Stalking, harassment and intimidation and the *Protection from Harassment Bill*

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The Government's *Protection from Harassment Bill* [Bill 49 of 1996-97], which was published on December 5th 1996, is designed to introduce new criminal offences and civil measures to deal with harassment in general and the activities of stalkers in particular. The Bill extends to England and Wales and Scotland, and in the case of Scotland is intended to create a legal right to be free from harassment. Proposals to deal with similar activities in Northern Ireland have been the subject of a separate consultation process and are not included in the current Bill. This paper describes the existing criminal and civil measures which may be used in dealing with stalking and other forms of harassment in England and Wales and Scotland, proposals for changes in the law and the measures set out in the current Bill. The Government intends the Bill to pass through all its stages in the House of Commons on 17 and 18 December 1996.

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CONTENTS

Summary

"Stalking" is not a term which is defined in the civil or criminal law in England and Wales or Scotland. It has been used by the tabloid press and others to describe a series of actions, whether words or deeds, which are intended to, or in fact cause harassment to another person. A number of well-publicised cases involving such forms of harassment and growing public awareness of this type of activity have led to calls for reform of the law in this area. Some of the cases which have received public attention have involved harassment of individuals by strangers, but many incidents involve people known to the victim. Most, but by no means all of the publicised cases have involved allegations of harassment of women by men.

This paper sets out the existing criminal offences and civil remedies which may be relevant in dealing with stalking and other similar forms of harassment. It goes on to summarise suggestions for reform of the law, including the proposals for England and Wales set out in the Home Office consultation paper *Stalking - The Solutions*, which was published in July 1996. The paper examines the provisions in the *Protection from Harassment Bill 1996-97*, which is designed to create new criminal offences in England and Wales of harassment and causing fear of violence, and to provide a specific civil remedy in England and Wales and Scotland. The Bill also provides criminal sanctions for breaches of orders by the civil or criminal courts in England and Wales and Scotland requiring the persons against whom they are made to refrain from particular conduct. All the stages of the Bill in the House of Commons are intended to be completed on December 17th and 18th 1996

I Harassment and the Criminal Law

A. England and Wales

1. Existing Offences

A person who "stalks" or otherwise harasses another person may be liable to prosecution under the existing criminal law. Much is likely to depend on the particular circumstances of the case.

Offensive or threatening telephone calls and letters

Under section 1 of the *Malicious Communications Act 1988* a person who sends a letter or other article to another person which conveys:

i) a message which is indecent or grossly offensive; or
ii) a threat; or
iii) information which is false and known or believed to be false by the sender; or
iv) any other article which is, in whole or in part, of an indecent or grossly offensive nature,

is guilty of an offence punishable on summary conviction (that is, on conviction by a magistrates' court) by a fine of up to £2,500 if his purpose, or one of his purposes, in sending it is that it should cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated. Section 2 of the *1988 Act* provides that a person is not guilty of this offence if he shows that the threat was used to reinforce a demand which he believed he had reasonable grounds for making, and that he believed that the use of the threat was a proper means of reinforcing the demand.

Section 43(1) of the *Telecommunications Act 1984* makes it an offence for a person to:

i) send, by means of a public telecommunications system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

ii) send, by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message that he knows to be false or persistently make use for that purpose of a public telecommunications system.

Halsury's Statutes notes that knowledge is an essential ingredient of this offence and cites case-law to support the view that knowledge includes the state of mind of a person who shuts his eyes to the obvious. It adds that there is authority for saying that where a person deliberately refrains from making inquiries the result of which he might not care to have, this constitutes in law actual knowledge of the facts in question.[1] The maximum penalty for an offence under section 43(1) of the *1984 Act* was increased from a fine of £1,000 to six months' imprisonment and a £5,000 fine by section 92 of the *Criminal Justice and Public Order Act 1994.*

Threats to Kill

Under section 16 of the *Offences Against the Person Act 1861*:

> A person who, without lawful excuse, makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years.

Public order offences, including causing harassment, alarm and distress

Section 4 of the *Public Order Act 1986* provides that a person is guilty of an offence punishable by up to six months' imprisonment and a £5,000 fine if he

i) uses towards another person threatening, abusive or insulting words or behaviour, or

ii) distributes or displays to another person any writing, sign or visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked. The offence may be committed in a public or a private place, although no offence is committed where the words or behaviour are used, or the writing, sign or visible representation distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling. A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

Section 6(3) of the *1986 Act* provides that a person is guilty of an offence under section 4 only if he intends his words or behaviour, or the writing, sign or visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting.

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[1] *Halsbury's Statutes* Fourth Edition Vol 45 p.193 note to s.43

Section 154 of the *Criminal Justice and Public Order Act 1994* added a new section 4A to the *Public Order Act 1986.* The new section, which came into force on February 3rd 1995, created an offence of "causing intentional harassment, alarm or distress", punishable by up to six months' imprisonment and a £5,000 fine. It is committed by a person who, with intent to cause a person harassment, alarm or distress, uses threatening, abusive or insulting words or behaviour or disorderly behaviour, or displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that person harassment, alarm or distress. A constable may arrest without warrant any person he reasonably suspects is committing such an offence. As with section 4 of the *1986 Act*, no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling. It is a defence for a person accused of an offence under section 4A of the *1986 Act* to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or that his conduct was reasonable.

The new offence of causing intentional harassment, alarm and distress is an aggravated form of the offence of "disorderly conduct", set out in section 5 of the *Public Order Act 1986*, which is punishable by a fine of up to £1,000. The offence under the *1986 Act* applies to threatening, abusive, insulting or disorderly behaviour used, or threatening, abusive or insulting writing, signs and visible representations displayed, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. It does not depend on harassment, alarm or distress actually having been caused in the particular case. It is a defence for a person accused of an offence under section 5 to prove that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, that he was inside a dwelling and had no reason to believe that the words, behaviour, writing, signs, or other visible representation would be heard or seen by a person outside that or any other dwelling, or that his conduct was reasonable.

A person is guilty of an offence under section 5 only if he intends his words or behaviour to be threatening, abusive or insulting or is aware that it may be so, or if he intends his behaviour to be or is aware that it may be disorderly.[2] A constable may arrest without warrant a person who fails to heed his or another constable's warning to desist from conduct which the constable reasonably suspects would constitute an offence under this section.

A person who uses or threatens unlawful violence towards another and whose conduct is such as would cause a person of reasonable firmness to fear for his safety may be found guilty of the offence of affray, punishable under Section 3 of the *Public Order Act 1996* by up to three years' imprisonment and a fine following conviction on indictment, or six months'

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[2] *Public Order Act 1986* s.6

imprisonment and a £5,000 fine following summary conviction. For the purposes of this provision a threat cannot, however, be made by the use of words alone and it must be shown that the accused intended to use or threaten violence, or that he was aware that his conduct might be violent or threaten violence.

Other public order offences and offences involving harassment

A person who trespasses on land in the open air and does anything which is intended by him to have the effect of intimidating people so as to deter them from engaging in any lawful activity, or of obstructing or disrupting that activity, may be charged with aggravated trespass, which is an offence under section 68 of the *Criminal Justice and Public Order Act 1994.* It is punishable with up to three months' imprisonment and a £2,500 fine.

Under section 241 of the *Trade Union and Labour Relations (Consolidation) Act 1992* it is an offence punishable with up to six months' imprisonment and a £5,000 fine for a person, wrongfully and without legal authority to carry on a number of different activities with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing. These activities include:

1) using violence towards or intimidating a person and his family or to damaging his property,

2) persistently following that person from place to place,

3) watching or besetting the house or other place where that person resides, works, carries on business or happens to be, or the approach to any such house or place.

These provisions have largely been used in connection with picketing and other activities associated with industrial disputes, and the part of the *1992 Act* in which they occur is concerned with industrial action. It was suggested at one time that these provisions might be invoked against some of the protesters at the site of the Newbury bypass, as they are not framed in a way which specifically restricts their ambit to industrial disputes, but there have been no further reports of their actual use in this context.

Arrest for breach of the peace

A police constable, or indeed any other person, may make an arrest where a breach of the peace has been committed, is being committed, or where there is reasonable cause to believe that such a breach will be committed or renewed. Individuals who are not police constables need to be aware, however, that they may be liable to actions for wrongful arrest in respect of the exercise of these powers, and may, therefore need to exercise caution, or leave matters to the police. In *R v Howell*[3] the Court of Appeal said that:

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[3] [1982] QB 416

> There is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being harmed through an assault, an affray, a riot, unlawful assembly or other disturbance

This emphasises that actual or apprehended violence is an essential ingredient of a breach of the peace. People who are arrested under these powers may be brought before magistrates, who may bind them over for a set period (often a year) to be of good behaviour and keep the peace. A person may be bound over whether or not he or she has been convicted of any substantive offence. A person who refuses to be bound over may be imprisoned for up to two months and fined £1,000. From news reports, it would appear that the need to prove actual or apprehended violence was the reason for the failure of attempts in January 1996 to use these powers against Bernard Quinn, who was alleged to have been stalking Princess Anne.[4]

Offences involving violence

In some cases the actions of a person who is alleged to have "stalked" or otherwise harassed another may amount to an assault or other similar crime of violence. An act by which one person intentionally or recklessly causes another person to apprehend immediate and unlawful personal violence is a common assault which, by virtue of Section 39 of the *Criminal Justice Act 1988* is a summary offence punishable by up to six months' imprisonment and a £5,000 fine.

Assault occasioning actual bodily harm is an offence under section 47 of the *Offences Against the Person Act 1861* punishable by up to five years' imprisonment. Actual bodily harm is capable of including mental as well as physical injury, although in the case of the former it is restricted to psychiatric injury rather than mere emotional reactions such as fear, distress or panic. *Halsbury's Statutes* notes that "actual bodily harm" includes any hurt or injury calculated to interfere with health or comfort and that an injury to a person's mind may be sufficient. It adds that in order to establish an offence under this section it is sufficient to show that the defendant committed an assault (that is, that he or she intentionally or recklessly caused another person to apprehend immediate and unlawful personal violence) and that actual bodily harm was occasioned. The prosecution is not obliged to prove that the defendant intended to cause some actual bodily harm or was reckless as to whether such harm would be caused.[5]

Causing or inflicting grievous bodily harm is an offence punishable by up to five years' imprisonment under section 20 of the *Offences Against the Person Act 1861*, which refers to

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4 Why stalkers are not all criminals - *Independent* 31.1.1996

5 *Halsbury's Statutes* Fourth Edition Vol 12 p.105 note to s.47

"whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument". *Halsbury's Statutes* notes that the word "maliciously" imports an awareness that the act may have the consequence of causing physical harm to some person. For a conviction under section 20 the prosecution must prove that the defendant either intended or actually foresaw that his act would cause harm; it is not sufficient to show merely that he ought to have foreseen that his act would cause harm. *Halsbury's Statutes* notes, however, that the physical harm which the defendant intended or foresaw might result need only be of a minor character for him to be guilty and it is not necessary for the prosecution to show that he intended or foresaw that his unlawful act might cause harm of the gravity described in the words of the section.[6]

In July 1994 newspapers reported that a Cheshire man, Christopher Gelder, had been convicted of grievous bodily harm and sentenced to eighteen months' imprisonment for making abusive telephone calls to a local woman who had suffered psychological harm as a result[7]. Mr Gelder's conviction was subsequently quashed by the Court of Appeal, who apparently considered that the jury had been misdirected, but did not rule on whether or not bodily harm could be inflicted over the telephone[8]. A hoax telephone caller was also reported to have been charged with this offence by police during the hunt for the abducted baby Abbie Humphries.[9] In recent cases some people who were alleged to have engaged in courses of conduct which amounted to the "stalking" of other individuals have been reported as having been convicted and sentenced to terms of imprisonment for assault occasioning actual bodily harm,[10] inflicting grievous bodily harm[11], and causing criminal damage, arson and displaying indecent photographs.[12] The use of the offence of assault occasioning actual harm to cover a case in which a man made repeated silent telephone calls to women has, however, been strongly criticised.[13] In some cases involving alleged stalkers, such as that involving Dennis Chambers, who was acquitted in September 1996 of charges of affray and causing grievous bodily harm, there have been difficulties for the prosecution in satisfying the requirements that the victim should have suffered harm amounting to psychiatric damage or that the accused person had the degree of intention (or *mens rea*) necessary for a conviction for the offence concerned.

2. Proposals for Reform of the Criminal Law

The definitions of the principal non-fatal offences of violence, such as assault occasioning actual bodily harm and causing grievous bodily harm, which are set out in the *Offences*

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6 ibid Vol 12 p.94 note to s.20

7 Bank clerk is first obscene caller to be jailed - *Guardian* 9.7.1994

8 Obscene caller freed - *Financial Times* 16.12.1994

9 GBH charge over Abbie hoax calls - *Daily Telegraph* 12.07.1994

10 Office worker who stalked colleague is guilty of assault - *Times* 27.3.1996

11 Stalker 'wormed his way into every shred' of his victim's privacy - *Times* 5.3.1996

12 Family was terrorised by daughter's ex-lover -*Times* 8.3.1996 and Anger at stalker sentence - *Guardian* 30.3.1996

13 Cases with comment: R v Ireland - *Archbold News* 12.7.1996

Against the Person Act 1861, have been much criticised by the judiciary, legal academics and the Law Commission for their complicated, obscure and old-fashioned language, their technical complexity and their unintelligibility to the layman. In a report on *Legislating the Criminal Code: Offences Against the Person and General Principles*[14] the Law Commission noted that the need for extensive judicial interpretation had effectively turned sections 18, 20 and 47 of the *1861 Act* into common law crimes, the content of which is determined by case-law and not by statute. This, the Commission noted was unsatisfactory, both because the extent of these important offences ought to be determined by Parliament, and because, on a more practical level, there were needless hazards in directing a jury on the basis of judicial pronouncements rather than a clear statutory text.

The Law Commission recommended that sections 18, 20 and 47 of the *1861 Act* be replaced by three specific offences described as intentionally causing serious injury to another, recklessly causing serious injury to another, and intentionally or recklessly causing injury to another, an offence of assault and a number of other more specific offences involving violence. The definition of "injury" proposed by the Law Commission was "a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition or b) impairment of a person's mental health". The report, which is part of the Law Commission's long-term project to update and consolidate the criminal law in a criminal code, has not been implemented.

The Calcutt Committee, which was appointed to consider what measures were needed to give further protection to individual privacy from the activities of the press and reported in June 1990, recommended[15] that three forms of physical intrusion, involving entering private property, placing surveillance devices on private property and taking photographs or recording the voices of individuals who were on private property be made criminal offences where they took place without consent and with a view to publication. At the same time the Committee rejected the idea of a general offence of harassment, partly because of the difficulty of defining such an offence satisfactorily. The Committee also felt that it would be wrong to create such an offence limited to the press, but that a more wide-ranging offence would have implications for civil liberties, and in particular for the right to demonstrate peacefully. The Committee, which was, of course, primarily concerned with intrusion by the press, considered that threatening or disorderly behaviour by individuals was already covered by existing law. The Committee's recommendations concerning these three forms of physical intrusion have not been implemented.

During the Commons Committee stage of the Bill which became the *Criminal Justice and Public Order Act 1994,* the Government rejected a new clause, tabled by Michael Shersby and moved by Lady Olga Maitland, which would have mad it an offence under the *Public Order*

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[14] Law Com No. 218, Cm 2370

[15] *Report of the Committee on Privacy and Related Matters* Cm 1102 paras 6.30-6.39

Act 1986 for one person to "stalk" another by repeatedly molesting, pestering or following them and thereby causing them harassment, alarm, distress or fear for their safety or the safety of a third person. In opposing the amendment the Home Office minister, David Maclean, said:[16]

> No one underestimates the appalling fears of what we should be grateful is a minority of people, about those who are so obsessed that they engage in stalking, pestering or annoying individuals. However, we have to wrestle with the question whether it is appropriate to amend the Public Order Act 1986 to deal with that menace or nuisance. Although I have listened carefully to the points that my hon. Friend has made and am sympathetic to the view that the behaviour is unacceptable - even before it becomes so blatantly criminal as attacking Steffi Graf or poisoning various people - I am not convinced that we should amend the Act. Section 5 concerns a very low-level offence. Although I agree that behaviour not caught by it may be unpleasant and undesirable, I am not persuaded that conduct that fails to pass the low test of section 5 should be criminalised.
>
> Subsection (3) would expand section 5 by including as offences repeated and unwelcome telephone calls. I fully agree with my hon. Friend that such calls are appalling and criminal, but I am not satisfied that the Public Order Act 1986 is the appropriate legislation in which to take action against them. They do not present a threat to public order or a threat of affray. Unpleasant though it is to receive such telephone calls, the chances of ensuing public disorder are not high. The hurt is felt in other ways. It is personal and specific. I should, therefore, prefer to rely on the more specific legislation that offers protection.
>
> It is an offence under the Telecommunications Act 1984 to make an indecent, obscene or menacing telephone call or persistently to use a telephone for the purpose of causing annoyance, inconvenience or needless anxiety to another person. That, I think, covers all the telephonic circumstances envisaged by my hon. Friend. Clause 68 of the Bill provides increased penalties for the offence in the 1984 Act and, as my hon. Friend knows, I said when we debated that clause that I was impressed with arguments that the penalties should be increased still further. In view of the fact that all the telephonic offences, nuisances or mischiefs that my hon. Friend mentioned are already covered in existing legislation and that we have increased the penalty, I am not minded to accept a new clause.
>
> I also remind hon. Members of my concern that although physically pestering, stalking or following a person on foot is a menace and a nuisance, I am not convinced that the creation of a new criminal offence in the Public Order Act 1986 is the way to deal with it - Neither am I convinced that the aspects of the behaviour that should be criminalised have been adequately defined. We are all used to being followed around by the press and media or by others, such as autograph hunters-very few of those, I confess. Some have a legitimate reason and although the practice may be a nuisance and a hassle, it is another matter to make it a criminal offence.
>
> I am happy to keep the matter under review, but I should be grateful if my hon. Friend would give more thought to the delineation between legitimate pestering or slightly annoying behaviour, and pestering or annoyance that should be treated as criminal behaviour. Behaviour in the latter category should, if possible, be dealt with under existing offences. For those reasons I do not wish my hon. Friend to press her new clause at this stage.

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[16] HC Standing Committee 'B' 29th Sitting c1282-3, 8.3.1994

In a Written Answer to a Question from Mr Michael on July 17th 1995 the Home Office minister, Mr Maclean, said that the Government was looking at the anti-stalking laws of the US and Canada to see if there were any lessons to be learnt from them. He added that the Government would consider whether there was a need for a formal review of our legislation in the light of this examination and the examination of other evidence provided by the National Anti-stalking and Harassment Campaign among others.[17] On March 6th 1996 Janet Anderson introduced a Ten Minute Rule Bill[18] designed to create a new criminal offence of "stalking" punishable by up to six months' imprisonment and a £5,000 fine following summary conviction or five years' imprisonment and a fine following conviction on indictment. The prosecution would not have been required to prove intent on the part of the alleged stalker, but it would have been a defence for a such a person to prove that he did not know and had no reasonable cause to believe that his behaviour was likely to cause harassment, alarm or distress or fear for personal safety. The Bill was also intended to permit a magistrates' courts to make a "prohibitory order" against alleged stalkers. Breach of such an order would have been a criminal offence punishable once again by up to six months' imprisonment and a fine following summary conviction, or five years' imprisonment and a fine following conviction on indictment. The Bill did not have Government support and did not progress further in the House of Commons.

In a Written Answer to a Question from Mr Chisholm on March 13th 1996 the Scottish Office minister Lord James Douglas-Hamilton said the Government had recently completed its examination of the US and Canadian legislation and was considering whether specific legislation to address the problem of stalking could with benefit be introduced in the United Kingdom.[19]

A Bill with the same text as that put forward in the House of Commons by Janet Anderson was introduced in the House of Lords by the Labour peer Lord McIntosh of Haringey on 13 May 1996 and had its Second Reading there on 12 June 1996[20]. During the Bill's committee stage in the House of Lords Lord McIntosh moved amendments designed to remove the criminal element from the Bill and turn the proposed new offence of stalking into a civil matter instead. The amendments would also have replaced the civil remedies in the original version of the Bill with a power for magistrates' courts, county courts or the High Court to make "non-molestation orders" against alleged stalkers. Breach of such an order would have been a criminal offence punishable by up to six months' imprisonment and a £2,500 fine following summary conviction, or two years' imprisonment and a fine following conviction on indictment. The Bill completed its passage through the House of Lords, but did not have Government support and did not progress further.

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17 HC Deb Vol 263 c934W, 17.07.1995

18 Stalking Bill [Bill 78 of 1995-96] HC Deb Vol 273 c370-371 6.3.1996

19 HC Deb Vol 273 c603(W), 13.3.1996

20 Stalking (No. 2) Bill [HL Bill 92 of 1995-96]

3. The Government's Proposals

On July 9th 1996 the Government published a consultation paper on stalking, which summarised difficulties in applying the current criminal law to the activities of stalkers as follows:[21]

> Though the offences under the Public Order Act may provide a sanction against stalkers in some instances, offences under the provisions of sections 4 and 4A would be committed only if the stalker intended his behaviour to cause the victim to believe that immediate violence would be used (section 4) or if harassment, alarm or distress is caused (section 4A).
>
> There are problems also in applying other aspects of the criminal law against stalkers. The Malicious Communications Act 1988 requires that the article sent must be indecent or grossly offensive. It must also be proved that the sender's purpose was to cause distress or anxiety. In the situations where stalkers continually send greetings cards, flowers or other unsolicited gifts,such intent cannot be proven. The offence of improper use of a public telecommunication system under the provisions of section 43 of the Telecommunications Act 1984 has apparently been useful in tackling obscene or persistent telephone calls. But this covers only one aspect of stalking behaviour.
>
> The recent convictions under section 20 of the Offences Against the Person Act, 1861, for psychological assault, represent an important and useful application of the criminal law in dealing with stalking. However, convictions in these cases were only secured because the extent of psychological harm inflicted on the victims was so severe as to equate with physical assault. These cases cannot therefore be used as a general precedent for dealing with cases of stalking. Victims should not have to suffer to such an extent in order for the law to provide an effective remedy - it is important to be able to take action before the behaviour of the stalker causes such severe harm to their victims.

The consultation paper put forward proposals for change in both the criminal and civil law in England and Wales to deal with the types of activity generally described as "stalking". The proposed changes were summarised as follows:[22]

> The Government proposes to deal with the menace of stalking through a combination of civil and criminal measures.
>
> The Government proposes a new tort of molestation. It would be unlawful to molest a person so as to cause them distress, either where the defendant intended to cause distress or where he realised, or ought to have realised, that his conduct was likely to cause distress. Breach of an order restraining molestation would be a criminal offence, punishable by up to five years' imprisonment.
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> The Government proposes two new criminal offences:
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> i. the persistent use of words or behaviour, which either intentionally leads a person to believe, or which occurs in circumstances where a reasonable person should have realised

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[21] *Stalking - The Solutions: A Consultation Paper*. Home Office July 1996 para 3.4-3.6

[22] ibid para 7.1-7.6

> that a person would believe that violence would be used against him or that he is likely to believe that violence would be used against him.
>
> ii. the persistent use of words or behaviour which either intentionally causes a person to be harassed, alarmed or distressed, or which occurs in circumstances where a reasonable person should have realised that this would be the effect.
>
> The maximum penalty for the offence described in (i) above would be five years imprisonment and/or an unlimited fine. For the offence described in (ii) above, the maximum penalty would be six months imprisonment and/or a fine at level 5 on the standard scale.
>
> It would be a defence to the tort and the criminal offences for a person to show that he was acting reasonably in the course of his profession, trade, business or other lawful activity.

The closing date for comment on these proposals was September 9th 1996. The Government noted that it was particularly interested in views on whether the proposed definitions, including the mental element,were appropriate; whether the defences were sufficient to ensure that people were not penalised for undertaking otherwise lawful activity; and whether or not the police should be given powers to seek orders restraining stalkers from particular activities in cases where the stalkers' victims were not aware that they were being stalked.

The main opposition parties welcomed the new measures proposed in the consultation paper, but objections were raised by some commentators on civil liberties grounds. An editorial in the *Guardian* on July 11th 1996 noted that:[23]

> Yet, for once, ministers were right to be cautious. The issue raises fiendishly difficult legal issues, which ministers have belatedly agreed to tackle. This week's consultation paper has been embraced by both main opposition parties, yet someone needs to speak up for the perils it poses to civil rights. Stalking will not be defined - either in civil or criminal law - but both legal systems will be used to catch offenders who cannot be caught by the current clutch of criminal statutes controlling harassment: abusive language, breaches of the peace, threatening words or malicious correspondence. Instead, three new avenues will be opened. Where there is no chance of prosecution, victims will be able to turn to the civil court for an injunction at a hearing where the offender will not need to be present and where a lower standard of proof (the balance of probabilities) is needed. Once the injunction is secured, offenders will be committing an offence and will be liable to a five-year prison sentence if they do not change their behaviour. Even worse, ministers are contemplating allowing injunctions against behaviour not where it has caused harassment but where there is "a likelihood". Where prosecution is possible from the start, there will be two new offences: causing a sense of harassment with up to a two-year prison sentence; and causing a fear of violence with up to a five-year sentence. There will be no need to prove intent.
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> Undoubtedly we need a law to control persistent pests. No one should dispute that. Yet we need something better than this package. What it would mean is that someone whose behaviour is hard to define could end up receiving a much longer sentence (five years for

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[23] Take time out for stalkers - *Guardian* 11.7.1996

> disobeying the court) than someone whom the prosecution could demonstrate from the start had caused distress (two years). As the consultation paper notes, many of the actions of stalkers are in themselves harmless - walking up and down a street or standing on a street corner. A run-up to an election is no time to be embarking on such a complex debate.

An editorial in the *Times* made the following observations:[24]

> With all attempts, however worthy, to create a new crime, legislators should first ensure that innocent people will not suffer as a result. The dangers of creating a stalking offence are threefold: that those going legitimately about their business will be caught in the net, that people will be vengefully accused of stalking, or that their motives will be misinterpreted.
>
> As a newspaper, we are concerned that journalists investigating a story in the public interest could be caught by this legislation, As presently drafted, there will be a defence of "acting reasonably and necessarily in pursuit of a business, trade or profession, or other lawful activity". It is to be hoped that reporters will not have to be taken to court and acquitted before the police accept that there is no ground for arrest.
>
> There is also a chance that a vindictive "victim" will accuse someone else of stalking as an act of revenge. Attention which might well have been welcome could suddenly be claimed to be harassment. Courts will need to demand evidence that victims made their displeasure clear to the "stalker".
>
> The third danger is that criminals will be made out of harmless, lovesick people who cannot resist going to places where they hope to catch sight of their beloved, or who bombard them with flowers or gifts under the genuine impression that their target will eventually capitulate. At one end of this spectrum of behaviour is the besotted adolescent, in the middle is the slightly creepy obsessive, and at the far end is the determined stalker. Drawing the line in the right place may prove extremely difficult.
>
> One remedy would be for the police to issue a "yellow card" warning to alleged stalkers before embarking on any further action. This would have the merit of avoiding the cumbersome machinery of the court, while alerting the lovesick that, even if they mean no harm, their victim is suffering as a consequence of their actions. In cases of false accusation, it would give the person concerned a chance to break contact with the accuser before being branded a criminal.
>
> Because there is all-party consensus on the need for a law against stalking, there is a risk that legislation will be rushed through Parliament without sufficient consideration. Even if MPs agree on the principle, they should think hard about the practical application of such a Bill.

The *Daily Telegraph*, while welcoming the proposal to tidy up the relevant civil law, made similar objections, noting that:[25]

> But civil law, of course, does not help those without the means to use it. So the most important question is: can new laws be drawn up which will not entangle the besotted admirer, the persistent autograph-seeker, the cranky but harmless fan at the stage door? After all, the presumption in a free society must be that it is always wrong to restrict everyday liberties unless there is a very clear public gain. And it is hard to see where that gain lies, since the proposed new laws would seem to threaten not just eccentrics, but ordinary people. It will be objected that judges will use their discernment, but some measures allow them little room: remember the Dangerous Dogs Act - another

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[24] It's bad to stalk - but the law needs very careful drafting - *Times* 19.10.1996

[25] Hard cases, bad law - *Daily Telegraph* 26.9.1996

law introduced in haste.

> There is a final point. The decisive factor in laws that detach intent from injury seems to be the emotions experienced by the person who feels that he or she has been harassed. Do we really want more laws based on bruised, or even seriously damaged, feelings? To what degree can the law be used to regulate what we do to each other when harm to property or physical harm is not involved? Are the principal winners likely to be not ordinary women, but the lawyers? Legislate in haste, repent at leisure, is usually a good rule. Mr Howard is wrong to have abandoned it.

The responses to the consultation paper generally supported the need for a review of the law and recognised that the existing civil and criminal law did not appear to give adequate protection to victims of stalking and other similar forms of harassment. Organisations such as the General Council of the Bar, the Magistrates' Association and the mental health charity MIND stressed the need for the proposed tort and the proposed criminal offence to be properly defined.

4. The Bill: New Criminal Offences

Harassment and putting people in fear of violence

Clause 1 makes a general declaration prohibiting a course of conduct which, if it is carried out will give rise to a criminal penalty under ***clause 2*** and may be the subject of a claim in civil proceedings under ***clause 3***. Such conduct may also be the subject of a claim in civil proceedings under ***clause 3*** if it is not carried out, but is "apprehended." The type of conduct which is intended to be the subject of these civil and criminal sanctions is described in paragraphs (1) and (2) of ***clause 1*** which provide that:

> 1. A person must not pursue a course of conduct-
>
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other.
>
> 2. For the purposes of this section, the person whose conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other

Further comment on this prohibition is set out at page 35 of this paper in relation to the civil

remedies under the Bill . As far as criminal proceedings are concerned***,Clause 2*** provides that a person who pursues a course of conduct in breach of ***clause 1*** is guilty of an offence punishable on summary conviction by up to six months' imprisonment and a £5,000 fine. A constable will be able to arrest without warrant a person he reasonably suspects of committing an offence under ***clause 2***.

Clause 7(2) provides that references to harassing a person include alarming the person or causing the person distress.

Clause 4 is intended to create an offence of putting people in fear of violence, which will be punishable on conviction on indictment by up to five years' imprisonment and a fine, and on summary conviction by up to six months' imprisonment and a fine. The offence is defined in paragraphs (1) and (2) of ***Clause 4*** as follows:

> (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 that the course of conduct would cause the other so to fear on that occasion.

Clause 4(5) provides that if on the trial on indictment of a person charged with an offence under ***clause 4*** the jury find him not guilty of the offence charged they may find him guilty of the lesser offence under ***clause 2***. The Crown Court will then have the same sentencing powers in respect of that offender as a magistrates' court would have had.

It will not be necessary for the prosecution to prove that a person accused of an offence under ***clause 2*** or ***clause 4*** had the intention of causing the victim to fell harassed or to fear violence. The prosecution will only have to prove that the accused knew or ought to have known this. A person who interprets words, deeds or events in a way which a reasonable person would not and cannot consequently be shown necessarily to have intended to harass a person or cause them to fear violence, will not, therefore escape conviction on this ground alone.

As far as the definitions of the new offences under ***clauses 2*** and ***4*** are concerned, it is unusual for a provision defining the circumstances in which a person may be liable to criminal sanctions to refer to what a person "must not" do, rather than to state that a particular act is a criminal offence. It is also unusual for such provisions to refer to what a person "ought to know". In its response to the Government's consultation paper, the General Council

of the Bar said that if there was to be an objective standard in relation to the mental element (*mens rea*) of the offence the test should be couched in terms of what the "reasonable person" *would* have realised and not, as appeared from the proposals to be the case, in terms which seemed to envisage a standard in which the reasonable man does not appreciate the outcome but *should* have done.

As it has a maximum penalty of five years' imprisonment, the offence under ***clause 4*** will be an arrestable offence under Section 24(1) of the *Police and Criminal Evidence Act 1984*, and the powers of arrest, entry and search without warrant, available under the 1984 Act in respect of arrestable offences, will therefore be available in respect of the offence. Those offences for which a person of 21 years or over (not previously convicted) may be sentenced to five years' imprisonment are arrestable offences under the 1984 Act, as are a number of other specified offences. A power of arrest without warrant may, of course specifically be provided in relation to an offence with a maximum penalty of less than five years, as will be the case, for example, with the offence of harassment under ***clause 2***. In its response to the consultation paper the Law Society said that the rationale that a five year penalty would be necessary to make the offence arrestable was flawed, and added that all the offences under the *Public Order Act 1986* are arrestable offences.

In its analysis of the Bill, Liberty notes that the five year maximum penalty for an offence under ***clause 4*** makes this offence more serious than actual assault, in that it permits a higher penalty than is currently available for common assault[26]. The same is also true of the offences under ***clause 3(3)*** and ***clause 5(5)*** of being in breach of a non-harassment order, both of which will be punishable by up to five years' imprisonment following conviction on indictment. This is the same as the maximum penalties for assault occasioning actual bodily harm and causing grievous bodily harm under sections 47 and 20 of the *Offences against the Person Act 1861* and greater than the maximum penalties for affray and fear or provocation of violence under sections 3 and 4 of the *Public Order Act 1986.* These offences under the 1861 and 1986 Acts require proof of a higher level of knowledge or intention than will be required for the new offences under the Bill, but have equal or lesser maximum penalties. It may therefore be considered likely that the new offences under the Bill will, in appropriate cases, be used in preference to these older offences, which may lead to a reduction in the use of these older offences. The creation of the relatively wide offence of disorderly conduct in section 5 of the *Public Order Act 1986* led to a decline in the use of other, more specific methods of dealing with offensive conduct, particularly arrests for drunk and disorderly behaviour.[27]

The fact that a maximum penalty is specified for a particular offence will not, of course,

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[26] *Briefing Paper on the Protection from Harassment Bill* - Liberty December 1996

[27] *Policing Low-level disorder: Police use of section 5 of the Public Order Act 1986* - Home Office Research Study 135, 1994

mean that this will necessarily be the sentence handed down in a particular case. This could only be done through the imposition of a minimum penalty and there are no proposals for minimum penalties for the offences under the Bill. The sentence imposed will, in fact, be for the judge dealing with the case to decide, with the maximum penalty being reserved for the worst possible case.

Under the *Police and Criminal Evidence Act 1984*, where an arrestable offence has been committed, any person may arrest without warrant any person who is guilty of it, or whom he has reasonable grounds for suspecting to be guilty of it. A police constable may arrest without warrant anyone who is about to commit an arrestable offence, or whom he has reasonable grounds for suspecting to be about to commit such an offence.

Under ***clause 1(3)*** the prohibitions on harassment will not apply where the person pursuing a course of conduct shows that:

a) his course of conduct was pursued for the purpose of preventing or detecting crime,

b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Under ***clause 4(3)*** the first two of these exemptions will also provide defences for a person charged with the offence under ***clause 4***. Such a person will also have a defence if he can show that the pursuit of the course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

Clause 12 is intended to give the Home Secretary the power to issue certificates stating that, in his opinion, anything done by a person specified in the certificate on an occasion specified in the certificate, related to national security, the economic well-being of the United Kingdom, or the prevention or detection of serious crime and was done on behalf of the Crown. Such a certificate is intended to be conclusive evidence that the provisions of the Bill will not apply to that person's conduct on that occasion.

The exemptions and defences under ***clauses 1(3)*** and ***4(3)*** and the certification procedure under *clause 12* are the means by which the Government intends to provide protection, in certain circumstances, for journalists, the police, the Security Service and others. While a certificate issued under *clause 12* stating that a person was working on behalf of the Crown

will be conclusive evidence that the person specified is exempt from the provisions of the Bill it would seem likely that a person such as a newspaper journalist would be considered to be working on behalf of the Crown. Journalists and other people operating in a private capacity will presumably have to rely on showing in court that there conduct came within one of the specified exemptions or defences. It is possible that, in practice, prosecutions will not generally be brought against journalists but the Bill does not provide any specific protection to the activities of journalists outside the terms of those defences. In particular, there is no "public interest" defence for journalists whose actions come within the types of conduct which are to be prohibited. In its analysis of the Bill, Liberty states that ***clause 12*** raises clear concerns in relation to equality before the law and equal treatment under the law, and in effect, offers certain individuals immunity from prosecution. It takes the view that these provisions are unjustified in view of the defences already provided in respect of conduct pursued for the purpose of preventing or detecting crime[28].

Clause 7(3) provides that a "course of conduct" must involve conduct on at least two occasions and the offence under *clause 4* also refers to a person causing another to fear on at least two occasions. The Bill does not define what is meant by an "occasion" or indicate the length of time that might have to elapse between one "occasion" and another in order for the conduct occurring on those occasions to amount to a "course of conduct" for the purposes of *clause 1* or c*lause 4*. It is presumably intended that this should be a matter to be determined by the courts in dealing with the cases which come before them.

The consultation paper referred to two offences involving the "persistent" use of words or behaviour. Both the offence under Section 32 of the *Sexual Offences Act 1956* of soliciting by a man for an immoral purpose and the offence under Section 1 of the *Sexual Offences Act 1985* which is designed to deal with kerb crawlers require it to be shown that a person acted "persistently". This term has been interpreted by the courts to mean that there must be a degree of repetition, but that two invitations are sufficient to support a charge.[29]The question whether the requirement of persistence may be satisfied by a single but continuing act has not been entirely settled by the courts.[30] The requirement of persistence is often cited as the element of the *1985 Act* which causes the police the most difficulty in using the Act's provisions against kerb-crawlers and there have been attempts (so far unsuccessful) to remove some of the difficulties caused by the definition of the offence in that Act[31] This may be why the Government has chosen another form of words for the two new offences to be created by the current Bill.

In its response to the consultation paper the General Council of the Bar said it considered that

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[28]*Briefing Paper on the Protection from Harassment Bill* - Liberty December 1996

[29] *Dale v Smith* [1967] 2 All ER 1133 also cited and applied in *R v Tuck* [1994] Crim LR 375

[30] See Rook and Ward on *Sexual Offences* (1990) p. 135-136

[31] e.g. Sir William Shelton's Sexual Offences Bill 1989-90

the word "persistent" would serve to deal with the different factual situations with which a court might be faced. It added that this need not be defined, but could be left as a question of fact to be determined in a trial if not admitted. It might be thought that while the matter of whether "persistent" can be taken to include a single continuing act has not been settled a requirement that conduct must have taken place on at least two occasions will be more likely to exclude the possibility of single rather than repeated acts being included in the offence. In responding to the consultation paper the mental health charity MIND expressed concern that single, one-off acts might be included in the offence, broadening it considerably and making it more difficult for someone who behaved in a way which was objectionable but in breach of no other law to avoid a penalty by amending their behaviour.

A number of commentators have expressed concern about the wide range of conduct or behaviour which could in theory be rendered criminal by virtue of the new offences which are to be created by the Bill and the lack of a requirement to prove intent, which might otherwise be used to narrow these circumstances down. It could be argued that there is not enough clarity or precision about the circumstances in which a person might find him or herself liable to prosecution and the threat of criminal sanctions, although others might take the view that a narrow definition would encourage determined harassers to find and exploit loopholes. In practice, much will depend on the approach adopted by the police and the Crown Prosecution Service in dealing with cases which are reported to them. It is likely, for example, that in many cases the police will issue warnings to alleged harassers, ordering them to desist, before proceeding further and that this will be used to distinguish one "occasion" from another for the purposes of establishing that the accused person engaged in a "course of conduct". Some commentators have suggested that the requirement that a warning be given should be set out in the Bill, rather than being left to administrative guidance or to officers' discretion. Under section 5 of the *Public Order Act 1986*, which penalises disorderly conduct and is only punishable by a fine, the police may only arrest a person without warrant if he continues to engage in offensive conduct after having been warned by the police to stop.

Article 10 of the *European Convention on Human Rights* sets out a general right to freedom of expression, which includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority" Article 11 of the Convention sets out a general right to "freedom of assembly and to freedom of association with others" The freedoms set out in these Articles are, however, qualified by additional provisions permitting restrictions for a number of different purposes, including the protection of the rights and freedoms of others.

Criminal Sanctions for breach of court orders

Clause 3(3) is designed to create a criminal offence which will be committed where a person, without reasonable excuse, breaches an injunction prohibiting harassment issued as part of the civil remedy set out in ***clause 3***. The offence will be punishable by a maximum of five years' imprisonment and a fine following conviction on indictment, or six months' imprisonment and

a £5,000 fine following summary conviction and will be an arrestable offence. The provisions of ***clause 3***, including those concerning the use of criminal sanctions for breach of injunction, are discussed elsewhere in this paper (pages 37-41)

Clause 5 seeks to give a court sentencing or otherwise dealing with a person convicted of an offence under ***clause 2*** or ***clause 4*** powers, in addition to dealing with him in any other way, to make an order restraining him from pursuing further conduct against the victim, or any other person named in the order, which amounts to harassment, or will cause a fear of violence. The order may have effect for a specified period or until a further order is made. It will be an arrestable offence punishable on indictment by up to five years' imprisonment and a fine, and on summary conviction by up to six months' imprisonment and a £5,000 fine for a defendant to breach such an order without reasonable excuse. Like the offence under ***clause 4*** and that under ***clause 3(3)*** this will be an arrestable offence by virtue of the length of the maximum penalty following conviction on indictment. The Law Society noted in its response to the consultation paper that an offence does not need to have a five year penalty in order to be an arrestable offence and suggested this alone would be a flawed rationale for specifying such a penalty in respect of a particular offence.

The relationship between the offence under ***clause 5(5)*** and the courts' existing powers to deal with breaches of their orders as contempts of court, which are punishable by up to two years' imprisonment, is not entirely clear. The consultation paper set out the Government's view that the civil courts should retain the power to deal with breaches of injunction as contempt[32] and where the offence under ***clause 3(3)***, of acting in breach of a civil injunction, is concerned it is specifically provided that the conduct which results in a conviction for that offence should not be punishable as contempt of court, and vice versa. There is no equivalent provision in respect of the offence under ***clause5(5)***. Equally, there is no express statement concerning the burden of proof.

It may seem likely that, as is generally the case, the burden of proving that an accused person is guilty of an offence under ***clause 5(5)*** will be on the prosecution, which will be required to prove the matter beyond reasonable doubt, although as with the offences under ***clause 2*** and ***clause 4*** it will not be necessary to show intent.

The prosecutor, the defendant or any other person mentioned in the order will be able to apply to the court which made the order for it to be varied or discharged by a further order. There is no equivalent provision in relation to the civil remedy under ***clause 3*** to allow parties to civil proceedings concerning allegations of harassment in England and Wales to apply to the court for a variation or discharge of an injunction made under that clause. In Scotland, ***clause 8*** does provide such a power in relation to civil proceedings concerning harassment

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[32] *Stalking - the Solutions.: a consultation paper* Home Office July 1996 para.5.12

and states that applications may be made in addition to any right to seek a review of the court's decision. In Scotland, the civil courts will be able to revoke a non-harassment order made under ***clause 8*** or vary it in such manner as they consider appropriate, but not so as to increase the period for which the order is to run. There does not appear to be any such limitation on the proposed power of the criminal courts to vary restraining orders made under ***clause 5***.

Clause 5(4) would seem to permit applications to vary or discharge restraining orders to be made ex parte. There is no express requirement in ***clause 5*** that the prosecutor, defendant or any other person mentioned in the order (presumably the victim in most cases) be notified that such an application is to be made. It may be that in some cases such a requirement will be implicit in the nature of the proceedings or that matters are to be left to be determined by existing practice, rules of court or other forms of guidance rather than by statute. Prosecutions are, however, generally brought by the Crown Prosecution Service and unless the case is a private prosecution, the victim of a criminal offence will not, generally, be a party to the proceedings.

Orders made under ***clause 5*** will constitute a sentence for the purposes of appeals against sentence. A person against whom an order is made will therefore be able to appeal to the Crown Court if the order was made by a magistrates' court, and to the Court of Appeal if it was made by the Crown Court.[33] In Scotland the prosecuting authorities will be able, by virtue of provisions in ***clause 11***, to appeal against any decision by a criminal court to refuse an application for a non-harassment order against a person convicted of an offence involving harassment. There is no specific right of appeal in ***clause 5*** against an equivalent failure by a court sentencing or otherwise dealing with a person convicted of an offence under ***clause 2*** or ***clause 4***.

Magistrates' courts have powers to order individuals to be bound over to be of good behaviour, whether or not they have been convicted of an offence, and convicted offenders against whom confiscation orders are made may be subject to further sanctions if they fail to comply with such orders, but powers for the criminal courts to order that individuals, who have completed their sentences and are not subject to parole licences or supervision requirements, conduct themselves or refrain from conducting themselves in a particular way after their sentence has been completed are otherwise rare. Such ongoing injunctive or quasi-injunctive orders have tended instead to be considered more appropriate for the civil courts.

Some commentators might argue that, in giving the criminal courts powers under ***clause 5*** to make restraining orders which resemble civil injunctions, the Bill is blurring to an excessive degree the distinction between criminal and civil proceedings, which have different

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[33] *Magistrates' Courts Act 1980* s. 108(3); *Criminal Appeal Act 1968* s.50

rules concerning liability and different standards of proof. Similar criticism has already been made of the provisions under ***clause 3*** which seek to make breaches of civil injunctions punishable in the criminal courts. In the consultation paper the Government acknowledged that there would be some overlap between the proposed new civil order and the proposed criminal offences but added that the Government considered that both had a part to play in combatting stalking.[34] The Government noted that:[35]

> Prosecution for breach of a court order is likely to be more appropriate than for one of the new offences because a single act would constitute a breach of the order whereas the criminal offences themselves require a course of conduct to be established. The normal principles of law would ensure that there was no risk of the stalker being prosecuted twice in regard to the same set of activities (i.e for breach of the order, and for the offence of stalking)

It has been argued that, as far as the criminal law is concerned, implementation of the Law Commission's recommendations in its November 1993 report on *Legislating the Criminal Code: Offences Against the Person and General Principles,* would be preferable to the creation of new criminal offences to deal with stalking and other forms of harassment, in that this would cover reform of the much-criticised current law relating to the inflicting of physical injury.[36] (see pages 10-11) It could be argued that one consequence of the creation of the new offences under the Bill, which do not require proof of intent may, ironically, be that it will in some cases be easier to proceed where a person causes alarm, distress or fear of violence than where a person causes actual, physical violence.

B. Scotland

1. Existing Offences: Breach of the Peace

In Scotland, the wide-ranging common law offence of breach of the peace has been used by the courts to deal with a number of forms of harassment which would be likely to come under the general heading of "stalking". The offence has no equivalent in England and Wales. The Home Office consultation paper noted that:[37]

> The activities commonly called stalking are criminal acts in Scotland under the common law offence of Breach of the Peace. In Scotland it has been said that conduct which may reasonably be expected to cause any person to be alarmed, upset or annoyed, breaches the peace.
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> In England and Wales, most criminal offences are statutory ones, and narrowly defined. Conduct can only be prosecuted under a statute if the act falls within the scope of the offences

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[34] *Stalking - The Solutions: A Consultation Paper*. Home Office July 1996 para. 5.25
[35] ibid para. 5.27
[36] How to stop stalkers - *Guardian* 26.9.1996
[37] *Stalking - The Solutions: a Consultation Paper.* Home Office July 1996 paras 4.8-4.9

> as defined by the statute and subsequently interpreted by the courts. It seems unlikely that a statute could be enacted under the criminal law of England and Wales which could replicate the wide powers of the Scottish courts to interpret common law offences such as Breach of the Peace.

The Labour Party's front-bench spokesman on Scottish Affairs, John McFall, has called for a specific statutory offence concerning stalking to be introduced in Scotland as well as in England and Wales. He has expressed concern that current prosecution practice in relation to breach of the peace tends to minimise the crime and expressed the view that the common law is inadequate to deal with the behaviour as seriously offensive as that of stalkers.[38]

Some commentators in Scotland have criticised proposals to create specific statutory offences concerning stalking and other similar forms of harassment for Scotland as well as England and Wales on the grounds that they represent a form of English interference in Scottish legal affairs and disregard Scotland's separate legal system and its legal traditions.

The Government's view of the current state of the criminal and civil law of Scotland on this matter was set out by the Scottish Office minister Lord James Douglas-Hamilton in a Written Answer of July 9th 1996:[39]

Mr. Gallie: To ask the Secretary of State for Scotland what steps he intends to take to ensure that the criminal and civil law in Scotland provide effective measures against stalking; and if he will make a statement. [36762]

Lord James Douglas-Hamilton: My noble and learned Friend the Lord Advocate considers that the common law of Scotland is adequate to deal with the menace of stalking. Such conduct can broadly be described as actings calculated to lead to the harassment of another person, whether they are intended to do so or whether they in fact do so. While such conduct frequently occurs on repeated occasions, it need not necessarily do so.

As far as the criminal law of Scotland is concerned, any conduct which is liable to create alarm and annoyance can give rise to a charge of breach of the peace. The types of conduct commonly referred to as stalking fall within that definition, even though the conduct complained of might in other circumstances be perfectly innocuous and lawful. Whether in any particular case the actings of an accused constitute a breach of the peace is a question for the court, which falls to be determined in the light of the circumstances of the individual case. The court is entitled to hold that the accused's conduct amounted to a breach of the peace, where something has been done in breach of public order or decorum and might reasonably be expected to have led to one or more members of the public being alarmed or upset. It is not necessary for the prosecutor to prove that actual harm was suffered by a third party. Nor is it necessary for the prosecution to establish that an accused person actually intended such a result.

In a case in 1961 the High Court of Justiciary upheld a conviction of breach of the peace where the accused had become infatuated with a young woman. The accused had formed a habit of waiting outside her place of employment, looking at her and following her and her fiance. The young woman became alarmed and agitated and her fiance angry and indignant. The High Court of Justiciary accepted that such conduct amounted to a breach of the peace. That is a good example of the flexibility

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[38] Bid for separate law on stalking renewed - *Herald* 16.7.1996

[39] HC Deb Vol 281 c115-116(W), 9.7.1996

with which the Scottish criminal courts can apply the common law offence of breach of the peace. In recent years persons who have engaged in stalking in Scotland have been successfully prosecuted on charges of breach of the peace.

Those who have made improper use of the public telephone system, by making offensive or menacing telephone calls, have been successfully prosecuted for contraventions of section 43 of the Telecommunications Act 1984.

In Scotland, a police constable may arrest, without warrant, anyone he reasonably suspects to have committed or to be likely to commit a breach of the peace.

The maximum sentence available for a conviction of breach of the peace depends on the court in which the case is prosecuted. The maximum sentence of imprisonment ranges from 60 days in the district court to life imprisonment in the High Court. The choice of court, which is determined by the Crown, reflects the gravity of the particular offence.

The joint consultation paper which has been published today by my noble and learned Friend the Lord Chancellor and my right hon. and learned Friend the Home Secretary identifies a number of deficiencies in the existing criminal law in England and Wales. These are difficulties over the requirement to prove intent on the part of the accused. There are also difficulties where the accused's behaviour is ostensibly routine and harmless and therefore not caught by existing laws. My noble and learned Friend the Lord Advocate is satisfied that these difficulties do not arise in Scotland, where the activities of stalkers are struck at by the common law offence of breach of the peace which, as explained above, covers a wider range of activity than the similar offence in England and Wales.

The common law of Scotland also provides the victims of stalking with certain civil remedies. When personal molestation or assault is seriously threatened an order for interdict may competently be sought from the sheriff court or the court of session. Interim interdict can also be granted. A person who fails to abide by the terms of an order for interdict or interim interdict is liable to be held in contempt of court and subjected to admonition, censure, fine or imprisonment. The maximum penalty which can be imposed by way of imprisonment for contempt of court is two years. It is also competent for a fine to be imposed.

2. The Bill: Criminal Sanctions for Breach of Court Orders

Under ***clause 8*** of the Bill the Government proposes to create a new delict or civil wrong relating to harassment and to give civil courts in Scotland the power to make non-harassment

orders, but ***clauses 2*** and ***4*** of the Bill, which are intended to create new offences of harassment and putting people in fear of violence in England and Wales, will not extend to Scotland. New criminal offences will, however, be created by ***clause 9*** and ***clause 11*** of the current Bill.

Clause 8 of the Bill, which is considered elsewhere in this paper (see pages 42-44) is designed to enable civil courts in Scotland to make non-harassment orders.

Clause 9 seeks to provide for a breach of such an order to be a criminal offence punishable by up to five years' imprisonment and a fine on conviction on indictment, or two years' imprisonment and a £5,000 fine on summary conviction. ***Clause 9(2)*** provides that breach of the order will not be punishable other than in accordance with ***clause 9(1)***. This is intended to prevent such a breach being punished as a contempt of court. The criticism that has been made in England and Wales of the proposed use of criminal sanctions for breach of a civil order has also been made of this proposal for Scotland (see commentary on p.40-41).

Clause 11 of the Bill inserts a new *section 234A* into the *Criminal Procedure (Scotland) Act 1995*. The new provision is intended to enable the prosecutor to apply to a court in Scotland which is sentencing a person convicted of "an offence involving harassment of a person" to make a non-harassment order against the offender in addition to any other disposal in relation to the offence. *Section 234(7)* provides that for the purposes of this provision,"harassment" is to be construed in accordance with *clause 8* of the Bill. ***Clause 8(3)*** provides that "harassment" of a person includes causing the person alarm and distress. An "offence involving harassment" will presumably therefore include breach of the peace or other offences where the conduct of the offender involved causing alarm and distress to a person, as well as the specific statutory offence of breaching a non-harassment order which will be created by ***clause 9*** of the Bill.

A non-harassment order made under the new *section 234A* of the *1995 Act* will require the offender to refrain from specified conduct in relation to the other person for a specified period, which may be an indeterminate period. The court may make such an order if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from further harassment. An offender against whom such an order is made will be able to appeal against it as if it were a sentence which had been imposed by the court. Breach of a non-harassment order will be an offence punishable on indictment by up to five years' imprisonment and a fine, and on summary conviction by up to six months' imprisonment and a £5,000 fine.

The prosecuting authorities will be able to appeal to the High Court against any decision by a court to refuse an application to make a non-harassment order under *section 234A* .

Section 234A(6) will enable an application to be made to the court which made the non-harassment order for it to be varied or revoked. The prosecutor at whose instance the order was made will be able to make such an application as will the person against whom it was made. The person mentioned in the order (i.e. the "victim") will not be able to make an application to vary or revoke a non-harassment order made in criminal proceedings under this section. In civil proceedings, such persons will, as parties to the proceedings, have standing to apply for the revocation or variation of non-harassment orders made under ***clause 8.*** In England and Wales victims will be able to apply for the variation or discharge of restraining orders made by the criminal courts under ***clause 5.*** The courts in Scotland will be able to revoke or vary non-harassment orders under this provision if they are satisfied on a balance of probabilities that it is appropriate to do so, but they will not be permitted to increase the period for which the order is to run. This is presumably because the application may be made ex parte without the other parties having prior notice of it. There is no equivalent restriction on the proposed powers of the criminal courts in England and Wales to issue further orders varying or discharging restraining orders under ***clause 5***.

Clauses 8 and ***11*** are intended to be brought into force by a commencement order made by the Secretary of State. (***clause 14***)

C. Northern Ireland

In October 1996 the Northern Ireland Office published a consultation paper on *Stalking in Northern Ireland*, setting out proposals for a new tort of molestation and two new criminal offences for Northern Ireland along the lines of the measures it proposed to introduce in England and Wales. In a Written Answer to a Question from Mr Robert McCartney on November 12 1996 the Northern Ireland minister, Sir John Wheeler, said he would be considering what legislation was required for Northern Ireland when all reponses had been received.[40] The closing date for comments on these proposals was 2 December 1996. The current *Protection from Harassment Bill*, which was introduced on December 5 1996, does not extend to Northern Ireland.

[40] HC Deb Vol 285 c184(W) 12.11.1996

II Harassment and the Civil Law

A. England and Wales

1. Existing Remedies

At present there are means by which the civil law can protect a person from harassment but in some cases there may be no protection available or it might be unclear how a person should proceed to protect him or herself.

In a significant number of "stalking" cases referred to in the media the stalker is known to the victim. Where they are spouses, former spouses or cohabitants then protection might be available through the current remedies for domestic violence. Former cohabitants only have a remedy if the behaviour in question took place while they were living together. The remedies for domestic violence are discussed in detail in Library Research Paper 96/39 on the *Family Law Bill [HL] [Bill 82 of 1995/96]*. In brief, the provisions of the *Domestic Violence and Matrimonial Proceedings Act 1976* permit county courts to grant injunctions to prevent molestation by a spouse or cohabitant against the applicant and/or a child living with the applicant. Ouster orders may also prevent a person from entering the joint home or from entering a specified area round the home. Where the injunction restrains the defendant from using violence (but not other forms of molestation) and there has already been actual bodily harm the court may attach power of arrest to the injunction. The police may then arrest a defendant if there is reasonable cause to suspect that he or she is in breach of any provision in the injunction and he or she will be brought before a judge within 24 hours. The victim is notified and will usually have to come to court and prove breach him or herself.

Spouses may also seek protection in the magistrates' courts under the *Domestic Proceedings and Magistrates' Courts Act 1978* but only if violence has been used or threatened against the applicant and/or a child of the family. Orders to regulate occupation of the matrimonial home may also be available to spouses under the *Matrimonial Homes Act 1983*. In addition, non-molestation injunctions may be available ancillary to divorce proceedings.

At present where the stalker and victim are not spouses, former spouses or cohabitants reliance must be made on ordinary tortious remedies (eg injunctions ancillary to proceedings for trespass, trespass to the person, nuisance and personal injury) which may be less effective in securing protection for the victim, particularly as no power of arrest may be attached to

such orders. However, two recent cases on the use of injunctions[41] have been seen by some commentators as establishing "harassment" as a fully developed tort (ie. civil wrong) in its own right. In these cases involving stalking and other similar forms of threatening and abusive behaviour the courts made use of injunctions together with their power to imprison for contempt of court for failure to observe such injunctions. Although it remains a matter of debate among lawyers as to whether a separate tort of harassment has now emerged[42] it is clear that the courts are now willing to grant injunctive relief at common law to restrain acts that might be described as harassment where it is necessary to protect the legitimate interests of a plaintiff who has invoked the court's jurisdiction.[43]

Breach of the court orders and injunctions described above amounts to a civil contempt punishable by committal to prison for a maximum period of two years, sequestration or a fine. The penalty imposed by the court must be commensurate with the seriousness of the contempt and the exact maximum level of the fine and the tem of imprisonment will depend on the type of court which made the order. However the overall maximum term of imprisonment is two years and the overall maximum fine is unlimited. No power of arrest for breach can be attached to injunctions not made in consequence of domestic violence provisions.

It should be noted that there are considerable difficulties in obtaining injunctive relief in harassment cases where the identity of the harasser is unknown to the victim. The police have only a limited role in investigating matters which fall outside the scope of the criminal law and a harasser may not have committed any act that could give rise to criminal prosecution.

The lack of or uncertainty over a common law tort of harassment has provoked debate on the desirability of creating a statutory tort of harassment. This has mainly arisen in relation to cases of "stalking" but it has also been an issue in the debates on privacy and the media. One witness to the Calcutt Committee recommended the creation of such a tort subject to the defence of publication in the public interest. The Committee considered that it might be possible to formulate a general tort of harassment, although it was not persuaded that it would provide a practical solution to the problem of harassment by the press. The Committee took the view that it would be necessary to limit the scope of any such tort, but thought that it might include a number of specific acts such as persistently following someone about from place to place and watching or besetting a person's house, place of work or the route to and from them.[44] This form of words is used in the criminal offence set out in section 241 of the *Trade Union and Labour Relations/Consideration) Act 1992* (see page 8 above).

2. Future Remedies - Family Law Act 1996

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41 *Burris v Azadani* [1996] 1 FLR 266 and *Khorasandjian v Bush* [1993] 2 FLR 66

42 see, for example, The final emergence of a tort of harassment? - *Family Law* November 1995; Is there a law against stalking? - N*ew Law Journal* 22.3.96; and the case comment on the Burris case in *Family Law* March 1996, p.146

43 *County Court Practice 1996*, Notes to Order 13, Rule 6 of the County Court Rules 1991

44 *Report of the Committee on Privacy and Related Matters* Cmnd 1102, paras. 6.23-6.25

Part IV of the *Family Law Act 1996* contains new provisions for dealing with domestic violence which are due to come into effect in October 1997.[45] These remedies will apply more widely than is at present the case but the Act does not create a general tort of harassment.

Non-molestation orders may be sought under section 42 of the Act by "associated persons". Molestation is not defined in the Act so that the courts have flexibility in this area but it will cover cases of actual or threatened violence, serious pestering or harassment. Courts are required by section 42(5) to have regard to all the circumstances of the case including the need to secure the health, safety and well-being of the applicant.

By section 62(3) of the Act a person is associated with another person if:

(a) they are or have been married to each other;

(b) they are cohabitants or former cohabitants;

(c) they live or have lied in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;

[NB this would cover *inter alia* flatmates and gay cohabitants]

(d) they are relatives;

(e) they have agreed to marry one another (whether or not that agreement has been terminated);

(f) they are parents of the same child or have or have had parental responsibility for the same child;

(g) they are parties to the same family proceedings.

Thus the new law offers domestic violence remedies to a much wider group of people than is currently the case. However, it does not offer protection to persons who experience harassment from strangers with whom they are not associated, nor to those who experience harassment from former lovers with whom they have never been associated according to the terms of section 62(3).

Courts will have the power under section 47 to attach powers of arrest to a non-molestation

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[45] *Marriage and the Family Law* Act 199*6: The new legislation explained* Lord Chancellor's Department (1996)

order where there has been violence or threatened violence against the person seeking the order and the victim would not be adequately protected without such a power.

Breach of a non-molestation order would be a civil contempt and punishable by a fine or a term of imprisonment for a maximum term of two years.[46] In addition courts may have power under section 14(4) of the *Contempt of Court Act 1981* to make a hospital order or a guardianship order under the *Mental Health Act 1983* where the defendant suffers from mental illness and might otherwise be committed to prison.

There is a controversial, but not party political, provision in section 60 of the 1996 Act for rules of court to be made enabling third parties to bring civil proceedings on behalf of victims of domestic violence. It is thought that it would usually be the police who would take such action in cases where a victim feels particularly vulnerable and therefore unable to take action him or herself. Police action in this area may or may not be an adjunct to criminal prosecution. Pilot schemes are to be conducted before deciding whether to bring section 60 into force. This will *inter alia* allow for an assessment of the resource implications of allowing third parties to bring civil proceedings on behalf of victims.

These existing civil remedies are widely thought to be inadequate to deal with many cases of harassment and stalking. At Lords committee stage on the *Family Homes and Domestic Violence Bill* of 1995-96 (which contained largely similar provisions to those in Part IV of the *Family Law Act 1996*) the Lord Chancellor said that he considered the development of a new branch of tort in stalking cases to be important. He said:[47]

> I have certain proposals in mind relating to privacy which could have an effect on some of this area if by any chance it were to progress to legislation. Even if it did not progress by this method, it might progress by other methods which would have some effect.
>
> I think that the general area of tort that is in issue here may well be a matter for the Law Commission to look at more systematically, and I would certainly wish to consider that as a possibility because I think the judiciary may well develop this area. It is always difficult because it depends on the cases they get and how suitable they are for making developments. But I certainly have in mind that this is an area of tort law which should not be neglected by the judiciary, if that happens, or alternatively by promoting legislation after study by the Law Commission.

The Government set out its view of the difficulties of dealing with stalking under the existing law in its consultation paper *Stalking - The Solutions*:[48]

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[46] section 14, *Contempt of Court Act 1981* (as amended)

[47] Special Public Bill Committee Deb. 24 April 1995 c.5

[48] Home Office, July 1996, paras 3.1-3.3

3.1 Though the civil courts have a power to make non-molestation orders, they would not have the power to act in many instances of stalking where the stalker is unknown to the victim, or where the parties are, or have been, merely friends, or work colleagues, even though the powers of the courts are extended by the provisions of the Family Law Act.

3.2 Although the courts are developing the law to give greater protection to victims of molestation, the precise basis of the right being protected is not clear, nor are all its components. Although greater protection has been given through the law of nuisance, that law is still intended to protect property rights and cannot offer sufficient protection to the victims of molestation. It could not be used, for example, to stop harassing phone calls to the plaintiff at her place of employment.

3.3 The maximum term of imprisonment which can be imposed for contempt of court for a breach of a court order is two years. It is arguable that this is an insufficient penalty to deter stalkers. Moreover, the police have only a limited role in investigating breaches of civil law. This is of particular concern at the stage where the identity of the stalker is unknown to the victim. Powers of arrest in relation to the civil law are very limited.

This view was borne out by many of the respondents to the Government's consultation paper and there was much support for changes to be made. The press however have highlighted a number of civil liberties concerns about the proposals while taking the view that some change in the law is desirable (see pages 15-17 *ante*). Other writers have suggested that stalking is essentially a criminal law and public order matter and should not come within the jurisdiction of the civil courts at all.[49] However this overlooks the fact that the civil courts have recently taken a more flexible approach to giving injunctive relief in some harassment cases.

3. The Bill

The Bill seeks to create a civil tort in England and Wales against which an order restraining harassment might be sought but unlike in Scotland[50] there is no provision seeking to create a specific statutory right to be free from harassment (see pages 42-43 *post*). In the consultation paper *Stalking - The Solutions*[51] the Government said that, if extended, the civil law would be available to the victim as a preventative measure early in the stalker's campaign.[52] However it should be noted that the extended civil law provisions proposed in this Bill would cover a wide variety of harassment cases and not just those involving "stalking" campaigns. In addition remedies would be more easily available to people who are not associated for the purpose of domestic violence remedies. This was welcomed by Victim

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[49] Can the law stop stalkers? - *Times* 22.10.96 and Wrong to rewrite law on hustings - *Scotsman* 20.10.96

[50] see clause 11

[51] Home Office, July 1996

[52] para 5.2

Support in their response to the Government's consultation paper on stalking.[53] The Government originally proposed a tort of "molestation" but the Bill proposes a tort of "harassment". The term "molestation" was criticised on consultation for a lack of certainty of definition.[54]

Orders could be sought under **clause 3** of the Bill in the county courts or the High Court but not in the magistrates' courts. In this respect the current Bill does not parallel current domestic violence remedies, which are available in all three types of court. The Magistrates' Association did not, on consultation, support magistrates' courts being given the power to deal with a tort of molestation which it said was a civil matter which should be rightfully heard in the civil courts. The Association made a distinction between this and its civil jurisdiction in relation to domestic violence on the grounds that the latter came within the specialised jurisdiction of the family proceedings court. The Bar Council was also opposed to magistrates' courts being given power to grant injunctive relief on the grounds that it would give them powers to act on an *ex parte* application and that it is not a court of record. However Lord McIntosh of Haringey took the view that one of the strengths of his *Stalking (No 2) Bill* of last session was that a civil order (a "prohibitory order") would be easily obtainable from the magistrates' courts.[55] He did not propose that the orders would be available in the county courts or the High Court to which one would normally expect to apply for civil orders. He spoke of the need to have an informal procedure not requiring legal aid in which the issue would be decided on the balance of probabilities (ie the lower standard of proof applying to civil proceedings).

It is not clear in cases of stalking by spouses, former spouses, cohabitants and other persons associated for the purposes of the *Family Law Act 1996* whether it would be more appropriate to pursue domestic violence remedies or take non-harassment proceedings. Much would depend on the facts of any particular case.

The prohibition on harassment is contained in **clause 1** and set out at page 17 above. In brief, there must be a course of conduct involving conduct on at least two occasions and by **clause 1(3)** it is a defence to show that the course of conduct was pursued for the purposes for preventing or detecting crime; that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or that in the particular circumstances the pursuit of the course of conduct was reasonable. This would mean that the lawful activities of the police would not give rise to civil proceedings in respect of harassment. However if a person could prove that the police were not seeking to prevent or detect crime in repeatedly stopping him, for example, he might be

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53 *Stalking - The Solutions: a response by Victim Support* - September 1996

54 *Law Society Response to The Home Office Consultation Paper: Stalking - The Solutions* October 1996 and *Response of the Common Law Team of the Law Commission to the consultation paper issued by the Home Office and the Lord Chancellor's Department, "Stalking - The Solutions"*

55 HL Deb vol 572 c819, 12.6.96

able to seek a remedy under **clause 3**. In civil proceedings taken under the Bill **clause 12** seeks to allow the Secretary of State to certify that a person was acting on behalf of the Crown in relation to national security, the economic well-being of the United Kingdom or the prevention or detection of serious crime. If such a certificate were made then it would be conclusive evidence that the Act did not apply to the conduct of a person against whom orders are sought. This clause would protect members of the security services from civil action and no argument could be entertained by the courts about the reasonableness of a member of the services' activities.

Clause 1 is widely drafted and, for example, the activities of political activists, market researchers, telephone sales companies, evangelical religious organisations and journalists as well as activities such as begging, racial or sexual harassment, harassment by neighbours or harassment in the workplace could be covered by the Bill. The Law Society has expressed concern about a wide application of a new tort without greater information and further opportunity for consideration.[56] Victim Support, on the other hand, have strongly welcomed the proposal for this new statutory tort of harassment to be widely drafted to catch a wider range of activities than those of stalkers alone.[57] It would be for those alleged to have pursued a course of conduct amounting to harassment under **clause 1** to prove that the pursuit of the course of conduct was reasonable in the circumstances. The courts will look at each case individually on its merits and in time case law may offer more guidance on the type of conduct and the particular circumstances which might be covered by **clause 1**.

The same prohibition on harassment applies for the purposes of both criminal and civil proceedings. A person could, therefore, both report the matter to the police for criminal investigation while at the same time pursuing civil remedies. The fact that the conduct might also amount to a criminal offence and is therefore a matter capable of investigation by the police could be useful in identifying a defendant for the purpose of civil proceedings where the identity of the harasser is not known to the victim. The Home Office's consultation paper stated that there might be difficulties if civil and criminal cases were proceeding through the courts in parallel because of the different standards of proof and rules of evidence.[58] It sought views as to whether, in situations where a criminal prosecution takes place, the civil case should not begin until the criminal case has been completed. There is nothing on the face of the Bill to this effect and Women's Aid[59] and Victim Support[60] have supported this approach. It might, however, be open to a civil court to adjourn proceedings until after the criminal trial.

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56 *op cit*
57 *op cit*
58 *op cit*,para 5.29
59 *Stalking - The Solutions: Response from the Women's Aid Federation of England* September 1996
60 *op cit*

It is not necessary to pursue both types of proceeding and civil or criminal remedies alone could be sought. A victim may decide to pursue civil remedies where there is insufficient evidence for a criminal prosecution but perhaps sufficient for the obtaining of a civil order. In criminal cases the matter must be proved *beyond reasonable doubt* but a lower standard of proof applies in civil proceedings where the matter must be proved *on the balance of probabilities.*

A person may, however, be reluctant to pursue civil remedies where he or she did not qualify for legal aid and did not have sufficient funds available to seek civil remedies. A victim may also be deterred by stress from seeking civil remedies and there is no provision in the Bill similar to section 60 of the *Family Law Act 1996* allowing for rules of court to be made so that a third party might act as the victim's representative and seek an order on her behalf. A provision to this effect was contained in the two Private Member's Bills on stalking that were introduced last session.[61] The inclusion of such a provision was discussed in the Government's consultation paper but only in the context of seeking orders on behalf of those who did not know that they were being "stalked". Children may not be aware, for example, that they are being followed but it might be desirable for action to be taken to protect them from such harassment. In such circumstances the matter could be reported to the police for criminal investigation and civil proceedings could be taken by a person appointed by the court as the minor's "next friend" either in addition or as an alternative to criminal proceedings, The "next friend" appointed by the court would normally be a relative of the minor concerned.

On consultation little support was given to the proposal to allow the police to obtain civil orders on behalf of an unknowing victim. The Magistrates' Association was opposed and Victim Support thought that more detailed proposals would need to be made before they could comment appropriately. The Bar Council said that it was "unhappy" with the proposal to give the police the right to intervene on behalf of victims when "the outcome would be to restrain an individual's liberty and leave them subject to stringent sanction, all to be achieved on the civil burden of proof".

Clause 3 seeks to allow for a person to take civil proceedings in respect of an actual or an apprehended breach of **clause 1**. There would, therefore, be no requirement that any such conduct has already taken place. Fear of harassment may be ground enough to seek orders from the civil courts. However there is no guidance for courts in the Bill on what might constitute reasonable grounds for apprehending harassment and so courts could decide to make orders on the basis of the applicant's subjective state of mind rather than on the basis of a reasonable fear of harassment. Case law would be important in determining this issue and it will be for the courts to decide whether to grant relief in any particular case. The Bill does not specify the terms of such an injunction and so courts would have the flexibility to

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[61] HC Bill 78 of 1995-96 and HL Bill 92 of 1995-96

frame the terms of an injunction in terms appropriate to deal with the behaviour complained of or feared. It should be noted that civil remedies would be the only remedies available under the Bill where there is a fear of harassment as criminal proceedings under **clauses 2 and 4** of the Bill could not be invoked unless and until there has been actual harassment.

There are potential civil liberties implications of granting orders on the basis of apprehended harassment. Given that many harassers in stalking cases have at one time been in close personal relationship with their victims it is not impossible to imagine a situation in which lawyers routinely advise their clients to seek "non-harassment" orders on relationship breakdown. However the availability of orders based on the fear of harassment alone might be useful if a person seeking an order has become afraid of harassment on the basis of his or her involvement with a present or past victim of the alleged harasser.

As with present injunctions and some domestic violence remedies, interim "non-harassment" orders could be sought by a victim *ex parte* (ie without the appearance of the alleged harasser at court to defend the case made against him). The Bill does not however contain guidelines on the granting of interim orders although the Government's consultation paper said that the serious consequences of breach of an injunction make it important for there to be safeguards when applications are made to the court without notice to the defendant. It said that in such cases, the provisions of the *Family Law Act 1996*[62] should be mirrored so that courts should consider any risk of significant harm attributable to the conduct of the defendant if the order was not made immediately, whether the victim would be deterred form pursuing the remedy if the order was not made immediately and whether there was reason to believe that the defendant was deliberately evading service of notice of the application. It also said that the defendant would have to be given an opportunity to make representations, as soon as just and convenient, at a full hearing.[63]

Courts would probably be able to accept undertakings from alleged harassers as they can at present in some domestic violence cases. Undertakings avoid the need for contested proceedings and thus offer a more conciliatory way forward. Breach of an undertaking gives rise to the same penalties as breach of a court order.

The Bill contains no provision specifically allowing for the revocation and variation of civil orders made in England and Wales. This contrasts with the provisions in the Bill relating to civil proceedings in Scotland [**clause 7**] and to restraining and non-harassment orders made following criminal conviction in England and Wales [**clause 5(4)**] and in Scotland [**clause 11(6)b**].

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[62] section 45

[63] para 5.13

Clause 3(2) seeks to provide for damages to be awarded where there has been harassment under the terms of the Bill. It specifically seeks to provide for damages to be available for "(among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment". There is no definition of "anxiety" in the Bill and so it is not known what will amount to anxiety for the purposes of the Bill nor whether it will be the subjective effect on the particular plaintiff (ie the applicant) that will be relevant for the purposes of awarding damages or whether the courts would decide that there would have to be some objective assessment of the likely effects of the conduct complained of on a plaintiff of normal robustness. The clause refers to *any* anxiety and this tends to suggest that the court would be required to consider the subjective effects on the particular plaintiff in awarding damages for anxiety. Again, *any* financial loss resulting from the harassment would be recoverable - this might include the expenses of moving house, taking extra security measures or loss of earnings where the harassment has resulted in the victim being unable to work. It may also be expected that the courts would award damages in the normal way if there had been any actual personal injury resulting from the harassment. However, the right to damages for harassment would not be of much assistance to a victim whose harasser has no means with which to pay a judgment against him.

Clause 3(3) seeks to make it a criminal offence for a defendant without reasonable excuse to breach an injunction made for the purpose of restraining the pursuit of any conduct which amounts to harassment. The proposed penalties for such offence are set out in **clause 3(6)**. A person found guilty on indictment (ie by the Crown Court) would be liable to imprisonment for a maximum term of five years or an unlimited fine or both. A person found guilty by a magistrates' court would be liable to imprisonment for a maximum term of six months and/or a maximum fine of £5,000. It is probable that the seriousness of the breach would determine the level of court in which criminal proceedings would be taken. The offence created would be an arrestable offence thus obviating the need for a specific statutory power of arrest to be attached to non-harassment orders.

The maximum term of imprisonment arising out of conviction on indictment for breach of an order represents an increase over the current maximum of two years in proceedings for civil contempt on breach of an order made in the civil courts. However a simple increase in the maximum term does not necessarily mean that longer sentences will be handed down in harassment cases. There is no proposal for minimum sentences in such cases. The penalties for breach of a civil order are the same as those contained in **clause 4(4)** in respect of the offence of putting people in fear of violence which is the more serious of the two criminal offences of harassment created by the Bill for England and Wales.

The Bill does not contain any statutory requirement for the police to warn a person about his breach of an order before a prosecution is mounted against him. In practice, the police are likely to give warnings in cases where they deem it appropriate.

The proposal to make breach of a civil order a criminal offence is highly controversial as it blurs the distinctions between the criminal and civil law. The proposal is supported by Victim Support[64] but the Bar Council has called it "an unwarranted and potentially dangerous extension of the law.[65] In order for a victim to obtain an injunction she must prove the matter on the balance of probabilities which is a lower standard of proof than that of beyond reasonable doubt which applies in criminal proceedings. A person who breaches an injunction may therefore be sentenced for a criminal offence without the safeguard of the more onerous standard of proof being applied to his behaviour at the time of making the civil order against him. However the breach itself would have to be proved beyond reasonable doubt where criminal proceedings were taken in respect of the breach as is the case where contempt proceedings for breach of an injunction are taken. Proceedings for breach of a "non-harassment order" will be heard in a criminal court which would not be the court which originally made the non-harassment order. It is highly unusual for a court making an order not to deal with breaches of its own orders, although breach of a non-harassment order could be dealt with by way of civil contempt proceedings as an alternative (see below). The Magistrates' Association, whose members would be responsible for hearing many criminal cases arising out of breach of civil orders, has commented on the need for great care in drawing up civil orders as a dispute as to the content of an order or its exact meaning could result in it being impossible to prove a breach to the criminal standard of proof.[66]

Liberty has said that the proposed fusion of the civil and criminal law in that breach of an injunction would be made a criminal offence is "dangerous" and likely to breach Article 6 of the European Convention on Human Rights.[67] Article 6 is the fair trial provision of the Convention which states:

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

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64 *Stalking - The Solutions: a response by Victim Support* September 1996

65 *Stalking - The Solutions: response to the consultation paper* September 1996

66 *Response to the Consultation Paper: Stalking - The Solutions* September 1996

67 Anti-harassment bill 'ineffectual and dangerous', says Liberty - Liberty *Press Notice* 5.12.96

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Liberty is, however, in favour of the creation of a new civil tort of harassment. It recommends improved access to civil law remedies by increasing the availability of legal aid together with powers of arrest for breach of an injunction as part of a package of alternative measures to deal with harassment which it recognises as a serious problem.

It should also be noted that a person may have had an order made against him based only on the applicant's apprehension of harassment but that a single act breaching the order could render him liable to criminal prosecution whereas a person charged with a criminal offence under **clauses 2 or 4** (described above at pages 17-22) must have pursued a "course of conduct" involving conduct on at least two occasions.

Clauses 3(4) and 3(5) seek to provide that civil contempt proceedings and criminal prosecution for breach of an order may be pursued in the alternative (ie where one type of proceedings for breach is taken the other may not be pursued). This would avoid "double jeopardy" for the offender. It should be noted that there is nothing in the Bill offering guidance on the appropriate use of these alternatives. However, civil contempt proceedings would have to be brought by the victim herself and the cost of this may be a deterrent to a victim not eligible for legal aid. Stress for the victim may also be a deterrent. There is no provision in the Bill to allow third parties to take enforcement proceedings on behalf of victims.

Clause 6 sets out the proposed limitation period for an action for damages for harassment taken under the Bill. It is proposed that actions must be taken within six years which is the normal time limit for actions based on tort. Actions for personal injuries arising out of negligence, nuisance or breach of duty have a three year time limit[68] but in such cases the court has a discretion under section 33(1) of the *Limitation Act 1980* to disapply the time limit and allow the action to proceed where it would be equitable to do so. Where personal injuries have arisen out of harassment it may be possible to take proceedings in negligence

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[68] section 11, *Limitation Act 1980*

or nuisance rather than for damages under the protection from harassment provisions of the current Bill. The proposed time limit for England and Wales differs to that proposed for Scotland in **clause 10** of the Bill (see page 44 *post*).

By virtue of **clause 14** the provisions relating to civil orders (ie **clauses 3** and **6** of the Bill) would be brought into force by order made by the Lord Chancellor.

B. Scotland

1. Existing Remedies

Scottish common law offers certain civil remedies to those suffering harassment. When personal molestation or assault is seriously threatened an order for interdict may be sought from the sheriff court or the Court of Session. Breach of an order for interdict or interim interdict is a contempt of court for which the penalties are admonition, censure, fine or a maximum term of imprisonment of two years.

Victims of domestic violence may also seek remedies by way of matrimonial interdict under the *Matrimonial Homes (Family Protection) (Scotland) Act 1981*. Section 14(2) of the 1981 Act defines "matrimonial interdict" as an interdict (including an interim interdict) which prohibits any conduct by one spouse or cohabitant towards the other or a child of the family or which prohibits entry to the matrimonial home or a specified area in the vicinity of the home. Powers of arrest may be attached to these interdicts under section 15 of the Act but the police have no powers to take civil action on behalf of the person in whose favour the interdict was granted.

2. The Bill

Clause 8(1) of the Bill creates a new legal right to be free from harassment in Scotland. The creation of an explicit statutory right amounting to a "civil right" is unusual in the legal systems of the United Kingdom but perhaps less so in the civil law tradition of Scotland. No explicit statutory right has been created for England and Wales but the common law system of that jurisdiction generally creates rights by implication through the creation of torts (ie civil wrongs) for which penalties for breach are specified. The explicit statutory right contained in **clause 8(1)** is declaratory in nature as the clause goes on to define the content of such a right and the circumstances in which it will be enforceable. The provisions of **clause 1** for England and Wales prohibiting harassment are also of a declaratory nature. There has been little comment on the specific point of the creation of a statutory right to be free from harassment, rather than the creation of the new delict of harassment, except that of Alistair Bonnington, a lecturer in criminal procedure who has commented that it is "about as

worthwhile as giving women a right not to be raped. It is no more than the expression of a pious hope that such conduct will cease."[69] However one of the functions of legislation of this type is to deter and to send out a message that behaviour of the type covered by the Bill is unacceptable.

Clause 8(1) goes on to seek to create a new delict of harassment by providing for a prohibition against pursuing a course of conduct which amounts to harassment of another person. This prohibition is couched in slightly different terms to that applying to England and Wales under **clause 1** of the Bill. By virtue of **clause 8(3)** "conduct", "harassment" and "course of conduct" would bear the same meaning as in England and Wales under **clause 7**.

As in England and Wales, **clause 8** would apply to a wide variety of conduct and not just that amounting to "stalking" and orders could be sought by way of "an action in harassment" in respect of an actual or an apprehended breach of **clause 8(1)**. Thus, as in England and Wales fear of harassment would be sufficient ground to apply for an order. For further discussion on this issue see the commentary on the English provisions on pages 37-38. Orders could be sought in the Court of Session or the sheriffs courts.

By virtue of **clause 8(4)** similar defences would apply in Scotland as would apply in England and Wales and **clause 12** would also apply allowing the Secretary of State to certify that a person was acting on behalf of the Crown in certain regards (this would usually arise in the context of the activities of the security services).

By virtue of **clause 8(5)**, in an action of harassment the court could award damages and, as in England and Wales, this could include damages for *any anxiety* caused by the harassment and *any* financial loss resulting from it [**clause 8(6)**]. The court could also grant interdict or interim interdict (ie an order restraining certain types of behaviour). In addition there is provision for the court to grant a *non-harassment order* in an action of harassment "if it is satisfied that it is appropriate to do so in order to protect the person from further harassment" [**clause 8(5)(b)(ii)**]. This new order may specify the type of conduct to be refrained from and the period of the restriction, which could be indeterminate. An interdict and a non-harassment order would not be able to contain the same prohibitions at the same time.

There are different penalties for breach of an interdict and breach of a non-harassment order. While legal commentators differ in their view of the exact technical nature of a breach of an interdict it is certainly a challenge to the authority of the court and is punishable by admonition, censure or a fine and/or a maximum term of imprisonment of two years.[70] A criminal standard of proof applies to breaches of interdict which means that the breach must be proved beyond reasonable doubt.

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[69] Wrong to rewrite law on hustings - *Scotsman* 20.10.96

[70] section 15(2), *Contempt of Court Act 1981 (as amended)*

By virtue of **clause 8(7)** either party to a non-harassment order could seek its variation or revocation. However the court cannot on such an application increase the period for which the order is to run. A further order would have to be sought by a victim who felt the need for continuing protection.

Clause 9 sets out the penalties for breach of a non-harassment order. As in England and Wales breach of such an order would be a criminal offence with the same maximum penalties attached: five years' imprisonment and/or an unlimited fine following conviction on indictment and six months' imprisonment and/or a fine of £5,000 following summary conviction. Breach of such an order would not be punishable in any other way (ie it would not be punishable as a challenge to the authority of the court as described above in relation to interdicts). The criticism that has been made in England and Wales of the proposal to make breach of a civil order a criminal offence has also been made in relation to the similar proposal for Scotland (see commentary on page 40-41 *ante*).

Clause 10 seeks to amend the *Prescription and Limitation (Scotland) Act 1973 (as amended)* so as to provide that the time limit for bringing an action of harassment would be the same as that applying to personal injury cases (ie three years). The court would be able to override this time limit in appropriate cases. This contrasts with the proposal in **clause 6** of the Bill that a six year time limit with no discretion to override should apply in England and Wales.

The Scottish provisions would be brought into force by order made by the Secretary of State [**clause 14**].

C. Northern Ireland

It is not proposed that the provisions of the Bill should extend to Northern Ireland [**clause 13**]. See page 29 for further discussion on the proposals for Northern Ireland.

III Proceedings on the Bill

It was originally proposed that all stages of the Bill would be taken on Monday 16 December. However the Leader of the House has announced that the debates will now take place over two days, 17 and 18 December. The proposed speedy passage of the Bill through its Commons stages has been criticised by the director of Liberty, John Wadham, in the following terms:[71]

> There has been growing concern about the erosion of parliamentary sovereignty by executive supremacy, and attempts to rush through this legislation without any opportunity for proper scrutiny or debate will only fuel existing public fears about the democratic deficit. This Bill, which is supposed to protect victims, will make a victim of democracy.

Liberty has also outlined its other concerns as follows:[72]

- Legislation which we will all have to live with for years is being rushed through in days. Every single piece of legislation which has been rushed through in this manner - from the Official Secrets Act 1911 to the Dangerous Dogs Act 1991 has been fraught with problems and has in practice taken up an enormous amount of government time after the event as a result.

- Such undermining of the democratic process is of even greater concern when the legislation involved is so controversial: this Bill proposes to create fundamental revisions to the criminal law by creating new crimes where there is no mental element, and also proposes a fusion of civil and criminal law. Furthermore, such broad proposals could affect large numbers of people.

- Clearly the proposed fusion of criminal and civil law, whereby breach of an injunction will become a criminal offence, there are fundamental concerns in relation to the Bill's conformity with the European Convention on Human Rights, and for that reason alone it deserves to have proper scrutiny.

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[71] Protection from Harassment Bill: democracy will be the main victim - Liberty *Press Release* 6.12.96

[72] Press Release of 6.12.96, *op cit*

Appendix

The USA and Canada

Reports in the media on the subject of stalking often refer to anti-stalking legislation in other countries, particularly the USA and Canada. In the USA, the law on this subject varies between different states. A 1992 Congressional Research Service Report noted that anti-stalking laws had been passed by the state legislatures in 27 states, and that a number of other states had legislation pending. The report commented that the "anti-stalking" statutes which had been passed varied in the type of behaviour which was sanctioned. Some statutes, such as California's anti-stalking laws, were narrowly drafted and restricted to those individuals who made credible threats of serious harm coupled with some overt following or harassment, (and in the case of California, require proof of intent) while others appeared to prohibit any repeated unwelcome contact between individuals, regardless of potential threat and raised concerns that they might punish non-threatening or even constitutionally protected activities, such as picketing. The report noted that widely or vaguely drawn statutes with inadequately defined terms risked being considered unconstitutional, either because they punished behaviour protected by the US constitution or because they were unconstitutionally vague.[73] (Under the due process clause of the Fourteenth Amendment to the US Constitution, legislation must be written with sufficient specificity so that a person of common intelligence can ascertain the limits of lawful behaviour)

The maximum penalties for the more general offences of harassment and for violations of court orders are higher in California than they are in England and Wales, although this does not in itself give any indication of the normal range of penalties handed down for these offences.

In Canada, 1993 amendments to the *Criminal Code* created an offence of "criminal harassment. The offence requires intent, in that there must be proof of knowledge or recklessness as to whether the victim is harassed, and is committed by someone who carries out any of a number of specified courses of conduct, such as repeatedly following a person or repeatedly communicating with them. It is punishable on indictment by up to five years' imprisonment.[74] Disobeying a lawful court order is also an indictable offence in Canada punishable by up to two years' imprisonment, unless some other punishment is expressly provided by law. Criminal action may therefore be taken against those who, for example, contravene civil court orders, such as "no contact" orders made in matrimonial disputes.[75]

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[73] *Anti-stalking Statutes: Background and Constitutional Analysis* - Kenneth R. Thomas, Congressional Research Service 26.9.1992

[74] Criminal Code s.264 (1)-(3)

[75] *Anti-stalking Laws: The United States and Canadian Experience* - Marilyn Pilon May 1993 Canadian Library of Parliament Background Paper BP-336E

The Home Office consultation paper refers to the experience of other countries in legislating on stalking and similar forms of harassment as follows:[76]

> Stalking, of course, is not a phenomenon restricted to England and Wales. The Government has therefore examined the approaches adopted in the United States of America, Canada and Australia to deal with stalking and also considered carefully how stalking is dealt with under Scottish law.
>
> Whilst all the specific anti-stalking statutes which have been examined recognised the terror that persistent obsessive harassment causes and sought to confront that problem, there was no common approach to the task. Nor does it appear on close examination, that any of these examples goes significantly beyond the position which already exists in English law, so far as providing a comprehensive response to the problem of stalking is concerned. It does not appear that any of the laws passed provide a model which could be used directly in England and Wales.
>
> Some statutes criminalised aspects of stalking which are already criminal offences in this country, such as threatening violence with illegal firearms, and dealt only with the most serious acts of stalking. Many of the statutes passed by state governments in the USA require the stalker to make actual threats against the victim and such instances are already covered by our existing criminal law. The model anti-stalking code proposed by the USA federal government would make illegal only those acts of stalking which put the victim in fear of bodily injury. In a similar way, the statute in Queensland seeks only to criminalise behaviour which threatens an unlawful act of violence.
>
> There has been little agreement in overseas laws on the issue of intent. Countries which have passed laws requiring the need to prove intent on the part of the stalker have experienced some difficulty in securing convictions.
>
> The statutes examined did not appear to provide for any civil law measures against stalking.

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[76] *Stalking - The Solutions: A Consultation Paper.* Home Office July 1996 para 4.3-4.7

Recent Research Papers on related subjects include:

96/99	The Crime (Sentences) Bill [Bill 3 of 1996-97]	01.11.96
96/39	Family Law Bill [HL] [Bill 82 of 1995/96] Domestic Violence	21.03.96

Civil Justice
Criminal Justice