What is immaterial for unlawful stalking</p> <p>(1) For section 359B(a), it is immaterial whether the person doing the unlawful stalking –</p> <p>(a) intends that the stalked person be aware the conduct is directed at the stalked person; or</p> <p>(b) has a mistaken belief about the identity of the person at whom the conduct is intentionally directed.</p> <p>(2) For section 359B(a) and (c), it is immaterial whether the conduct directed at the stalked person consists of conduct carried out in relation to another person or property of another person.</p> <p>(3) For section 359B(b), it is immaterial whether the conduct throughout the occasion on which the conduct is protracted, or the conduct on each of a number of occasions, consists of the same or different acts.</p> <p>(4) For section 359B(d), it is immaterial whether the person doing the unlawful stalking intended to cause the apprehension or fear, or the detriment, mentioned in the section.</p> <p>(5) For section 359B(d)(i), it is immaterial whether the apprehension or fear, or the violence, mentioned in the section is actually caused.</p>
<p>Australia (Queensland)</p> <p>Exemption</p>	<p>Exemptions:</p> <ul style="list-style-type: none"> • acts done in the execution of a law or administration of an Act or for a purpose authorised by an Act; • acts done for the purposes of a genuine industrial dispute; • acts done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest; • reasonable conduct engaged in by a person for the person’s lawful trade, business or occupation; and • reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving.
<p>Australia (Victoria)</p> <p>Offence</p>	<p>Crimes Act 1958</p> <p>Section 21A Stalking</p> <p>(1) A person must not stalk another person. Penalty: Level 5 imprisonment (10 years maximum).</p> <p>(2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct which includes any of the following-</p> <p>(a) following the victim or any other person;</p>

- (b) contacting the victim or any other person by post, telephone, fax, text message, e-mail or other electronic communication or by any other means whatsoever;
 - (ba) publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material –
 - (i) relating to the victim or any other person; or
 - (ii) purporting to relate to, or to originate from, the victim or any other person;
 - (bb) causing an unauthorised computer function (within the meaning of Subdivision (6) of Division 3) in a computer owned or used by the victim or any other person;
 - (bc) tracing the victim's or any other person's use of the Internet or of e-mail or other electronic communications;
- (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;
- (d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);
 - (da) making threats to the victim;
 - (db) using abusive or offensive words to or in the presence of the victim;
 - (dc) performing abusive or offensive acts in the presence of the victim;
 - (dd) directing abusive or offensive acts towards the victim;
- (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
- (f) keeping the victim or any other person under surveillance;
- (g) acting in any other way that could reasonably be expected-
 - (i) to cause physical or mental harm to the victim, including self-harm; or
 - (ii) to arouse apprehension or fear in the victim for his or her own safety or that of any other person- with the intention of causing physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person.

(3) For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim, including self-harm, or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if –

- (a) the offender knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear; or
- (b) the offender in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.

<p>Australia (Victoria)</p> <p>Defence</p>	<p>It is a defence to the charge for the accused to prove that the course of conduct was engaged in without malice –</p> <ul style="list-style-type: none"> • in the normal course of a lawful business, trade, profession or enterprise (including that of any body or person whose business, or whose principal business, is the publication, or arranging for the publication, of news or current affairs material); or for the purpose of an industrial dispute; or • for the purpose of engaging in political activities or discussion or communicating with respect to public affairs.
<p>New Zealand</p> <p>Offence</p>	<p>The Harassment Act 1997 (HA)</p> <p>3. Meaning of harassment</p> <p>(1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.</p> <p>(2) To avoid any doubt –</p> <ul style="list-style-type: none"> (a) the specified acts required for the purposes of subsection (1) may be the same type of specified act on each separate occasion, or different types of specified acts: (b) the specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person. <p>4. Meaning of specified act</p> <p>(1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:</p> <ul style="list-style-type: none"> (a) watching, loitering near, or preventing or hindering access to or from, that person’s place of residence, business, employment, or any other place that the person frequents for any purpose: (b) following, stopping, or accosting that person: (c) entering, or interfering with, property in that person’s possession: (d) making contact with that person (whether by telephone, correspondence, or in any other way): (e) giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person: (f) acting in any other way – <ul style="list-style-type: none"> (i) that causes that person (person A) to fear for his or her safety; and (ii) that would cause a reasonable person in person A’s particular circumstances to fear for his or her safety. <p>(2) To avoid any doubt, subsection (1)(f) includes the situation where –</p> <ul style="list-style-type: none"> (a) a person acts in a particular way; and (b) the act is done in relation to a person (person B) in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person (person A); and (c) acting in that way – <ul style="list-style-type: none"> (i) causes person A to fear for his or her safety; and (ii) would cause a reasonable person in person A’s particular circumstances to fear for his or her safety, whether or not acting in

	<p>that way causes or is likely to cause person B to fear for person B's safety.</p> <p>(3) Subsection (2) does not limit the generality of subsection (1)(f).</p> <p>8. Criminal harassment</p> <p>(1) Every person commits an offence who harasses another person in any case where –</p> <p>(a) the first-mentioned person intends that harassment to cause that other person to fear for –</p> <p>(i) that other person's safety; or</p> <p>(ii) the safety of any person with whom that other person is in a family relationship; or</p> <p>(b) the first-mentioned person knows that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for –</p> <p>(i) that other person's safety; or</p> <p>(ii) the safety of any person with whom that other person is in a family relationship.</p> <p>(2) Every person who commits an offence against this section is liable, on summary conviction, to imprisonment for a term not exceeding 2 years.</p>
<p>New Zealand</p> <p>Defence</p>	<p>No specific defence for criminal or civil harassment but the Law Commission recently suggested that the general defence of "lawful purpose" for civil harassment should be reformulated.</p>
<p>Canada</p> <p>Offence</p>	<p>Criminal Code R.S.C. 1985, s. 264 Criminal harassment</p> <ul style="list-style-type: none"> • 264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person 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. • Prohibited conduct <p>(2) The conduct mentioned in subsection (1) consists of</p> <p>(a) repeatedly following from place to place the other person or anyone known to them;</p> <p>(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;</p> <p>(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</p> <p>(d) engaging in threatening conduct directed at the other person or any member of their family.</p> <p>Manitoba: Domestic Violence and Stalking Act 1999</p> <ul style="list-style-type: none"> • Meaning of "stalking" <p>2(2) Stalking occurs when a person, without lawful excuse or authority and knowing that another person is harassed or recklessly as to whether the</p>

	<p>other person is harassed, repeatedly engages in conduct that causes the other person reasonably, in all the circumstances, to fear for his or her own safety.</p> <ul style="list-style-type: none"> • Examples of conduct 2(3) The conduct referred to in subsection (2) includes the person <ul style="list-style-type: none"> (a) following from place to place the other person or anyone known to the other person; (b) communicating directly or indirectly with or contacting the other person or anyone known to the other person; (c) besetting or watching any place where the other person, or anyone known to the other person, resides, works, carries on business or happens to be; or (d) engaging in threatening conduct directed at the other person or anyone known to the other person. • Certain persons deemed to have fear 2(4) Where, but for mental incompetence or minority, a person would reasonably, in all the circumstances, fear for his or her safety owing to conduct referred to in subsection (2), the person is conclusively deemed to have the fear referred to in that subsection.
<p>Canada</p> <p>Defence</p>	<p>Criminal Code R.S.C. 1985, s. 264 Criminal harassment</p> <ul style="list-style-type: none"> • lawful authority <p>The Manitoba Domestic Violence and Stalking Act, C.C.S.M. c. D93</p> <ul style="list-style-type: none"> • lawful excuse or authority; a sort of an in-built defence in the definition of stalking.
<p>United States (California)</p> <p>Offence</p>	<p>Penal Code § 646.9. Stalking</p> <p>(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.</p> <p>(e) For the purposes of this section, “harasses” means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.</p> <p>(f) For the purposes of this section, “course of conduct” means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “course of conduct.”</p>

<p>United States (California)</p> <p>Exemption</p>	<ul style="list-style-type: none"> • Constitutionally protected activity is not included within the meaning of “course of conduct.” • Constitutionally protected activity is not included within the meaning of “credible threat.” <p>Furthermore, § 646.9 exempts from liability:</p> <ul style="list-style-type: none"> • conduct that occurs during labor picketing.
<p>United States (Nevada)</p> <p>Offence</p>	<p>Nevada: Revised Statutes § 200.571. Harassment: Definition; Penalties</p> <ol style="list-style-type: none"> 1. A person is guilty of harassment if: <ol style="list-style-type: none"> (a) Without lawful authority, the person knowingly threatens: <ol style="list-style-type: none"> (1) To cause bodily injury in the future to the person threatened or to any other person; (2) To cause physical damage to the property of another person; (3) To subject the person threatened or any other person to physical confinement or restraint; or (4) To do any act which is intended to substantially harm the person threatened or any other person with respect to his or her physical or mental health or safety; and (b) The person by words or conduct places the person receiving the threat in reasonable fear that the threat will be carried out. 2. Except where the provisions of subsection 2 or 3 of NRS 200.575 are applicable, a person who is guilty of harassment: <ol style="list-style-type: none"> (a) For the first offense, is guilty of a misdemeanor. (b) For the second or any subsequent offense, is guilty of a gross misdemeanor. <p>Nevada: Revised Statutes § 200.571; Stalking: Definition; Penalties</p> <ol style="list-style-type: none"> 1. A person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, and that actually causes the victim to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, commits the crime of stalking. Except where the provisions of subsection 2 or 3 are applicable, a person who commits the crime of stalking: <ol style="list-style-type: none"> (a) For the first offense, is guilty of a misdemeanor. (b) For any subsequent offense, is guilty of a gross misdemeanor. 2. A person who commits the crime of stalking and in conjunction therewith threatens the person with the intent to cause the person to be placed in reasonable fear of death or substantial bodily harm commits the crime of aggravated stalking. A person who commits the crime of aggravated stalking shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than \$5,000. 3. A person who commits the crime of stalking with the use of an Internet or

	network site, electronic mail, text messaging or any other similar means of communication to, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim shall be punished for a category C felony as provided in NRS 193.130.
<p>United States (Nevada)</p> <p>Exemption</p>	<p>“Without lawful authority” in § 200.575 (Stalking) includes acts which are initiated or continued without the victim’s consent. The term does not include acts which are otherwise protected or authorized by constitutional or statutory law, regulation or order of a court of competent jurisdiction, including, but not limited to:</p> <ul style="list-style-type: none"> • Picketing which occurs during a strike, work stoppage or any other labor dispute. • The activities of a reporter, photographer, camera operator or other person while gathering information for communication to the public if that person is employed or engaged by or has contracted with a newspaper, periodical, press association or radio or television station and is acting solely within that professional capacity. • The activities of a person that are carried out in the normal course of his or her lawful employment. • Any activities carried out in the exercise of the constitutionally protected rights of freedom of speech and assembly.
<p>South Africa</p>	<p>The Protection from Harassment Act 2010 (Civil harassment)</p> <p>Definitions and application of Act</p> <p>1.(1) In this Act, unless the context indicates otherwise –</p> <p>“court” means any magistrate’s court for a district referred to in the Magistrates’ Court Act, 1944 (Act No. 32 of 1944);</p> <p>“harassment” means directly or indirectly engaging in conduct that the respondent knows or ought to know –</p> <p>(a) causes harm or inspires the reasonable belief that harm may be caused</p> <p>(i) to the complainant or a related person by unreasonably – following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;</p> <p>(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or</p> <p>(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person; or</p> <p>(b) amounts to sexual harassment of the complainant or a related person;</p> <p>“harm” means any mental, psychological, physical or economic harm;</p> <p>“related person” means any member of the family or household of a complainant, or any other person in a close relationship to the complainant</p> <p>“sexual harassment” means any –</p> <p>(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;</p>

	<p>(b) unwelcome explicit or implicit behavior, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;</p> <p>(c) implied or expressed promise of reward for complying with a sexually-oriented request; or</p> <p>(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually-oriented request;</p> <p>Application for protection order 2.(1) A complainant may in the prescribed manner apply to the court for a protection order against harassment.</p>
<p>South Africa Defence</p>	<p>For the purpose of deciding whether the conduct of a respondent (i.e. the one against whom a protection order is being applied for) is unreasonable in the sense of the definition of harassment, the court must, in addition to any other factor, take into account whether the conduct, in the circumstances in question, was engaged in –</p> <ul style="list-style-type: none"> • for the purpose of detecting or preventing an offence; • to reveal a threat to public safety or the environment; • to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or • to comply with a legal duty.