

**Legislative Council
Panel on Constitutional Affairs**

Overseas Experience in Implementing Anti-stalking Legislation

INTRODUCTION

The Administration has commissioned the Centre for Comparative and Public Law of the University of Hong Kong (“the Consultant”) to conduct a study on the experience of overseas jurisdictions in implementing anti-stalking legislation (“the Study”). This paper summarises the key findings of the Study.

BACKGROUND

2. On 19 December 2011, we issued the Consultation Paper on Stalking (“Consultation Paper”) which sets out the recommendations of the Law Reform Commission (“LRC”) in its report on “Stalking” and invites public comments on the issues involved. Comments were invited on, inter alia:

- (a) whether stalking should be made a criminal offence based on the LRC’s recommendation that :
 - (i) a person who pursues a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;
 - (ii) for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and
 - (iii) 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; and
- (b) whether a defence for news-gathering activities should be subsumed under the defence of “the pursuit of the course of conduct was reasonable in the particular circumstances” (i.e.

“reasonable pursuit” defence). Apart from the “reasonable pursuit” defence, the LRC proposed that the following defences should be provided : (i) the conduct was pursued for the purpose of preventing or detecting crime; and (ii) the conduct was pursued under lawful authority.

The consultation period ended on 31 March 2012. We reported the views received to the Legislative Council Panel on Constitutional Affairs (“CA Panel”) in November 2012¹.

Concerns over press freedom and freedom of expression/demonstration

3. Of the 506 written submissions received, about 46% supported the introduction of an anti-stalking legislation and about 35% opposed, while the remaining did not indicate any general support or objection or indicated support subject to substantive revisions to the formulation of the offences and/or the defences. A key focus of the discussion during the consultation period was the impact the proposed offence might have on press freedom and freedom of expression/demonstration. Of the 506 submissions, more than 40% expressed views over press freedom and/or the proposed defences. Of these, about 15% supported the “reasonable pursuit” defence and believed that this should suffice, while the other 85% were of the view that the “reasonable pursuit” defence was not sufficient insofar as protection of press freedom and freedom of expression/demonstration was concerned. All the media organisations/journalist groups that sent in submissions objected to the introduction of the anti-stalking legislation as proposed in the Consultation Paper, and considered that the “reasonable pursuit” defence proposed in the Consultation Paper was insufficient in protecting press freedom.

4. In the light of the above concerns over press freedom and freedom of expression/demonstration, we consider it prudent to study the experience of overseas jurisdictions in implementing their anti-stalking legislation². The Study is now completed.

¹ Summary of the views received is set out in the Administration's paper on Consultation on Stalking – summary of views received (LC Paper No. CB(2)196/12-13(04)).

² We informed the CA Panel at its meeting on 21 January 2013 that we would conduct the Study, and undertook at the special meeting of the Finance Committee on 10 April 2013 that we would revert to the CA Panel on the findings in the second half of 2013.

KEY FINDINGS OF THE STUDY

Main Objectives

5. We have studied the operation of anti-stalking legislation in the following jurisdictions: the United Kingdom (“UK”); Queensland and Victoria in Australia; New Zealand; Canada; California and Nevada in the United States (“US”) and South Africa³. Salient points of the findings are summarised in the ensuing paragraphs. Further information is at **Annex A**, while the full report is available at the website of the Constitutional and Mainland Affairs Bureau (<http://www.cmab.gov.hk/en/issues/stalking.htm>)⁴.

An overview of the jurisdictions studied

6. All the jurisdictions studied except South Africa have criminal and civil laws against stalking. The South African legislation only provides a civil remedy. The approaches adopted in the legislation of these jurisdictions are similar though there are differences in terms of scope and form. The legislation in UK, Queensland and Victoria, New Zealand, Canada, and South Africa lists out the acts that would amount to stalking/harassment while that in California and Nevada does not. Specific exemptions for legitimate activities (including news and/or protest activities) are found in the legislation of Nevada, California, Queensland and Victoria while UK, New Zealand, Canada and South Africa provide general defences. The relevant provisions in the anti-stalking laws of the above jurisdictions are at **Annex B**⁵.

UK: Protection from Harassment Act 1997

7. UK’s Protection from Harassment Act 1997 (“PHA”) creates two levels of criminal offences, prohibiting a person from (i) pursuing a course of conduct which amounts to harassment including alarming the person or causing the person distress (the less serious offence); and (ii) pursuing a course of conduct which causes another to fear that violence will be used against him (the more serious offence). With the broad formulation of the offences and the general defences, the Consultant found that the PHA is the

³ These jurisdictions were selected having regard to the degree of press freedom and rights protection they have; their legal system (e.g. common law with constitutionally protected rights); and the relative ease of obtaining useful information about the jurisdiction.

⁴ Annex A and the full report are only available in English.

⁵ Annex B is only available in English.

broadest piece of legislation among the jurisdictions studied.

8. There are around 7 000 to 10 000 offences proceeded against under the main sections of the PHA⁶ each year during the period of 2006 - 2010. Ten cases targetting against news-gathering activities have been identified⁷. They are all pursued under the civil harassment provisions, mostly in the form of injunctions. The Consultant noted that injunctions sought under the PHA are conveniently obtained⁸, and this is assisted by the broadness of the legislation, as conduct restrained can include nearly anything. The Consultant also noted that the PHA general defences of “in the particular circumstances the pursuit of the course of conduct is reasonable” and “conduct was pursued for the prevention or detection of crime” have not assisted the media.

9. The Consultant identified five criminal cases and nine civil cases that involved protesters. Among the criminal cases, one concerned a protester who sent out death threats and pleaded guilty to the offence of harassment, while two cases arose from a breach of an injunction order⁹ that prohibited protest activities¹⁰. In eight of the nine civil cases, an injunction order was granted to prohibit or restrict protest activities in a designated exclusion zone or restrain the defendants from harassing designated protected persons¹¹. The remaining case was an unsuccessful application for injunction order under the PHA. The Consultant noted that the above cases involving news gathering and protest activities have given rise to serious concerns over the freedom of expression.

10. The PHA was amended in 2001 and 2005 by creating the offences of

⁶ PHA's section 2 “Offence of harassment”; section 3 “Civil remedies (breach of injunction)”; section 4 “Putting people in fear of violence”; and section 5 “Restraining order (breach of restraining order)”.

⁷ The case number referred in this paper represents the cases as identified by the Consultant from accessible sources.

⁸ Firstly, some hearings of the cases in the UK may not be heard in public. Secondly, the UK's Civil Procedure Rules allows “without notice injunction applications”, i.e. no formal notice is required to be given to the defendants. Also, the merits of the case are not fully argued in applications for injunctions. Thirdly, there are injunctions which not only impose a restraint on publishing certain information but also on disclosing the existence of the injunction.

⁹ Under the PHA, breaching of injunction order constitutes criminal offence.

¹⁰ As regards the rest of the cases, in one case, it was not clear if the protester was charged under the offence of harassment or for beach of the injunction; in the other case, the court found the charge defective as the group of victims was too vaguely defined, and the protester was acquitted.

¹¹ One of the cases concerned an interim injunction which was lifted by an out of court settlement between the claimant and the defendant on the condition of certain undertakings by the defendant.

“collective harassment” (i.e. the pursuit of conduct by two or more persons) and “harassment to deter lawful activities” (i.e. harassing two or more persons on separate occasions). In 2012, the offence of stalking was introduced into the PHA specifying, for the first time in the legislation, acts of prohibited conduct.

Australia: The Criminal Code Act 1899 (Queensland); the Crimes Act 1958 (Victoria)

11. The anti-stalking legislation in both Queensland and Victoria adopts the “fear for safety” threshold and specifies a list of prohibited acts in the legislation, and has specific defences/exemptions for news gathering and protest activities.

12. The Consultant did not find any reported case involving news gathering activities. There are two criminal cases under Victoria's Crimes Act 1958 identified which involved protesters. In one case, a protester was found guilty of the offence of stalking as a result of his protest activities including distributing pamphlets containing the victim's information to her neighbours, congregating near her home and a phone call to her¹²; in another case, a protester was found guilty of stalking as he protested at a temple by handing out pamphlets, erecting a banner and tailgating the victim's vehicle. Convictions in the latter case were overturned on appeal on the basis that the protest was directed at a wider audience than the alleged victim, and that the acts of the protest did not constitute the crime of stalking as defined by the law and were not carried out with the purpose of causing harm or apprehension.

13. The Consultant did not find any major concerns over press freedom and freedom of expression/demonstration subsequent and in relation to the enactment of the legislation.

New Zealand: The Harassment Act 1997

14. Similar to Queensland and Victoria of Australia, New Zealand's Harassment Act 1997 adopts the “fear for safety” threshold and specifies a list of prohibited acts in the legislation. But unlike the two Australian jurisdictions, New Zealand only provides a general defence of “lawful purposes” in relation to civil harassment. No reported case involving news

¹² While Victoria's Crimes Act 1958 has the defence for political activities, the court considered that the protester's course of conduct was for his personal agenda.

gathering activities is found. There are three civil cases identified which involved protesters, where restraining orders were granted under the Harassment Act 1997 to prohibit protest activities. The Consultant did not find any major concerns over press freedom and freedom of expression/demonstration subsequent and in relation to the enactment of the legislation.

Canada: Criminal Code R.S.C. 1985

15. Canada's Criminal Code also adopts the "fear for safety" threshold, specifies a list of prohibited acts in the offence, and provides a general defence of lawful authority.

16. The Consultant did not find any reported case involving news gathering and protest activities. Nor did he find any major concerns over negative effects by the legislation on freedom of expression and other related freedoms after the enactment. The Consultant noted that neither of the two largest journalists associations, viz, Canadian Association of Journalists and the Canadian Journalists for Free Expression, has voiced out any concerns about criminal harassment charges being brought against the media.

US: California Penal Code and Civil Code; Nevada Revised Statutes

17. California's Penal Code and Civil Code and Nevada's Revised Statutes adopt the "fear for safety" threshold but do not specifically list out prohibited acts in the offence. California's Penal Code has specific exemption for conduct that occurs during labour picketing, while Nevada's Revised Statutes have specific exemptions for news gathering and protest activities.

18. The Consultant did not find any reported case involving news gathering activities and protest activities in California and Nevada. Nor did he find any major concerns over negative effects by the legislation on freedom of expression and other related freedoms.

South Africa: The Protection from Harassment Act 2011

19. South Africa's Protection from Harassment Act 2011 provides only a civil regime, adopting the "fear for safety" requirement and specifying a list of prohibited acts, with general defences. The Act only came into operation in April 2013. The Consultant did not find any case involving news gathering and protest activities.

Recommendations by the Consultant¹³

20. The Consultant observed from the above cases that news and protest activities are less likely to get caught if the scope of the offences is more precise, a subjective fault element is used, and if specific defences/exemptions are provided. He has therefore offered some recommendations on the offence and exemption formulations as follows:

Offences

21. The Consultant recommended that the new offence of stalking should be based on the criminalisation of a course of conduct¹⁴, consisting of at least two of the acts in a list of four categories of prohibited acts (either the same or different acts) which causes a person reasonably, in all circumstances, to fear for his safety or the safety of anyone known to him. Having regard to the kind of conduct that constitutes stalking in the jurisdictions studied, the Consultant proposed the following prohibited acts, which are found in the legislation of the jurisdictions studied:

- (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, electronic mail 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; and/or
- (d) following, pursuing or accosting a person from place to place.

22. There should be a mental element of intending to cause a person fear for his safety or the safety of anyone known to him, or being reckless¹⁵ as to whether his conduct might cause such fear for safety.

23. The Consultant's proposal differs from that of LRC's mainly in three

¹³ A list of the full recommendations is set out in the executive summary at Annex A.

¹⁴ A course of conduct is a term used in jurisdictions such as UK, Victoria, California and Nevada.

¹⁵ Recklessness should be understood here as either an awareness of an unreasonable risk of causing fear for safety, or not caring about such a risk.

aspects. Firstly, it includes a definition of stalking activities in the form of an exhaustive list of acts done in relation to another person, so as to enhance legal certainty. Secondly, the “fear for safety” threshold is adopted, as compared to LRC’s recommended threshold of causing the person “alarm or distress”. The “fear for safety” threshold is used in all the jurisdictions covered in the study. Thirdly, the Consultant’s proposed mental element (i.e. intention and recklessness) is a subjective form, while the LRC recommended an objective reasonable standard (i.e. “knowing or ought to know” that conduct amounts to harassment), so as to avoid trapping the morally innocent. While the objective standard requires individuals to live up to the standards of the fictitious “reasonable man”, there may be cases where an individual (for whatever reason including age, immaturity, mental disability) did not in fact see the risk of harm, but a reasonable man in the circumstances would have seen the risk.

Exemptions

24. The Consultant saw the need to specifically exempt news gathering and expressive activities related to public affairs. Case law shows that the anti-stalking legislation of the UK has been used against the media and demonstrations, and that the vague reasonableness defence has arguably not provided sufficient protection to the media or peaceful demonstrators. Moreover the strong concerns over press freedom and freedom of expression expressed during the public consultation need to be addressed. Therefore, he proposed that the following categories of activities be exempt¹⁶ from the new stalking offence:

- (a) Conduct done pursuant to lawful authority: The intention is to make clear that conduct authorized by law will not be caught by the new offence. It has the effect of ensuring that acts done pursuant to lawful authority can continue without fear of being in violation of this new offence.
- (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: This category exempts anyone who is “gathering information for communication to the public” and is doing so “pursuant to a

¹⁶ The Consultant considered that legal interpretation of “exemption” is the same as “defence” in criminal law. The word “exemption” instead of “defence” is used in the report to signify that the activities are being excluded from the ambit of the criminal offence.

contractual arrangement” with a media organisation¹⁷ and should take care of concerns of the media.

- (c) Activities of a person carried out in the normal course of his lawful employment: Following the example of the Nevada legislation, this category provides an assurance to people doing one’s lawful job, even where it may sometimes result in distress or even fear for other persons, will not result in prosecution under the new stalking offence.
- (d) Activities of a person carried out for the sole purpose of discussing or communicating matters that concern public affairs: This exemption is meant to protect freedom of expression including protest activities. However, a person who tries to use this exemption for objectives other than discussing or communicating matters that concern public affairs (e.g. organising demonstration outside the home of a person because of a personal grudge) will not be able to rely upon this exemption, given that communication of public affairs could not be said to be the “sole” purpose.

25. The Consultant’s proposal differs from that of LRC’s mainly in that it provides specific exemptions for news and protest activities and activities carried out in the normal course of lawful employment, as against LRC’s recommended “reasonable pursuit” defence and defence for conduct pursued for the purpose of preventing or detecting crime.

VIEWS SOUGHT

26. The Administration respects press freedom and freedom of expression, and understands the concerns raised during the public consultation in 2011-12 over the impact of anti-stalking legislation on these freedoms. In deciding on the way forward, it is important that a suitable balance is struck between affording better protection to victims of stalking on the one hand, and ensuring that legitimate news-gathering activities and public protest would not be adversely affected on the other.

27. The Study provides information on the operation of anti-stalking legislation overseas and an appraisal of the impact of such legislation on the concerned freedoms in the concerned jurisdictions. We will carefully

¹⁷ “Contractual arrangement” rather than contractual obligation is used so as to include freelance authors who may have less formal engagements with a media company.

consider the findings and recommendations of the Study. The Administration at this juncture has no preconceived view on the way forward. At this stage, we would like to report the findings and recommendations of the Study to Members for information and seek Members' views.

**Constitutional and Mainland Affairs Bureau
December 2013**

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>
--	---

- 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

	<p>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>
<p>United States (Nevada) 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.