The Equality & Justice Alliance is dedicated to advancing equality and promoting equal protection of the law for all Commonwealth citizens regardless of sex, gender, sexual orientation, gender identity or expression.
This report

This report commissioned by Sisters For Change provides a comparative review of harassment and sexual exploitation laws across the Commonwealth with the objective of informing Namibia’s development of anti-discrimination, harassment and sexual exploitation laws. The report explores the prevalence of discrimination, harassment, violence and sexual exploitation in Namibia and discusses a series of recent case studies demonstrating gaps in legal protection. The report considers international and regional human rights conventions and legal standards relevant to harassment, hate speech and sexual exploitation and analyses the criminal offences, civil wrongs and civil remedies which currently exist in Namibia to tackle physical, verbal and online harassment. The report concludes with a detailed examination of three different models of harassment laws from the Commonwealth countries of the United Kingdom (England and Wales); South Africa and Canada.

The purpose of the report is to support the development of legislation to tackle offline and online harassment, in particular harassment on the grounds of personal characteristics such as sex, race, disability, sexual orientation or gender identity and sexual exploitation of children and vulnerable adults in order to advance equality and strengthen equal protection of the law for all Commonwealth citizens.

Four separate volumes of appendices are available in PDF format providing excerpts of legislation on discrimination, harassment and sexual exploitation from across the regions of the Commonwealth – Africa, Asia, Caribbean and the Americas, Europe and Pacific – as well as relevant international and regional conventions and directives.
Authors and acknowledgements

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About Legal Assistance Centre

The Legal Assistance Centre is a public interest law centre in Namibia which strives to make the law accessible to those with the least access, through education, law reform, research, litigation, legal advice, representation and lobbying, with the ultimate aim of creating and maintaining a human rights culture in Namibia.

For more information visit www.lac.org.na.

About Sisters For Change

Sisters For Change (SFC) is an international NGO working to eliminate discrimination and violence against women and girls worldwide through legal reform, legal empowerment, legal accountability and legal advocacy strategies. SFC works to generate systemic change in how governments combat violence, structural change to give women voice and agency in justice systems and social change to end the social acceptance of violence against women and girls. SFC is active in the UK, India and Indonesia. As a member of the Equality & Justice Alliance, SFC is working to reform laws that discriminate against women and girls and LGBT people across the Commonwealth. SFC is currently working with the Governments of Namibia, Saint Lucia and Samoa on technical assistance programmes and is a member of the SADC Parliamentary Forum’s Technical Working Group on the development of a Model Law on Gender-Based Violence.

For more information visit www.sistersforchange.org.uk

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Appendices

The Legal Assistance Centre and Sisters For Change have compiled four separate volumes of appendices to accompany the EJA report, Comparative legal review of harassment and sexual exploitation laws across the Commonwealth. The appendices are available in PDF format and provide excerpts of legislation on discrimination, harassment and sexual exploitation from across the regions of the Commonwealth - Africa, Asia, Caribbean and the Americas, Europe and Pacific - as well as relevant international and regional conventions and directives. The Appendices are available to download at www.sistersforchange.org.uk.
Focus of review

COMMONWEALTH CASE STUDIES
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1. Social context: Prevalence of discrimination, harassment and sexual exploitation in Namibia
This report commissioned by Sisters For Change provides a comparative review of harassment and sexual exploitation laws across the Commonwealth with the objective of informing Namibia's development of anti-discrimination, harassment and sexual exploitation laws. The Namibian Constitution provides that all Namibians are equal before the law. Articles 10 and 23 of the Constitution:

- prohibit discrimination on the basis of sex, race, colour, ethnic origin, religion, creed or social or economic status;
- provide for the criminal punishment of the propagation of racial discrimination; and
- include affirmative action for previously-disadvantaged groups (specifically including women).

Nevertheless, racial discrimination, discrimination against women, discrimination against persons with disabilities and discrimination on the basis of sexual orientation and gender identity persist. In 2017, the Office of the Ombudsman conducted public hearings as part of an inquiry into the degree to which racism, racial discrimination, discrimination in general and tribalism are still prevalent in Namibia. Many people testified to the persistence of racism and ethnic tensions in everyday life. The report on the inquiry drew attention to cyber racism and recommended research to determine the adequacy of existing laws to combat cyber racism and what new legislation may be needed.

Namibia suffers from high levels of gender-based violence (GBV), including rape, sexual abuse of children and domestic violence. Namibia’s National Gender Policy 2010-2020 cites rape and domestic violence as being the most common manifestation of GBV, but also references stalking, emotional abuse and sexual exploitation. In its 2015 Concluding Observations on Namibia’s combined 4th and 5th State Party report under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CEDAW Committee noted its concern regarding persistent discriminatory stereotypes and patriarchal attitudes about familial and societal gender roles. In its 2016 Concluding Observations on Namibia’s State Party Report under the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee noted similar concerns. It also noted that discrimination on the basis of sexual orientation is not explicitly prohibited in Namibia and recommended the adoption of legislation, including hate crime legislation punishing homophobic and transphobic violence.

Namibia is party to the Convention on Rights of Persons with Disabilities (CRPD). Namibia’s 1st State Party Report under the CRPD was due on 3 June 2010 but has yet to be submitted. Literature on Namibia evidences many serious problems experienced by persons with disabilities, including discrimination in various spheres of life, exclusion from education employment and access to public buildings and lack of economic opportunities.

Many international instruments address harassment (both physical and online), hate speech and sexual exploitation. Under Article 144 of the Namibian Constitution, all international treaties ratified by Namibia are automatically incorporated into domestic law. The ICCPR includes the right not to be discriminated against and the right to freedom of expression. The Convention on the Elimination of All Forms of Racial Discrimination requires States Parties to condemn racial discrimination and pursue by all appropriate means a policy of eliminating racial discrimination. Similarly, CEDAW requires States Parties to condemn discrimination against women and pursue by all appropriate means a policy of eliminating discrimination against women. Though children’s rights are technically covered by general protections for human rights, the Convention on the Rights of the Child (CRC) enshrines rights which apply specifically to children. Children’s rights to protection from exploitation and harassment require a higher standard due to the special vulnerability of children.
Namibia has also ratified the African Charter on Human and Peoples’ Rights 1981 (ACHPR) which broadly addresses basic human rights in the African context, including the right to be free from discrimination and a prohibition against all forms of exploitation and inhumane treatment. The Protocol to the African Charter for Human and Peoples’ Rights on the Rights of Women in Africa 2003 (the Maputo Protocol) sets out specific obligations of States in relation to women’s rights, including protecting women from discrimination and protecting their dignity and bodily integrity. The African Charter on the Rights and Welfare of the Child 1990 focuses on positive children’s rights and includes the right to freedom of expression and the right to be free from attacks on one’s honour or reputation.

A number of international or regional treaties specifically focus on harassment and sexual exploitation and provide useful frameworks for reference, including the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007, the Council of Europe Convention on preventing and combating violence against women and domestic violence 2011 (Istanbul Convention) and the African Union Convention on Cyber Security and Personal Data Protection 2014.

Part 3 of the report analyses the range of existing criminal offences, civil wrongs and civil remedies in Namibia which can be applied to tackle physical, verbal and online harassment. A number of these remedies are limited to harassment of specific kinds (such as physical or sexual harassment) or in specific contexts (such as within a domestic relationship or in an employment setting). Criminal offences include intimidation; incitement to racial hatred; assault; the use of telecommunication devices such as mobile phones to harass persons or transmit obscene communications; and a range of offences relating to sexual exploitation and grooming. Civil wrongs include infringement of dignity; invasion of privacy; and sexual harassment in the workplace. When it comes to redress for harms such as harassment and hate speech, civil and criminal remedies may be considered in the alternative or in combination.

Part 4 of the report provides a detailed examination of harassment laws from the following three Commonwealth countries:

**A. United Kingdom: England & Wales**

The Protection from Harassment Act 1997 is examined in detail, together with the rich jurisprudence which has developed under this Act in terms of the application of harassment and stalking in a wide variety of contexts. The Act is comprehensive and includes four criminal offences of harassment and stalking and both civil and criminal remedies.

**B. South Africa:** The South African Protection from Harassment Act 2011, in contrast, provides a new civil remedy in the form of protection orders modelled on the protection orders available to victims of domestic violence, but creates no new criminal offences (other than criminal sanctions for violation of protection orders).

**C. Canada:** demonstrating yet another approach, in 1993 Canada established the offence of criminal harassment within its existing Criminal Code to deal with harassment and stalking behaviour. In respect of civil remedies, Canada relies on a general peace bond (a form of protection order issued by criminal courts), which was already in existence under the Criminal Code.

Four separate volumes of appendices have been compiled to accompany this report. The appendices are available in PDF format at www.sistersforchange.org.uk and provide excerpts of legislation on discrimination, harassment and sexual exploitation from across the regions of the Commonwealth – Africa, Asia, Caribbean and the Americas, Europe and Pacific – as well as relevant international and regional conventions and directives.
Introduction

In December 2018, Sisters For Change commissioned the Legal Assistance Centre, Namibia to conduct a comprehensive review of domestic, regional and international laws and standards and recognised good practice models on legislation in the following areas:

- Stalking and physical harassment, including an examination of civil and criminal remedies for harassment against persons targeted on the basis of personal characteristics, including sex, gender, race, religion, sexual orientation, gender identity, age or disability.

- All forms of online harassment, abuse and violence directed at children or adults, with particular attention to the protection of groups targeted on the basis of personal characteristics (including children; women; lesbian, gay, bisexual and transgender (LGBT) people; ethnic and racial minorities; people with disabilities).  

- Physical and online grooming and sexual exploitation of children.

The paper provides a comparative review and analyses of legislation on these three areas, in order to inform and guide the development of legislation on discrimination, harassment and sexual exploitation in Namibia.

Structure of this report

1. Part 1 of the report explores the prevalence of discrimination, harassment and sexual exploitation in Namibia. The Namibian Constitution provides that all Namibians are equal before the law. Nevertheless, racial discrimination, discrimination against women, discrimination against persons with disabilities and discrimination on the basis of sexual orientation and gender identity persist. Part 1 considers the types of discrimination and harassment experienced by individuals on the basis of their personal characteristics and explores levels of gender-based violence and violence against children in Namibia, including rape, sexual abuse and domestic violence. Part 1 concludes with a series of recent case studies of harassment and sexual exploitation of children.

2. Part 2 of the report considers international and regional human rights conventions and legal standards which apply to harassment (both online and offline), hate speech and sexual exploitation. The analysis focuses primarily on international treaties which Namibia has ratified but also includes reference to a small number of international and regional instruments specifically addressing harassment and child sexual exploitation which Namibia has not ratified.

3. Part 3 of the report discusses the range of existing criminal offences, civil wrongs and civil remedies in Namibia which can be applied to tackle physical, verbal and online harassment. A number of these remedies are limited to harassment of specific kinds (such as physical or sexual harassment) or in specific contexts (such as within a domestic relationship or in an employment setting). Part A defines and analyses relevant criminal offences, Part B analyses civil wrongs and remedies.

4. Part 4 provides a detailed examination of three different models of harassment laws from the following Commonwealth countries:
   A. United Kingdom: England & Wales
   B. South Africa
   C. Canada

1 The report does not include discussion of offences relating to child pornography or evidentiary issues arising in relation to cyber harassment, as the Namibian Electronic Transactions Bill [B.2 - 2019] contains explicit provisions on this.
The Legal Assistance Centre and Sisters For Change have compiled four separate volumes of appendices to accompany the EJA report, *Comparative legal review of harassment and sexual exploitation laws across the Commonwealth*. The appendices are available in PDF format and provide excerpts of legislation on discrimination, harassment and sexual exploitation from across the regions of the Commonwealth – Africa, Asia, Caribbean and the Americas, Europe and Pacific – as well as relevant international and regional conventions and directives. The four volumes comprise:

**Appendix 1: Models of harassment laws** – includes excerpts of harassment laws from across all regions of the Commonwealth as well as from a number of Non-Commonwealth countries including Germany, the United States and Bermuda.

**Appendix 2: Models of cyber harassment laws and related legislation** – includes excerpts of laws on online harassment and cybercrimes, voyeurism and laws on jurisdiction for the investigation and prosecution of cybercrimes from across the regions of the Commonwealth as well as international conventions on violence against women and child sexual exploitation and abuse.

**Appendix 3: Models of laws prohibiting discrimination, harassment and hate speech based on personal characteristics** – includes excerpts of laws prohibiting discrimination and harassment based on personal characteristics, aggravated offences and laws prohibiting hate speech, hate crimes and inciting violence from across the regions of the Commonwealth as well as and international and regional conventions prohibiting discrimination.

**Appendix 4: Models of laws on grooming and sexual exploitation of children** – includes excerpts of domestic laws on grooming and sexual exploitation from across the regions of the Commonwealth and international and regional conventions on the rights and protection of children.

The Appendices are available to download at www.sistersforchange.org.uk.
1. Social context: Prevalence of discrimination, harassment and sexual exploitation in Namibia

Social context:
Prevalence of discrimination, harassment and sexual exploitation in Namibia
Introduction

The Bertelsmann Transformation Index Report of 2018 provides an accurate assessment of current key areas of violence and conflict in Namibia. It states:

“Religious conflicts are absent from Namibia. However, conflicts rooted in social discrepancies and ethnic identities are on the rise, but remain relatively low scale and are not associated with any significant levels of physical violence. The issue of land (both urban and rural) has become an issue of growing contestation, which is increasingly related to regional (ethnic) identities regarding the mainly southern, central and eastern regions. Local minority groups feel discriminated against, as people from other areas of the country re-settle lands they were dispossessed of under German and South African colonial rule.

Violence, however, is so far restricted to individual forms of aggression (crime), which increasingly reflect social anomy and frustration. So-called passion murders, baby dumping, child abuse, rape and killing of girls and women have horrendous dimensions and are on the rise. The rate of suicide is among the highest on the continent. Forms of road rage are common and the rate of traffic deaths is also among the highest in the world. Though political and social conflicts remain largely peaceful and ethnic tensions, while possibly on the rise, do not (yet) appear to effect [sic] governance.”

A. Discrimination

The Namibian Constitution provides that all Namibians are equal before the law. The Constitution specifically:

- prohibits discrimination on the basis of sex, race, colour, ethnic origin, religion, creed or social or economic status;
- provides for the criminal punishment of the propagation of racial discrimination; and
- includes affirmative action for previously-disadvantaged groups (specifically including women).3 Nevertheless, racial discrimination, discrimination against women, discrimination against persons with disabilities and discrimination on the basis of sexual orientation and gender identity persist.

The 2017 Afrobarometer Survey in Namibia asked respondents about their personal experiences of discrimination on the basis of gender, religion, ethnicity or disability in the year preceding the survey (sexual orientation was not specifically included in this question.) Interestingly, there were relatively few reports of discrimination on the basis of any of these grounds other than ethnicity, with a quarter of the respondents reporting that they had experienced discrimination on this basis. However, in response to another question, about 44% of respondents stated that they would dislike having homosexuals as neighbours, which was far above the percentages who would be bothered by neighbours of different religions, ethnicities or nationalities.4

Racial and ethnic discrimination

In 2017, the Office of the Ombudsman conducted public hearings as part of an inquiry into the degree to which racism, racial discrimination, discrimination in general and tribalism are still prevalent in Namibia, and public views on how to address such attitudes. Many people testified to the persistence of racism and ethnic tensions in everyday life. The public felt that racism and ethnicity influence employment decisions in the public and private sectors, and racism in the school environment was also highlighted. Sport was identified as another sector where racism, discrimination, xenophobia and intolerance tend to emerge, including “the exchange of racial epithets between athletes, crowd abuse and taunts which are based on race, ethnic or cultural background remain at the elite and community levels”. The report on the enquiry also drew attention to cyber racism and recommended research to determine whether existing laws are sufficient to combat cyber racism and what new legislation might be needed in this regard.5 Namibia is a party to the Durban Declaration and Programme of Action against racism, racial discrimination, xenophobia and related intolerance, adopted by consensus at the 2001 World Conference against Racism (Durban Declaration). The Durban Declaration proposes concrete measures to combat racial discrimination and xenophobia and made a series of recommendations to states, including the following which have particular relevance in the present context:

- To support efforts “to ensure safe school environments, free from violence and harassment motivated by racism, racial discrimination, xenophobia or related intolerance”.6

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3 Constitution of Namibia, Articles 10 and 23.
6 Durban Declaration and Programme of Action against racism, racial discrimination, xenophobia and related intolerance 2001, para 123ff.
A. Discrimination cont

To create competent national bodies to investigate allegations of racial discrimination and to give protection to complainants against intimidation or harassment.7

The need for “a prompt and coordinated international response to the rapidly evolving phenomenon of the dissemination of hate speech and racist material through the new information and communications technologies, including the Internet; and in this context strengthening international cooperation”.8

Discrimination against women

Despite women’s progress in increased numbers in political bodies at national and local levels, and increased political visibility, gender stereotypes remain powerful – particularly in matters relating to sexuality and the family. The Office of the Ombudsman has reported that Namibian households are rooted in patriarchy and despite progress in the protection and respect of women’s rights, there remains a gap in the exercise of those rights for women as compared to men.9

In its Concluding Observations on Namibia’s combined fourth and fifth period reports pursuant to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CEDAW Committee noted its concern regarding persistent discriminatory stereotypes and patriarchal attitudes about familial and societal gender roles.10

Similarly, in its 2016 Concluding Observations on Namibia’s State Party Report under the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee noted its concern about “the persistence of discriminatory stereotypes and deep-rooted patriarchal attitudes regarding the roles and responsibilities of women, which furthermore constitutes a major cause of violence against women”.11

Discrimination on grounds of sexual orientation and gender identity

Discrimination and harassment on the basis of sexual orientation or gender identity continues to be a problem in Namibia, although there has been some improvement since the early post-independence years. The attitude of the government has generally moved away from outright condemnation of lesbian, gay, bisexual or transgender (LGBT) people to more of a “don’t ask, don’t tell” approach. Namibian law criminalises sodomy, although criminal charges involving consensual sodomy are almost non-existent.12 The 2013 Baseline Study Report on Human Rights in Namibia observed that bullying on the basis of sexual orientation and gender identity is a problem in Namibian schools, which sometimes results in drop-outs or even suicide.13

In April 2016, the UN Human Rights Committee, which monitors States Parties’ compliance with the ICCPR, expressed concern that discrimination on the basis of sexual orientation is not explicitly prohibited in Namibia, recommending the adoption of legislation. It also noted concerns regarding discrimination, harassment and violence against LGBT people, including cases of so-called “corrective rape” against lesbians. Amongst its recommendations was a proposal that Namibia “adopt hate crime legislation punishing homophobic and transphobic violence and vigorously enforce it”. In 2017, the Committee against Torture, which monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), expressed concern about “reports of the failure to investigate, prosecute and punish violence, harassment and ill-treatment, rape and murder of lesbian, gay, bisexual, transgender and intersex persons”, including “reports of abuse of gay men by law enforcement personnel”. It recommended that Namibia should “take all necessary measures to protect [LGBT] persons from threats and any form of violence” and ensure that violence against such persons is “promptly, impartially and thoroughly investigated and the perpetrators prosecuted and punished”, as well as giving consideration to decriminalising sexual acts between consenting adult men.14

7 Ibid., para 164(b).
8 Ibid., para 147(b).
14 UN Human Rights Committee, “Concluding observations on the second report of Namibia”, CCPR/C/NAM/CO/2, 22 April 2016 at para 9(b) and (c), 10(b) and (c): https://fortounohr.org.za/layout/15/newbodydownload.aspx?symbolno=CCPR/C/NAM/CO/2&lang=en.
Namibia’s National Human Rights Plan 2015-2019, approved by Parliament in late 2014, highlights the need to protect members of vulnerable groups against discrimination and lists amongst these vulnerable groups LGBT people.15

During 2019, there was been increasing discussion of the need to decriminalise consensual sodomy between adults, with the First Lady of Namibia speaking out strongly in favour of such a move.16

**Discrimination against persons with disabilities**

Namibia is a party to the Convention on Rights of Persons with Disabilities (CRPD) and also to its 2006 Optional Protocol. Namibia’s first State Party Report under the CRPD was due on 3 June 2010 but has yet to be submitted.17 The literature on Namibia identifies many serious problems experienced by persons with disabilities, including discrimination in various spheres of life, exclusion from education employment and access to public buildings and lack of economic opportunities.

No data on the targeting or harassment of persons with disabilities currently exists. Anecdotal evidence indicates that women with disabilities may be specific targets of gender-based violence.18 The National Plan of Action on Gender-Based Violence 2012-2016 includes the following observations:

“Persons with disabilities are likely to be more vulnerable to rape than others for many reasons, the most obvious one being that they often have less capability for physical self-defence. Other sources of vulnerability may include difficulty in reporting rape due to communication problems, a greater amount of dependence on other people for care (who may in some cases take advantage of this situation) or the lack of a caretaker to protect them from harm. Persons with disabilities may also be hampered in laying charges. Furthermore, even when charges are laid, the fact of the disability may interfere with the victim’s ability to provide convincing evidence of a rape. For instance, a blind victim cannot provide a description of a rapist’s appearance, and a mentally disabled victim is unlikely to be a credible witness. Anecdotal evidence indicates that the extent of GBV against persons with disabilities is likely to be much larger than reported cases would indicate. Because persons with disabilities often find themselves isolated from mainstream society, and because some forms of disability may interfere with the ability to communicate, such persons may endure sexual abuse for longer periods of time than others before it comes out into the open. Persons with mental disabilities or disorders in particular may face other forms of abuse or neglect by their care takers, either at home or in institutional care.19

**Discrimination on grounds of religion**

The Republic of Namibia is explicitly established as a secular state by Article 1(1) of the Namibian Constitution. Article 19 protects the right of every person “to enjoy, practise, profess, maintain and promote” any religion, subject to the terms of the Constitution, the duty to respect the rights of others and the national interest. Article 10 prohibits discrimination on the basis of religion or creed, amongst other grounds.

According to the Namibia International Religious Freedom Report 2017, approximately 97% of the Namibia population identifies as Christian.20 Religious groups are not required to register with the government, although some proposals for registration have been discussed in recent years due to concerns about exploitation of congregation members by some religious groups.21

The Racial Discrimination Prohibition Act 26 of 1991 contains a provision on racial discrimination in respect of access to religious services; providing as follows: “No person shall deny any other person access to any religious services; providing as follows:

“No person shall deny any other person access to any organised religious service conducted by a religious institution because such other person is a member of a particular racial group and not a member of that institution.”22

No reports have been located concerning religious intolerance, denials of religious freedom or any harassment of persons on the basis of their religious faith.23

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16 The First Lady of Namibia opened her keynote address at this topic at an event entitled ‘The Journey’, organized by the National Council from 12-14 June in the Parliament Gardens. This event was aimed at stakeholders from Parliament, ministries, offices, civil society, faith-based organisations, musicians, artists and volunteers, and intended to raise awareness about a broad range of human rights issues, including trafficking, GBV and child abuse. See ‘Sodomy laws are days numbered’, Namibian Sun, 14 June 2019: https://www.namibiansun.com/news/sodomy-laws-are-days-numbered-geingos42019-06-13/.
21 Information from Ministry of Justice, Windhoek, 2019.
B. Gender-based violence

Gender-based violence (GBV) is rooted in gender inequality and continues to be one of the most pervasive human rights violations globally. GBV is violence directed against a person because of their gender. Both women and men experience gender-based violence but the majority of victims are women and girls. Gender-based violence against women constitutes discrimination against women under Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and therefore engages all obligations under the Convention. CEDAW Article 2 provides that the overarching obligation of States parties is to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, including gender-based violence against women. That is an obligation of an immediate nature – delays cannot be justified on any grounds, including economic, cultural or religious grounds. In its General Recommendation No. 19 (1992) (GR 19) on violence against women, the CEDAW Committee indicated that, with regard to gender-based violence against women, the obligation comprises two aspects of State responsibility for such violence – that which results from the acts or omissions of both the State party or its actors, on the one hand, and non-State actors, on the other.

Namibia, like so many countries around the world, suffers from high levels of GBV, including rape, sexual abuse of children and domestic violence. Political will to address GBV has been evident in the many statements, conferences and plans focused on GBV, but implementation continues to lag behind good intentions, with few significant strides made in prevention or reduction of GBV or in state responses to victims of GBV. Namibia’s National Gender Policy 2010-2020 cites rape and domestic violence as being the most common manifestation of GBV, but also mentions “stalking, emotional abuse and sexual exploitation” as being linked to gender-based violence.25

C. Violence against children

The problem of violence against children in Namibia is openly acknowledged and the incidence of child abuse is known to be high, but violence against children has never been the primary focus of a major Namibian research study. UNICEF provides this overview of the Namibian situation:

“Violence against children takes place in families, homes, schools, communities and online. It is associated with crime, the use of weapons, gangsterism, human trafficking, living on the streets, harmful traditional practices, gender-based violence, cybercrime and assault by authority figures such as the police. In schools, children experience a whole range of violations at the hands of other learners, ranging from bullying and cyber-bullying to being punched or being forced to do things with their bodies against their will. Furthermore, in poverty-stricken communities, transactional sexual relationships between teachers and students are likely to take place. Violence in schools is also often a reflection of what happens in the broader environment, with arguments between parents at home or children’s wrongdoings being dealt with harshly. Children are not taught peaceful conflict resolution, and resort to violent means to settle disagreements.”26

Domestic violence catches children in the cross-fire, with more than one in every five victims of domestic violence who applied for protection orders stating that their children had been harmed or threatened by the abuser.\textsuperscript{27} Sexual abuse within the family is also a severe problem.\textsuperscript{28} School, like the family environment, is an unsafe place for many children, with nearly half of the learners who responded to a national SMS survey in 2011 indicating that they did not feel safe at school.\textsuperscript{29} Bullying and physical violence at school are widespread.\textsuperscript{30}

\textbf{Violence against children on the basis of sexual or gender diversity}

A 2014-2015 study supported by UNESCO examined gender-based violence, including violence related to sexual and gender diversity. The findings revealed that stigma and discrimination against lesbian, gay, bisexual, transgender or intersex (LGBTI) people is present in Namibian schools.\textsuperscript{31} The key findings of the survey with regard to Namibia were:

\begin{itemize}
  \item \textbf{\textcircled{\textapprox}} 41\% of the survey respondents reported that violence related to gender diversity occurs in Namibia and in Namibian schools.\textsuperscript{32}
  \item \textbf{\textcircled{\textapprox}} School violence is mostly verbal, but frequently also physical. Sexual violence is possibly underreported “because the unwanted touching of breasts, bottoms and other parts of the body may have been normalized in schools and is no longer perceived as violence”.\textsuperscript{33}
\end{itemize}


\textsuperscript{29} Theuna Keulder, Improving civic participation of the Youth in Namibia through the use of mobile phones and engagement through a Study Circle program in schools, Windhoek, Namibia Institute for Democracy, 2011, p. 22; https://www.unicef.org/namibia/NDUNICEF_2011_Listen_Loud_Final_Report.pdf.

\textsuperscript{30} Global School-based Student Health Survey Namibia 2013 Fact Sheet at 2; Report on the Namibia School-based Student Health Survey 2004, Windhoek: Ministry of Health and Social Services, 2008 at 15, Table 3.3.4 at 14, and Table C.3.12, p. 77. Note that the discussion of the 2004 survey statistics in the narrative of the report is misleading. The figures reported here have been recalculated from Table 3.3.4: https://www.who.int/ncds/surveillance/gshs/2013_Namibia_Fact_Sheet.pdf; See also Patrick Burton, Lezanne Leoschut and Masa Popovac, Protecting the Flame: Overcoming violence as a barrier to education in Namibia, Cape Town: Centre for Justice and Crime Prevention, 2011; http://www.cjcp.org.za/uploads/2/7/8/4/27845461/monograph_8_-_protecting_the_flame_namibia.pdf; Aune Ndeumona Sam, “An Investigation into the Nature of Bullying in Namibia’s National Safe Schools Framework, Part A: Introduction and Overview, Windhoek: Ministry of Education, Arts and Culture and UNICEF, 2018 pp.6 and 13: https://unesdoc.unesco.org/ark:/48223/pf0000244754.

\textsuperscript{31} Ibid., p. 37

\textsuperscript{32} Ibid., p. 38


\textsuperscript{34} Ibid.; see the references to cyber bullying at pp. 4, 6, 9 and 7 and the definition of grooming of p. 5.

\textsuperscript{35} Ibid.; see the references to cyber bullying at pp. 4, 6, 9 and 7 and the definition of grooming of p. 5.

\textsuperscript{36} Ibid.; see the references to cyber bullying at pp. 4, 6, 9 and 7 and the definition of grooming of p. 5.

The constitutional guarantees of freedom of speech and freedom of the press are generally respected in Namibia, but not yet thoroughly-entrenched. The 2018 Country Report on Namibia published by the Bertelsmann Transformation Index included the following trenchant analysis of freedom of speech and press in Namibia:

“Popular protests in Namibian cities during 2016 were on several occasions restricted, and the police on rare occasions have prohibited or physically intervened (e.g. pepper spray, rubber bullets) in demonstrations. In the northern parts of the country, where SWAPO support exceeds 90% of the popular vote, freedom of speech and freedom of association are imperfect. Namibia has a very plural (print) media landscape. A variety of independent newspapers are able to report freely and perform as watchdogs. Investigative journalism is an integral part of a few newspapers. In contrast, the dominant state broadcaster has acted cautiously, refraining from promoting any opinions that are likely to upset the dominant party in political power.

Political officeholders are often non-cooperative when it comes to the independent media, while the minister of information announced in 2016 plans to regulate the media more closely. This provoked concerns among the independent media, while the president quickly reassured them that their liberties will not be restricted. But he also stresses that media outlets should act responsibly, which could be understood as not criticizing the government too strongly. For several years, Journalists Without Borders has ranked Namibian among the top 20 countries in the world in terms of media freedom.

An independent media ombudsman as well as the local branch of the Media Institute for Southern Africa (MISA) are strong advocates for media freedom and critical of state intervention.

Occasionally, freedom of expression is (ab)used to justify offensive language bordering on hate speech. Instances of the use of offensive language include statements by political officeholders, who claim that it is their civil right to speak out. The government announced in 2016 a plan to give preference to state media for advertising, which might be used as a means to increase pressure on privately owned media outlets. Concerns among independent media outlets that the state might be tempted to interfere more have increased.

…

Namibia’s constitution enshrines a wide range of civil rights, which are to a large extent also respected in practice. Especially the freedom of speech is a much-valued part of Namibian society, as well as religious freedom. While hate speech has occasionally been a matter of concern, especially when it comes to abusive or racist insults, given that the range of statements that can be protected under the freedom of speech is very liberal. At times, statements protected under freedom of speech disrepect the protection of another person’s private sphere and can be intimidating, especially when political officeholders threaten opponents.”

Like many African countries, Namibia is characterised by a strong sense that elders and leaders should be respected – with this admirable principle sometimes being taken to excess. For example, satirical political cartoons and outspoken protests have periodically inspired complaints and calls for legal action against statements which are “insulting” to political leaders. This sensitivity to insult is reflected in a recent law which makes it a serious offence to display contempt, “whether by words, either spoken or written” for a national symbol (including the Namibian flag, coat of arms, national anthem, national seal and presidential standard) or to hold a national symbol up to ridicule. The offence is punishable by a fine of up to N$50 000 or imprisonment for up to five years, or both.
E. Case studies of harassment and sexual exploitation

As already noted above, data-gathering, research and documentation of levels of discrimination and harassment across the range of protected grounds (sex, gender, race, religion, sexual orientation, gender identity, age or disability) and prevalence of sexual exploitation are severely lacking.

The case studies discussed below were reported to the Legal Assistance Centre by clients or conveyed in interviews and discussions with NGOs or individuals. While there are reports of discrimination, negative statements and stereotyping of persons on the basis of personal characteristics, including sex, race, ethnicity, sexual orientation, gender identity and disability, there are few reports of stalking or harassment on the grounds of personal characteristics. Cases of this type of harassment may be unacknowledged or unreported because it is not a well-recognised or understood concept as well as due to the vulnerability of persons targeted and their fear of coming forward to report.

Physical pursuit of an adult woman

A 28-year-old working woman habitually caught a taxi after work behind the shop where she usually bought groceries. One day she noticed a man watching her get into the taxi. She saw the same man watching her a second time, and a third time, which made her feel suspicious and anxious. One evening after work, she had climbed into the back seat of a taxi when this man ran over and tried to climb in beside her. She managed to jump out of the taxi before it moved off.

Cyber harassment of women and girls

In 2013 a Namibian woman successfully sought a High Court interdict against her ex-boyfriend after he had posted allegedly defamatory material about her on his Facebook page – including allegations of promiscuity, photographs of her, coarse statements about genitalia and sexual acts, and false statements that she had undergone multiple abortions. He also posted photos of what he claimed to be text messages from the ex-girlfriend, but she claimed that these were faked. The online harassment was combined with persistent telephone calls and text messages as well as physical stalking at her home and at her workplace. The High Court granted an interdict ordering the ex-boyfriend to remove the defamatory material from Facebook.

This incident is not an anomaly. For example, Regain Trust (a local NGO which provides counselling and advocacy around gender-based violence) says that young girls have reported having had nude pictures of themselves circulated on social media, as well as incidents of gender-based violence that are video-recorded and circulated online.

Cyber harassment of children

LifeLine/ChildLine Namibia is an NGO that offers free telephone counselling on abuse and family problems, as well as conducting various outreach activities. It received 25 cases of cyber harassment during the period May-December 2018, in the form of cyberbullying, grooming, sexting/sexortion and the sharing of personal information, images and videos. According to LifeLine/ChildLine Namibia, children do not immediately identify or report online abuse, but more often disclose after careful probing.

44 Interview with Regain Trust, 27 February 2019.
E. Case studies of harassment and sexual exploitation cont

The group notes that online and offline abuse “often take place concurrently and cannot clearly be separated from each other”.45 To date, cases reported have resulted mostly from outreach efforts aimed at selected schools in only half of Namibia’s 14 regions.46

The following are amongst the cases reported to LifeLine/ChildLine Namibia in 2018:

〜 One girl reported accepting a friend request from someone she did not know when she was new to Facebook. The “friend” sent her a virtual bunch of flowers, and, feeling unsure of how to respond to this, she sent him a smiley emoji. He then sent her a video containing a picture of a man masturbating. She deleted the video, went offline and told her cousin about the experience since she did not feel comfortable to speak to her parents. She reports, “I stopped using Facebook for 2 years because I was really scared but I am back online now.”47

〜 A boy reported posting a picture of himself on social media and receiving nasty comments in response, which made him feel “inferior and alone”. He did not respond to the comments. But rather confided in his aunt who advised him to “let it go”.48

〜 Several learners reported that they received nude photos from strangers. One learner reported that someone hacked into her Facebook account and then started contacting men requesting sexual favours. This was reported to her parents, but they accepted that these communications did not really come from her. One boy became Facebook friends with what appeared to be a boy about his age, but he later found out he was talking to an older man who lives nearby. One learner reported that her 18-year-old friend had committed suicide after sexual images of her were exposed.49

Moving to other sources of information, one local children’s home interviewed by the Legal Assistance Centre in 2019 reported that a 17-year-old gay boy in their care reported being ridiculed online about his sexual orientation.50

Grooming

The issue of grooming was given impetus by an online film, Dragan’s Lair, in which Lucy Witts told the story of the grooming and abuse of herself and her sister Sophy Witts by their step-father, Dragan Vujicin, in Namibia during the 1970s and 1980s. In a separate incident years later, Vujicin was convicted of sexual abuses and trafficking in respect of four minors, three aged 9 and one aged 7 at the time when the crime first took place. During 2013 and 2014, Vujicin enticed the four girls into his home with “compassion, money, toys, sweets and food”. Some of the victims lived in neighbouring shacks on the same property, while other victims lived on the same street.51 Vujicin exposed himself to the girls and sexually fondle them; he made them watch pornographic films and made them perform sex acts on him. None of the girls disclosed the abuse to anyone, including their parents. Vujicin was finally arrested in 2014.52 He was convicted of 7 counts of rape and 4 counts of human trafficking in February 2019, and sentenced to 35 years in prison.53

In another report of grooming, a Windhoek-based children’s home told the Legal Assistance Centre in 2019 that they have had problems with volunteers from overseas who engage in grooming of young girls at the home, and promise to take them abroad. They have experienced difficulties in having such cases prosecuted because these volunteers do not remain in Namibia.54

48 Ibid., based on information, p.12.
49 Ibid., based on information, p.13.
50 Interview with children’s home in Windhoek, 28 February 2019.
51 “Man guilty of child rape at Swakop”, The Namibian, 1 February 2019. Vujicin was sentenced to five years for each of the 4 counts of human trafficking and 10 years for each of the 7 rape convictions, totaling 90 years; however as some of the sentences will run concurrently, his effective sentence is 35 years. https://www.namibian.com.na/75212/read/Man-guilty-of-child-rape-at-Swakop.
52 Ibid.
54 Interview with children’s home in Windhoek, 28 February 2019.
2. International and regional legal standards on harassment, hate speech and sexual exploitation

International and regional legal standards on harassment, hate speech and sexual exploitation
Introduction

Many international instruments address harassment (both online and offline), hate speech and sexual exploitation. Under Article 144 of the Namibian Constitution, all international treaties ratified by Namibia are automatically incorporated into domestic law. Part 2 of the report focuses primarily on international treaties which Namibia has ratified. Reference is also made to a small number of international and regional instruments of particular relevance which have not been ratified by Namibia.

The majority of the key international human rights treaties were implemented before the advent of the internet and social media. Nonetheless, amongst international bodies, there is a consensus that provisions contained in these international and regional treaties are sufficiently broad to address current harms such as cyber-harassment. However, there are as yet few if any legal decisions applying the key international human rights treaties which Namibia has ratified to issues such as cyber harassment and cyber surveillance.
Every member state of the United Nations (UN) has adopted the Universal Declaration of Human Rights (UDHR). This UDHR was drafted after World War II, in an effort to prevent repetitions of the War’s atrocities. The UDHR sets out fundamental human rights to be enjoyed by every human being around the world. The focus of the instrument is on equality of all humans.\(^{58}\) It prohibits discrimination, cruel and degrading treatment, and arbitrary attacks on a person’s family, reputation or correspondence.\(^{59}\) On the other hand, the UDHR encourages freedom of expression, which must be kept in mind when considering the scope and content of laws to prevent and punish harassment.\(^{60}\)

**International Covenants on Civil & Political Rights and Economic, Social & Cultural Rights 1966**

The UDHR prompted the conclusion of international treaties with more specific protections which build on the basic human rights endorsed by the UDHR. The International Covenant on Civil and Political Rights 1996 (ICCPR) focuses on the civil and political rights of individuals, including the right not to be discriminated against and the right to freedom of expression\(^{61}\) and is complemented by the International Covenant on Economic, Social and Cultural Rights 1996 (ICESCR) which protects human rights in the context of employment, family life, health, cultural life and the right to an adequate standard of living.\(^{62}\)

**Convention on the Elimination of All Forms of Discrimination Against Women 1979**

The UN Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) guarantees equality between men and women and prohibits discrimination against women on the basis of their sex in various spheres of life.\(^{63}\) Though preceding international instruments prohibited discrimination on the basis of sex, there was no consolidated treaty which dealt with the issue of discrimination against women before CEDAW.\(^{64}\) In 1992, General Recommendation 19 was adopted by the CEDAW Committee, making it clear that gender-based violence constitutes a form of discrimination against women.\(^{65}\)

**Convention on the Elimination of All Forms of Racial Discrimination 1965**

Of the primary international treaties, the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD) was the first to come into force and has the third highest number of ratifying parties.\(^{66}\) As is the case with CEDAW, the foundation for CERD was based on the UDHR call for racial harmony. Following anti-Semitic rhetoric around the world, the UN General Assembly originally adopted a resolution in 1960 targeting not only race, but also manifestations of hatred based on religion and nationality.\(^{67}\) Intense debate took place among UN countries about whether to make a binding international instrument about these topics, as well as whether or not racial and religious discrimination should be contained together in one instrument. Ultimately, it was decided that the issue of race should stand alone.\(^{68}\) CERD concerns discrimination based on race, colour and ethnic origin. The Convention specifically addresses segregation and apartheid views and the need to eradicate propaganda which espouses such views, while at the same time advocating for freedom of expression.\(^{69}\)
A. International legal framework cont

Constitution on the Rights of the Child 1989
The Convention on the Rights of the Child 1989 (CRC) is the most widely ratified human rights treaty in the world. Its most important principle is that any decision related to a child must be in the best interests of the child, defined for purposes of the Convention as being any person below the age of 18. Though children’s rights are technically covered by general protections for human rights, the CRC enshrines rights which apply specifically to children, giving children a distinct protected status. Children’s rights to protection from exploitation and harassment require a higher standard due to the special vulnerability of children. The CRC introduced the concept of “the best interests of the child”, which has had a profound impact on children’s rights domestically and internationally.

Article 34 of the CRC protects children from all forms of sexual abuse and exploitation and requires State Parties to take all reasonable measures to prevent:

a. inducement or coercion of a child to engage in unlawful sexual activity;
b. use of children in prostitution or other unlawful sexual practices; or
c. use of children in pornography.

State Parties to the CRC also undertake to support recovery and reintegration for children who have been victims of exploitation, abuse and neglect. Children also have the right to freedom of expression, which may be relevant in certain cases of harassment and exploitation.

Namibia has also ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000, which addresses various types of child exploitation. This Protocol focuses on eradicating exploitation of children for sexual or other purposes. The Protocol states in its Preamble that part of the reason for its enactment is the increase in child pornography available on the internet. It emphasises that State parties must work together to investigate offences of this type and enshrines a commitment to global cooperation in bringing to book people who perpetuate such abuses. This Protocol does not specifically mention grooming as one of the types of child sexual exploitation but it is likely that “grooming” as a concept became more prominent following the enactment of the Protocol; in any event, grooming is essentially an early component of the three key offences covered by the Protocol.

Aspects of child sexual exploitation are also addressed in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplemented by the United Nations Convention against Transnational Organized Crime (Palermo Protocol) and the International Labour Organisation (ILO) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, both of which Namibia has ratified.

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71 Ibid., p.4.
73 Ibid., Article 13.
75 Ibid., Preamble.
76 Ibid.
77 Ibid., Articles 5 and 6.
The African Charter on Human and Peoples’ Rights 1981 (ACHPR) broadly addresses basic human rights in the African context, including the right to be free from discrimination and a prohibition against all forms of exploitation and inhumane treatment. Namibia has also ratified the Protocol to the African Charter for Human and Peoples’ Rights on the Rights of Women in Africa 2003 (Maputo Protocol), which sets out specific obligations of States in relation to women’s rights, and the Southern African Development Community (SADC) Protocol on Gender and Development. These are discussed below.

**The Maputo Protocol 2003**

The Maputo Protocol was adopted by the African Union in 2003 and entered into force in 2005. The Maputo Protocol protects women’s human rights across the spectrum of civil, political, social, economic, cultural, environmental and sexual health rights, including:

- The right to dignity and respect as a person and to be protected from all forms of violence (Article 3).
- The right to life and the integrity and security of her person (Article 4).
- The enjoyment of equal rights and to be regarded as equal partners in marriage, separation, divorce and annulment of marriage (Article 6).
- The right to equality before the law and to the equal protection and benefit of the law (Article 8).
- The right to participate in the political and decision-making process (Article 9).
- The right to education and training and equal opportunities in work (Articles 12 and 13).
- The right to health and reproductive rights (Article 14).

Under the Protocol, States Parties must take all appropriate legislative, institutional, budgetary and other measures to combat all forms of discrimination and harmful practices against women, including:

- Incorporating in their national constitutions and domestic law the principle of equality between women and men and ensuring its effective application.
- Introducing legislation or regulations to prohibit all forms of discrimination and harmful practices and taking corrective and positive action in those areas where discrimination against women in law and in fact exists.
- Modifying patterns of conduct of women and men though public awareness and education strategies aimed at eliminating harmful cultural and traditional practices and harmful gender stereotyping.
- Integrating a gender perspective in their legal and policy decisions, programmes and plans.
- Supporting national, regional and international initiatives aimed at eliminating all forms of discrimination against women.

The Protocol includes special protections for elderly women, women in distress and women with disabilities.

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82 Ibid., Articles 22-24.
The SADC Protocol on Gender and Development 2008

The SADC Protocol on Gender and Development was signed in Johannesburg, South Africa, on 17 August 2008 and came into force on 22 February 2013. The Protocol aims to empower women, eliminate discrimination and achieve gender equality through the implementation of gender responsive legislation and policies, and to deepen regional implementation of strategies in pursuit of gender equality. The Protocol is the first legally binding commitment made by SADC Member States towards addressing gender-based violence (GBV). It defines GBV as “all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or undertake the imposition of arbitrary restriction on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.”

State Parties are required to legislate to provide effective remedy to victims of GBV including treatment and services providing emergency contraception, access to post exposure prophylaxis and access to specialised services such as counselling. The Protocol calls on States Parties to review laws and procedures to eliminate gender bias but recognises that alongside policies and legislation additional measures must be taken to combat GBV.


The African Charter on the Rights and Welfare of the Child 1990 (ACRWC) applies the CRC to the African context, focusing on positive children’s rights rather than prohibitions. It includes the right to freedom of expression and the right to be free from attacks on one’s honour or reputation.83 One interesting addition in the ACRWC is Article 26, which states that Parties undertake to make children living under Apartheid and other oppressive regimes the highest priority.84 Article 27 of the ACRWC commits States Parties to the prevention of sexual exploitation of children, particularly in relation to sexual activity, prostitution and pornography.85

The African Youth Charter 2006

The African Youth Charter 2006 delineates similar rights for youths in Africa (defined as those between the ages of 15 and 35 years) with respect to non-discrimination, privacy and freedom of expression.86

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84 Ibid., Article 26.
85 Ibid., Article 27. This Article aligns with the Optional Protocol to the CRC.
C. Specific international and regional instruments on harassment and child sexual exploitation

A number of international and regional treaties and non-binding international instruments specifically focused on harassment and sexual exploitation provide useful frameworks for reference. These are discussed briefly below.

**HARASSMENT BASED ON PERSONAL CHARACTERISTICS**

The international legal framework addressing harassment targeting persons based on their personal characteristics is in large part based on the non-discrimination provisions of the key international and regional instruments. There are also international agreements which relate to specific personal characteristics, most notably race and xenophobia, which are explicitly addressed in Article 20(2) of the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Additional Protocol to the Convention on Cybercrime concerning criminalisation of acts of a racist and xenophobic nature committed through computer systems; and the African Union Convention on Cybersecurity and Personal Data Protection (Malabo Convention).

**HARASSMENT AND STALKING OF WOMEN**

The Beijing Platform for Action

The Beijing Platform for Action was formulated at the Fourth World Conference on Women in 1995. After two weeks of debate, the Platform for Action targeted 12 areas for female empowerment, making it the most far-reaching international commitment to women’s rights in the world. Namibia was amongst the 189 States that adopted this non-binding Platform. However, no country has yet to fully reach the level of equality envisioned by the Platform. The Platform for Action’s definition of violence against women includes sexual harassment at work, schools and elsewhere. The eradication of harassment as an aspect of violence against women has therefore been a goal on the world stage for over 20 years.

**Convention on preventing and combating violence against women and domestic violence 2011 (Istanbul Convention)**

The Istanbul Convention provides a comprehensive blueprint for national responses to violence against women and domestic violence, and specifically addresses stalking in Article 34 – making it the first international convention to explicitly recognise and call for action against this abuse. It originated with the Council of Europe, but is open to ratification by any country in the world and is intended to be a source of guidance and inspiration for all governments on these issues, regardless of whether or not they formally become parties to it.

The Istanbul Convention is unique because it specifically addresses stalking, in Article 34, making it the first international convention to explicitly recognise and call for action against this abuse. Before the advent of this Convention, many Council of Europe States (like Namibia) did not have a stalking provision in either criminal or civil law. Namibia is not a party.

**Sexual harassment**

Article 40 of the Istanbul Convention requires States Parties to take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.

**Stalking**

Article 34 of the Istanbul Convention requires States Parties to take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is penalised. The Explanatory Report to the Convention provides the following guidance in relation to Article 34:

90 Ibid. As of July 2019, the Convention had been ratified by 34 member states of the Council of Europe, but no non-member state had yet joined it. See “Chart of signatures and ratifications of Treaty 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, Status as of 28/07/2019”. https://rm.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures
92 Ibid.
93 Council of Europe Explanatory Report to the Convention on Cybercrime, 2001: https://rm.coe.int/CofEWA/001/CommonSearchServices/DisplayCITMCContentDocumentId=90000016800cc50
C. Specific international and regional instruments on harassment and child sexual exploitation cont

“182. This article establishes the offence of stalking, which is defined as the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety. This comprises any repeated behaviour of a threatening nature against an identified person which has the consequence of instilling in this person a sense of fear. The threatening behaviour may consist of repeatedly following another person, engaging in unwanted communication with another person or letting another person know that he or she is being observed. This includes physically going after the victim, appearing at her or his place of work, sports or education facilities, as well as following the victim in the virtual world (chat rooms, social networking sites, etc.). Engaging in unwanted communication entails the pursuit of any active contact with the victim through any available means of communication, including modern communication tools and ICTs.

183. Furthermore, threatening behaviour may include behaviour as diverse as vandalising the property of another person, leaving subtle traces of contact with a person’s personal items, targeting a person’s pet, or setting up false identities or spreading untruthful information online.

184. To come within the remit of this provision, any act of such threatening conduct needs to be carried out intentionally and with the intention of instilling in the victim a sense of fear.

185. This provision refers to a course of conduct consisting of repeated significant incidents. It is intended to capture the criminal nature of a pattern of behaviour whose individual elements, if taken on their own, do not always amount to criminal conduct. It covers behaviour that is targeted directly at the victim. However, Parties may also extend it to behaviour towards any person within the social environment of the victim, including family members, friends and colleagues. The experience of stalking victims shows that many stalkers do not confine their stalking activities to their actual victim but often target any number of individuals close to the victim. Often, this significantly enhances the feeling of fear and loss of control over the situation and therefore may be covered by this provision.

186. Finally, just as it is the case with psychological violence, Article 78, paragraph 3, provides for the possibility of any state or the European Union to declare that it reserves the right to provide for non-criminal sanctions, as long as they are effective, proportionate and dissuasive. Providing for a restraining order should be seen as a non-criminal sanction within the possibility of a reservation. Once more, the intention of the drafters was to preserve the principle of criminalisation of stalking, while allowing flexibility where the legal system of a Party provides only for non-criminal sanctions in relation to stalking.”

Aggravating circumstances

Article 46 specifically requires States to take legislative or other measures to ensure that the following circumstances (insofar as they do not already form part of the constituent elements of the offence) are considered as aggravating circumstances in the determination of sanctions relating to the offences included in the Convention:

(a) the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;

(b) the offence, or related offences, were committed repeatedly;

(c) the offence was committed against a person made vulnerable by particular circumstances;

(d) the offence was committed against or in the presence of a child;

(e) the offence was committed by two or more people acting together;

(f) the offence was preceded or accompanied by extreme levels of violence;

(g) the offence was committed with the use or threat of a weapon;

(h) the offence resulted in severe physical or psychological harm for the victim; and

(i) the perpetrator had previously been convicted of offences of a similar nature.
Restraining or protection orders
Article 53 requires States Parties to take legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of the Convention and that such protection orders are:
- available for immediate protection and without undue financial or administrative burdens placed on the victim;
- issued for a specified period or until modified or discharged;
- where necessary, issued on an ex parte basis which has immediate effect;
- available irrespective of, or in addition to, other legal proceedings;
- allowed to be introduced in subsequent legal proceedings.

Specialist support services
The Convention requires States Parties to set up specialised support services for victims of any type of violence covered by the Convention, including services for victims of stalking.

CYBER HARASSMENT
Council of Europe Convention on Cybercrime 2001

In 1996, the European Committee on Crime Problems (CDPC) convened a committee of experts to develop a binding international instrument on cybercrime. Given the transnational nature of many cyber offences, the CDPC concluded that the only effective way to prevent misuses of internet technology was to tackle the problem internationally. The Council of Europe’s Convention on Cybercrime 2001 (Budapest Convention) is the first international treaty addressing cybercrime. Like the Istanbul Convention, the Budapest Convention is not limited to European countries and has in fact been ratified by Commonwealth countries outside Europe (including Canada and Australia), and also the United States. In Africa, the Convention has been joined by Cabo Verde, Ghana, Mauritius and Senegal, and signed by South Africa.

The Convention has three essential goals:
1. to harmonise national laws on cyber-crime;
2. to identify investigatory powers necessary to prosecute and prove crimes that occur via the internet; and
3. to set up a feasible international system of cooperation.

More specifically, the Convention calls for the criminalisation of content-related offences, including online child pornography (which is outside the scope of this paper), hate crimes and the infringement of copyright and related rights. State Parties to this Convention are required to address these three areas, amongst others, in their domestic legislation.

Notably, despite being the first and undoubtedly the most prominent international treaty regarding internet offences, the Budapest Convention does not mandate the criminalisation of cyber harassment. In fact, there is no mention of cyber harassment in the Explanatory Report as a crime which was even considered for inclusion. Potential components of cyber harassment are addressed, such as hacking into a person’s email, but cyber harassment is not captured by the Convention more generally.

The Budapest Convention is supplemented by an Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems 2003, which specifically addresses the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

African Union Convention on Cyber Security and Personal Data Protection 2014

The African Union Convention on Cyber Security and Personal Data Protection 2014 addresses cybercrime and related issues. Namibia ratified this Convention in February 2019 but the Convention does not yet have sufficient ratifications to come into force at the regional level.
C. Specific international and regional instruments on harassment and child sexual exploitation cont

Amongst other things, the Convention specifically prohibits content-related offences related to child pornography and hate speech.\(^{102}\) The Convention recognises that certain offences which had previously been prohibited under national criminal laws when committed offline may now exist online and requires States Parties to legislate to combat such online harms. For example, it mandates that States Parties must ensure that extortion and blackmail involving computer data are addressed by law, and that the use of computer technology in the commission of such offences should be considered an aggravating factor.\(^{103}\) The Convention also emphasises that any regulatory framework on cyber-security must respect the rights of citizens guaranteed by the international human rights conventions, particularly the African Charter on Human and Peoples’ Rights.\(^{104}\)

**GROOMING AND SEXUAL EXPLOITATION OF CHILDREN**

There are two international instruments devoted entirely to the topic of child sexual abuse and exploitation. These are discussed below.

**Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007**

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention) aims to prevent instances of child sexual abuse and exploitation, to aid victims of such crimes, and to encourage collaboration towards prevention both domestically and internationally.\(^{105}\) It is open to non-member states of the Council of Europe, although no non-member states have become parties as yet.\(^{106}\) This Convention mandates that State Parties legislate with respect to reporting obligations, helplines, and other necessary services to assist victims.\(^{107}\)

The Convention also requires State Parties to criminalise the following acts: sexual abuse, offences concerning child prostitution and child pornography, corruption of children and solicitation of children for sexual purposes.\(^{108}\) The Convention explicitly requires the criminalisation of situations where sexual activity has yet to occur, by giving attention to the crimes of “corrupting a child” and “solicitation of children for sexual purposes” through information and communication technologies.\(^{109}\)

**European Union Directive related to child sexual abuse and sexual exploitation 2011**

The European Union produced a Directive related to child sexual abuse and sexual exploitation in 2011 to establish minimum rules for criminal offences related to child sexual exploitation and abuse. The Directive describes categories of offences of exploitation (such as pornography and prostitution) as well as rules on consent, aggravating circumstances, protections for child victims and access to services for victims during and after criminal proceedings.\(^{110}\) Although this Directive is technically applicable only within the European Union, its principles can offer guidance more broadly.


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103 Ibid., Article 30.
104 Ibid., Article 31(2).
109 Ibid., Article 25(3).
110 Ibid., Article 30.
112 The Convention explicitly requires the criminalisation of situations where sexual activity has yet to occur, by giving attention to the crimes of “corrupting a child” and “solicitation of children for sexual purposes” through information and communication technologies.
114 The European Union produced a Directive related to child sexual abuse and sexual exploitation in 2011 to establish minimum rules for criminal offences related to child sexual exploitation and abuse. The Directive describes categories of offences of exploitation (such as pornography and prostitution) as well as rules on consent, aggravating circumstances, protections for child victims and access to services for victims during and after criminal proceedings. Although this Directive is technically applicable only within the European Union, its principles can offer guidance more broadly.

Aspects of child sexual exploitation are also addressed in several international conventions to which Namibia is a party. The Convention on the Rights of the Child; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol); and the International Labour Organisation (ILO) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. The Convention also requires State Parties to criminalise the following acts: sexual abuse, offences concerning child prostitution and child pornography, corruption of children and solicitation of children for sexual purposes. The Convention explicitly requires the criminalisation of situations where sexual activity has yet to occur, by giving attention to the crimes of “corrupting a child” and “solicitation of children for sexual purposes” through information and communication technologies.

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103 Ibid., Article 30.
104 Ibid., Article 31(2).
109 Ibid., Article 25(3).
110 Ibid., Article 30.
3. Domestic legal framework in Namibia
Part 3 of the report discusses the range of existing criminal offences, civil wrongs and civil remedies in Namibia which can be applied to tackle physical, verbal and online harassment.\textsuperscript{115} A number of these remedies are limited to harassment of specific kinds (such as physical or sexual harassment) or in specific contexts (such as within a domestic relationship or in an employment setting). Part A discusses relevant criminal offences, Part B discusses civil wrongs and remedies.

\textbf{A. Constitution of the Republic of Namibia}

\textbf{CHAPTER 3 FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS}

\textit{Article 5 Protection of Fundamental Rights and Freedoms}

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

\textit{Article 10 Equality and Freedom from Discrimination}

1. All persons shall be equal before the law.
2. No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

\textit{Article 23 Apartheid and Affirmative Action}

1. The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

2. Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the defence force, the police force, and the correctional service.

3. In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

### B. Criminal law

The table identifies and defines existing criminal offences which may apply in cases of harassment, hate speech and sexual exploitation. The scope and application of each offence is then analysed below.

**Table 1: Existing criminal offences relevant to harassment, hate speech and sexual exploitation**

<table>
<thead>
<tr>
<th>Criminal Offence</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assault</strong>, including assault by threat</td>
<td>Intentionally and unlawfully (1) applying force to the body of another person, directly or indirectly; or (2) threatening another person with immediate personal violence in circumstances which lead the threatened person to believe that the person making the threat has the intention and the power to carry out the threat.</td>
</tr>
<tr>
<td><strong>Indecent assault</strong></td>
<td>Assault of an indecent character.</td>
</tr>
<tr>
<td><strong>Crimen iniuria</strong></td>
<td>The unlawful, intentional and serious violation of the dignity or privacy of another person.</td>
</tr>
<tr>
<td><strong>Criminal defamation</strong></td>
<td>The unlawful and intentional publication of a matter which tends to injure someone’s reputation.</td>
</tr>
<tr>
<td><strong>Extortion</strong></td>
<td>Unlawfully and intentionally obtaining some advantage from another by subjecting the other person to pressure which induces him or her to hand over the advantage.</td>
</tr>
<tr>
<td><strong>Intimidation</strong> (Intimidation Proclamation, AG 24 of 1989)</td>
<td>Physically harming, or threaten physical harm to, another with the intent to compel or induce that other person to do, or to abstain from doing, something or to assume or to abandon a particular standpoint; also prohibits actions or language that would have the probable effect of causing another to fear for his or her physical safety, the safety of his or her property or the safety of the person or property of another person – and to be induced by such fear to do, or to abstain from doing, something or to assume or to abandon a particular standpoint.</td>
</tr>
<tr>
<td><strong>Incitement</strong> (Riotous Assemblies Act 17 of 1956)</td>
<td>Urging another person to commit an offence.</td>
</tr>
<tr>
<td><strong>Trespass</strong> (Trespass Ordinance 3 of 1962)</td>
<td>Entry or presence upon land or in buildings without permission of the owner or lawful occupier.</td>
</tr>
<tr>
<td><strong>Child pornography offences</strong> (Child Care and Protection Act 3 of 2015)</td>
<td>Inducing, procuring, offering, allowing or causing a child to be used for purposes of creating child pornography, whether for reward or not.</td>
</tr>
<tr>
<td><strong>Sexual exploitation and grooming offences</strong> (Combating of Immoral Practices Act 21 of 1980)</td>
<td>~ Soliciting or enticing a child or a seriously mentally-impaired female to engage in indecent or immoral act. ~ Enticing a person to the commission of immoral acts by means of solicitation or by exhibiting himself or herself in an indecent manner in public view (used in practice against sex workers, but worded broadly enough to apply to other contexts such as enticement of children or indecent exposure to children in a playground). ~ Administering drugs or alcohol to a female with the intent to stupefy or overpower her in order to enable unlawful carnal intercourse with her. ~ Procuration of females for the purpose of unlawful carnal intercourse with another person. ~ Facilitating communication or connection between a male and a female for purposes of enabling the male to engage in unlawful carnal intercourse with a female. ~ Detaining a female for the purpose of unlawful immoral intercourse with a male. ~ Committing indecent or immoral acts with children of either sex (if the perpetrator is at least three years older than the child) or with mentally-impaired females.</td>
</tr>
</tbody>
</table>
### B. Criminal law cont

<table>
<thead>
<tr>
<th>Criminal Offence</th>
<th>Definition</th>
</tr>
</thead>
</table>
| **Trafficking offences**  
(Combating of Trafficking in Persons Act 1 of 2018) | Intentionally recruiting, transporting, delivering, transferring, harbouring, selling, exchanging, leasing or receiving a person for the purposes of exploitation, by means of threat, use of force or other forms of coercion, abduction, fraud, deception, kidnapping, abuse of power or abuse of position of vulnerability or giving or receiving of payments or benefits to obtain the consent of a person who has control over another person; if the person who is trafficked is a child, the means are irrelevant. |
| **Telecommunications offences**  
(Communications Act 8 of 2009) | Using a telecommunications device to make, create, solicit or initiate the transmission of an “obscene, lewd, lascivious, filthy, or indecent” communication, with the intent to annoy, abuse, threaten, or harass another person. |
| | Using a telecommunications device to make, create, solicit or initiate the transmission of any “obscene or indecent” communication, knowing that the recipient is under 18 years of age. |
| | Making a telephone call or using a telecommunications device to make an anonymous communication, “whether or not conversation or communication ensues”, with intent to “annoy, abuse, threaten, or harass” someone. |
| | Causing another person’s telephone to repeatedly or continuously ring, with intent to harass. |
| | Making repeated telephone calls, or repeatedly initiating communication with a telecommunications device, “during which conversation or communication ensues”, solely to harass someone. |
| | Knowingly and intentionally permitting any telecommunications facility under his or her control to be used for a prohibited activity. |
| **Allegations of witchcraft**  
(Witchcraft Suppression Proclamation 27 of 1933) | Alleging witchcraft by another person, or naming or indicating another person as being a wizard or witch. |
| **Threats and hate speech on racial grounds**  
(Racial Discrimination Prohibition Act 26 of 1991) | Threatening or insulting a person or group of persons on the basis of race. |
| | Causing, encouraging or inciting hatred towards persons of a specific racial group. |
| | Disseminating ideas based on racial superiority. |
| **Other criminal offences** | public indecency (unlawfully, intentionally and publicly performing an act which tends to deprave the morals of others or which outrages the public’s sense of decency). |
| | malicious damage to property (unlawfully and intentionally damaging property belong to another). |
| | pointing a firearm. |
| | fraud (the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another). |
| | forgery (making a false document with intent to defraud to the actual or potential prejudice of another). |
| | loitering or committing public nuisances. |
1. Intimidation

The Intimidation Proclamation, AG 24 of 1989 makes it a crime to physically harm, or threaten physical harm to, another with the intent to compel or induce that other person to do, or to abstain from doing, something or to assume or to abandon a particular standpoint. This statutory crime of intimidation also prohibits actions or language that would have the probable effect of causing another to fear for his or her physical safety, the safety of his or her property or the safety of the person or property of another person – and to be induced by such fear to do, or to abstain from doing, something or to assume or to abandon a particular standpoint.116 No court cases applying this proclamation could be located.

In South Africa, in the 2018 Moyo case,117 a similar law was upheld by the Supreme Court of Appeal against a challenge that it unjustifiably infringed the Constitutional guarantee of freedom of expression. The Court observed that this criminal offence of intimidation could be used against wrongs such as harassment, stalking, trolling on social media and cyber-attacks to address gaps in the common law and criminal law.118

2. Incitement

Incitement is the criminal offence of urging another person to commit an offence, found in Namibia’s misleadingly titled Riotous Assemblies Act 1956. Namibia’s High Court has stated (in dicta) in the 1994 Kauesa case that “it must be obvious that, when speech constitutes incitement to an offence, the prohibition of such speech is reasonable and necessary in a democratic State and such speech can never be regarded as protected speech”.119

South African case law has noted that incitement can take various forms, including “suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity”.120

The decisive question in respect of incitement is whether the accused sought to influence the mind of another person towards the commission of a crime; it is not relevant whether or not the target is receptive to the incitement.121

Incitement is punishable with the same penalties as the criminal act which was encouraged.122 The criminal charge of incitement is normally utilised in practice when the crime which was urged did occur, then the person who encouraged it is likely to be charged as an accomplice or a conspirator.123

Incitement could be applied to instances of harassment where someone urges criminal actions against a person or group of persons being harassed.


Namibia’s Racial Discrimination Prohibition Act 1991 prohibits certain forms of threats and hate speech on racial grounds. This statute makes it a criminal offence to threaten or insult a person or group of persons on the basis of race; to cause, encourage or incite hatred towards persons of a specific racial group; or to disseminate ideas based on racial superiority.124

The punishment for these offences is a fine of up to N$100 000, imprisonment for up to 15 years, or both.125 Where a court convicts a defendant of an offence in terms of the Act, the complainant can apply for compensation for damages suffered as a result of the offence.126 The application of this statute shows that protection against racially-motivated threats and hate speech is a permissible limitation on the right to freedom of speech and expression.127

116 This Proclamation was unconstitutionally enacted during the election campaign and the transition to Independence in mind, but the wording of the relevant provisions is broad enough to allow for applications to other situations. The Proclamation repealed the South African Intimidation Act 72 of 1982 which applied to South West Africa at that time; it is similar to that Act, but not identical. The Namibian Proclamation omits a problematic reverse onus which has been ruled unconstitutional in South Africa, in Moyo v The Minister of Justice and Constitutional Development & others, S v The Minister of Justice and Correctional Services & others [2018] ZASCA 100.

117 Ibid. This case is as of August 2019 on appeal to the Constitutional Court, with argument having concludes but judgment still awaited.

118 Ibid., paras 84-92. “Examples of intimidatory conduct that are particularly apposite to current issues in the world are stalking and harassment. These are specific criminal offences in many parts of the world and stalking and harassment go hand in hand with intimidation and conduct directed at inducing fear in the victim” para 97.

119 Kauesa v Minister of Home Affairs & Others 1994 NR 102 (HC) at 120, overruled in Kauesa v Minister of Home Affairs 1995 NR 175 (SC). This dicta of the High Court was not discussed in the Supreme Court case. Dicta are statements made by a court which are not actually necessary to support the outcome of the case. Unlike the actual holding of the case, dicta are not binding precedent – meaning that courts are not compelled to follow dicta in subsequent cases.


121 S v Mtshiyana and Another 1966 (6) SA 655 (AD) at 658 [invoking a conviction of incitement to murder].

122 CR Seymour, Criminal Law, Durban: Butterworths, 1984 at 245.

123 Ibid., pp. 245-246.


125 Ibid., s 14(1)(8). Some exceptions to the crime of hate speech were added in response to the ruling in S v Smith NO & Others to ensure that the law does not inhibit good faith discussion of matters of public interest. See section 14(2).

126 Ibid., s 116.

127 As discussed below, S v Smith NO & Others 1996 NR 367 (HC) ruled that section 11(1) was in conflict with Article 21(1) and (2) of the Constitution and referred it back to Parliament for amendment to make it consistent with the Constitution: http://namiblii.org/na/judgment/high-court/1996/62.
The constitutionality of the restrictions on speech imposed by the Racial Discrimination Prohibition Act came squarely before the High Court in the subsequent case of S v Smith NO & Others. The Court looked in particular to the Canadian precedents previously quoted by the Namibian Supreme Court, noting that Canada had adopted a proportionality test to analyse whether a law restricting constitutionally protected freedoms seeks to accomplish a significant objective by means which are “reasonable and demonstrably justified.” The Court found that this proportionality test contains three components:

1. The measures adopted must be carefully designed to achieve the objective in question, and not arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective at hand.

2. The means should implicate the right or freedom in question as minimally as possible.

3. There must be a proportionality between the effects of the measures which limit the protected right and the objective which has been identified as being of sufficient importance to justify limiting other rights; it may be that the severity of the deleterious effects of the measures imposed will not be justified by the purposes these measures are intended to serve, citing R v Oakes: “The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.”

Applying this test to the case at hand, the High Court ruled that the original formulation of s.11(1) of the Racial Discrimination Prohibition Act 1991 was in conflict with the Namibian Constitution’s protections for freedom of speech and expression, and freedom of thought, conscience and belief, on several grounds:

- truth was not a defence under any circumstances, even where the statement was not made with an intention to provoke hatred;
- the statute did not clearly require that the sole purpose of the person making the statement was to provoke racial hatred or disharmony; and
- there were no exceptions for matters of public interest or even for legitimate criticism of government policy which may cause disharmony even when uttered for the purpose of securing the removal of racist practices.

The Court referred the statute back to Parliament to correct the defects which unnecessarily infringed freedom of speech and expression. Parliament accordingly amended s.11 and added new defences to s.14 to address the constitutional concerns, thus drawing the offences in question more narrowly. It is no longer an offence to “ridicule” anyone on the grounds of belonging to a particular racial group (which was originally provided for in s.11(1)(a) of the Act); to cause, encourage and incite “disharmony” or feelings of “hostility” or “ill will” between different racial groups (as originally provided for in s.11(1)(b)).

In terms of the amended Act, racist statements are allowed if they concern a subject of public interest, are made for the public benefit, and are true or on reasonable grounds believed to be true. True statements are generally excluded from prosecution if they were communicated without any intent to encourage racial hatred or express racial superiority. Prosecution is also excluded in respect of statements made with the intention to improve race relations.
Some assert that the amendments have now made the Act too narrow. For example, Professor Nico Horn has asserted that the broad exclusions are responsible for the fact that no one has been prosecuted under the Act since it was amended, noting that even in cases “where prosecution should at least have been considered, neither the public nor the authorities even mention prosecution under the Act”.137

In addition, in its 2016 observations on Namibia, the Committee which monitors the International Convention on the Elimination of All Forms of Racial Discrimination reiterated a concern that the definition of racial discrimination in Namibia’s Racial Discrimination Prohibition Act is not aligned with Article 1 of the Convention.138 The Convention defines “racial discrimination” as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”139

The Namibian Act does not define racial discrimination at all, but only “racial group”, which is “a group of persons defined by reference to colour, race, nationality or ethnic or national origin”;140 the Act then prohibits a range of activities directed at members of a racial group.

The Office of the Ombudsman reported in 2017 that the Prosecutor-General received 19 police dockets relating to racial discrimination in the preceding three to four years, with only six cases proceeding to court.141 This report also emphasises that the lack of complaints, prosecutions and convictions under the Act should “not be viewed as positive” since it may well be a result of lack of the public’s awareness of their rights in this regard, fear of social censure or reprisals, concerns about the cost and complexity of the judicial process, or lack of trust in the police and judicial authorities.142

When comparing threats and hate speech based on race to threats and hate speech based on other characteristics, it must be kept in mind that the Namibian Constitution explicitly authorises criminal penalties for the propagation of “the practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long”.143

However, the Constitution also explicitly authorises the enactment of legislation “providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices”144—a principle which could arguably be invoked to support the protection of other previously disadvantaged groups against harassment and hate speech based on certain personal characteristics.145


138 See also Committee on the Elimination of Racial Discrimination, “Concluding observations on the first to thirteenth periodic reports of Namibia” CERD/C/NAM/CO/23, 22 January 2013 at 14; https://www.ombudsman.org.na/file/3rrc2d2a2c52bd5c24c5a5f2010091c.pdf.


142 Ibid., pp 21/22. Aside from the reported cases discussed in the text, the only other reported case concerning the Act is S v Hotel Chiriv (Pty) Ltd and Another 1993 NR 78 (HC), which involved an incident at a hotel where a black man, and his black driver were informed that they were not welcome, told that they could not dine at the hotel and reprimanded for using the hotel toilet without permission. The High Court confirmed the lower court’s finding that the hotel owners had violated the section of the Act which provides that the right of admission to public amenities may not be reserved on grounds of race.

143 Namibian Constitution, Article 23(1): “The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.” http://www.lac.org.na/laws/annos/354/The%20Namibian%20Constitution.pdf.

144 Ibid., Article 23(2).

145 In this vein, the Smith case notes: “As already indicated the prevention of a recurrence of the type of racism and its concomitant practices which prevailed prior to independence in this country is a sufficiently significant objective to warrant a limitation on the rights enshrined in Article 21(1) under consideration. This however does not justify restrictions with regard to groups of persons who never featured in the preindependence of this country and were never part of a party to the social fissure amongst the different peoples making up the population of this country that was occasioned by the aforesaid racist policies.” S v Smith NO and Others 1996 NR 367 (HC), p.372; https://namilib.org.na/ijw/mark/holdings/1996/02. However, one commentator asserts that the court has construed the Act too narrowly, arguing that “the sufficiently significant objective of the Act also includes the prevention of discrimination against all groups, racial and ethnic, irrespective of their place and role in preindependence Namibia”. Nico Horn, “Freedom of expression and hate speech in Namibia”, 111 Namibia Law Journal 43 (2009), p.47; https://www.na.gov.na/jrl/page/article/9886403-52456-bec4d1412b60119157b7f55a96492e1252038.
B. Criminal law cont

4. Assault

Assault is a common law crime which is defined as intentionally and unlawfully:

1. applying force to the body of another person, directly or indirectly; or
2. threatening another person with immediate personal violence in circumstances which lead the threatened person to believe that the person making the threat has the intention and the power to carry out the threat.146

The crime of assault can take the form of words or gestures alone, without any actual physical violence.147

The punishment for assault is based on the seriousness of the assault. For example, assault occasioning actual bodily harm (AOABH) is a serious assault that causes actual harm to the victim.148

5. Indecent assault

Indecent assault is a common law crime which involves an assault of an indecent character. This is understood to mean physically touching the genitals or other private parts of another person's body, or attempting to touch someone in this way, even through clothes. It is a gender-neutral crime which can be applied to touching between the same or opposite sexes.149

6. Telecommunications offences

The Communications Act 2009 contains a number of criminal offences aimed at the harassing use of "telecommunications devices" – which would appear to include cell-phones and other devices used for email and other communications services (Facebook, Twitter, Whatsapp, Instagram and the like) transmitted by internet service providers.150 The Act also explicitly includes "telephones" in the description of some of the offences, which suggests that the term "telecommunications devices" does not itself include landline telephones. It is noteworthy that that the offences broadly cover abuse and harassment by means of speech, images, anonymous communications or even silence.

The key offences relevant to harassing behaviour include:

- Using a telecommunications device to make, create, solicit or initiate the transmission of an "obscene, lewd, lascivious, filthy, or indecent" communication, with the intent to annoy, abuse, threaten, or harass another person.151
- Making a telephone call or using a telecommunications device to make an anonymous communication, "whether or not conversation or communication ensues", with intent to "annoy, abuse, threaten, or harass" someone.152
- Causing another person’s telephone to repeatedly or continuously ring, with intent to harass.153
- Making repeated telephone calls, or repeatedly initiating communication with a telecommunications device, “during which conversation or communication ensues”, solely to harass someone.154
- Knowingly and intentionally permitting any telecommunications facility under his or her control to be used for a prohibited activity.155

The punishment for these offences is a fine of up to N$20 000, imprisonment for up to five years, or both. The penalty is significantly higher for obscene communications aimed at children, rising to a fine of up to N$1 million, imprisonment for up to 15 years, or both.156

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147 See R v Onatolu 1970 (2) SA 306 (R), S v Miyia and Others, 1966 (4) SA 274 (N). It has been held that the essential elements of the crime are not present when the threat of violence is purely a conditional one, such as in a case where the accused had raised an iron bar and said to the complainant, "If you come near me I will hit you; I will kill you." R v Miyia 1962 B.N.R.45, as cited in R v Onatolu 1970 (2) SA 306 (R). However, the existence of a conditional aspect to the threat does not always allow the person making the threat to evade conviction. See, for instance, Wassermann v S ECA 20/2016 (2016) NAHCMD 363 (17 October 2016).
148 See, for instance, S v Kids 2014 (3) NR 697 (HC).
150 See, for example, Rex v S 1950 (2) SA 350 (S), where one male juvenile touched the private parts of another male juvenile through his clothing. The accused was convicted of an unnatural offence, but the appeal court found that the correct charge should have been indecent assault. See also Rex v M 1947 (4) SA 489 (N), where a man's conviction for indecent assault for attempting to lift a woman's dress was overturned, but only because of unsatisfactory evidence, and S v Mubahali 1985 (4) SA 317 (T) where a man's conviction on indecent assault was upheld for lifting a woman's leg in a way that exposed her private parts.
These offences do not appear to be well-known in Namibia and we have not found any reported cases involving these offences. One potential problem is the law’s failure to give meaning to the concepts of communication that is “obscene, lewd, lascivious, filthy, or indecent”. The Namibian High Court struck down the Indecent and Obscene Photographic Matter Act 37 of 1967, which criminalised the possession of “any indecent or obscene photographic matter” on the grounds that the offence was overly broad, which could result in an unreasonable restriction of the legitimate exercise of the constitutional right of freedom of speech and expression. The Court noted that the offence could prohibit “a virtually limitless range of expressions”, from commercial advertising to exalted art, “simply because they contain oblique, isolated or arcane references to matters sexual, or deal frankly with a variety of social problems”. This backdrop must be kept in mind in relation to any restriction of “indecent or obscene communications”.  

7. Offences relating to sexual exploitation and grooming

Namibia’s Combating of Immoral Practices Act 1980 contains miscellaneous offences aimed at various forms of sexual exploitation of both children and adults. There are several offences in this statute that are aimed at situations where a person applies unlawful pressure on someone to induce them to engage in indecent or immoral acts with that person – such as soliciting or enticing a child or a seriously mentally-impaired female to engage in indecent or immoral acts, or administering drugs or alcohol to a female with the intent to “stupefy or overpower” her in order to have unlawful carnal intercourse with her. Other offences in the statute are aimed at situations where one person acts with the intent to facilitate indecent or immoral acts with a third party. The Act also criminalises “indecent” and “immoral” acts with children of either sex (if the perpetrator is at least three years older than the child) or with mentally-impaired females. Due to piecemeal amendments to the Act, its various offences are inconsistent on the question of whether they protect males, and on whether the offences described are gender-neutral or limited to heterosexual contact. The statute, having been enacted in 1980, unsurprisingly contains no specific mention of online solicitation or communication, but the wording of many of its provisions is broad enough to capture both online and offline acts.

8. Offences relating to child pornography

It is an offence under the Child Care and Protection Act 2015 “to induce, procure, offer, allow or cause a child to be used for purposes of creating child pornography, whether for reward or not”. This crime is punishable by a fine of up to N$50 000 or imprisonment for up to 10 years or both. Child pornography is not defined in the statute. Although child pornography is not generally covered by this report, the offence could overlap with grooming and child exploitation for sexual purposes – particularly in respect of the reference to inducement.

9. Crimen injuria

Crimen injuria [which also appears in Namibian jurisprudence as “crimen injuria”] is a common law crime which entails the unlawful, intentional and serious violation of the dignity or privacy of another person. It could in theory be committed by electronic means.

There are four components to the crime:  
1. impairment of the dignity of another person;  
2. seriousness;  
3. unlawfulness; and  
4. intentionality.

Opening private post, eavesdropping on private conversations with listening devices and “Peeping Toms” are activities which may be considered forms of crimen injuria because they constitute invasions of privacy.

“Grooming” a child as a preliminary step towards sexual contact may constitute crimen injuria, as an invasion of dignity. A stranger who stares at and follows...
The offence of crimen iniuria generally attracts a punishment in the nature of a fine or a caution and discharge.\textsuperscript{168} The crime has been applied in South Africa and in Lesotho to insulting speech which addresses gender attributes and sexual orientation.\textsuperscript{167}

A case decided by the South African Supreme Court of Appeal in 2018 discussed the shortcomings of crimen iniuria as a legal tool to address stalking, with the Court noting that crimen iniuria is aimed at violations of personality rights rather than the inducement of fear.\textsuperscript{170} The case concerned s.1(1)(b) of the Intimidation Act 1982 which criminalised acts, conduct or utterances that induced fear for an individual's safety or fear for the safety of an individual's property or livelihood. The appeal was heard by the Constitutional Court in February 2019 (Moyo and Another v Minister of Police and Others [2019] ZACC 40). The key issue before the Constitutional Court was whether s.1(1)(b) of the Act was constitutionally invalid for unjustifiably criminalising expressive conduct protected by section 16(1) of the South African Constitution. It was common cause between the parties that on a literal reading, s.1(1)(b) appeared to be constitutionally invalid in that it limited the right to freedom of expression: “a[bsent any careful interpretive lens, the section can be read to criminalise any expressive act which induces any fear, of any kind, for one’s own safety, or the safety of one’s property, the security of one’s livelihood, or the safety of another” (para.42). The question for the Constitutional Court therefore was whether the section could nevertheless be interpreted in a manner that rendered it constitutionally compliant, as the majority of the Supreme Court of Appeal had found.

The Constitutional Court held that s.1(1)(b) referred to intimidatory conduct of a certain kind – “fear for one’s safety” or the “fear for the safety of one’s property or security of one’s livelihood” and did not support the notion that the fear is related to actual harm or that the threat of such harm should be imminent. As such, the Court concluded that “if the proper reading of the section does not include incitement of imminent violence, but only covers intentional conduct that creates an objectively reasonable fear of harm to person, property or security of livelihood, then it would criminalise protected free speech and probably also peaceful forms of protest” (para.69). The Constitutional Court set aside the order of the Supreme Court replacing it with a declaration that s.1(1)(b) of the Intimidation Act 1982 was unconstitutional and invalid.

10. Criminal defamation

Criminal defamation is a common law crime which entails the unlawful and intentional publication of a matter which tends to injure someone’s reputation.\textsuperscript{171} Commentators disagree on whether or not the injury must be serious in order to constitute a crime, but the Supreme Court of Appeal in South Africa has held that while it is usual practice to prosecute only serious instances of damage to reputation, seriousness is not an actual element of the crime.\textsuperscript{172} It is open to the accused to prove that the defamatory publication was justified – such as by proving that it was substantially true and published for the public benefit, or that it constituted fair comment regardless of its truth.\textsuperscript{173}

\textsuperscript{165} An example is in Van Maer 1923 CRD 77, where staring and following were components of a single incident.


\textsuperscript{169} South Africa: Matswevu v S 2010 (2) SACR 276 (CC) 2010 (1) NR 199 (HC); Rooxenase S v Moloape [1994] SHC 38, 1923 OPD 77, where staring and following were components of a single incident.

\textsuperscript{170} Moyo v Minister of Justice and Constitutional Development and Others, Sonti v Minister of Justice and Conviction Services and Others 2018 (2) SACR 313 (SCA) at paras 102-103 (Matswevu for the majority, footnote adopted). The Court cited several instances of stalking behaviour which would not be covered by crimen iniuria. For further information, see “Moyo and Another v Minister of Justice and Constitutional Development and Others (‘Moyo’), SERI (Socio-Economic Rights Institute) website, which has links to many of the court papers: http://www.seri-sa.org/index.php/component/content/article/id=240
criminal-features/minister-of-justice-and-constitutional-development-and-others"


\textsuperscript{172} Moyo v Minister of Justice and Constitutional Development and Others, Sonti v Minister of Justice and Conviction Services and Others 2018 (2) SACR 313 (SCA) at paras 102-103 (Matswevu for the majority, footnote adopted). The Court cited several instances of stalking behaviour which would not be covered by crimen iniuria. For further information, see “Moyo and Another v Minister of Justice and Constitutional Development and Others (‘Moyo’), SERI (Socio-Economic Rights Institute) website, which has links to many of the court papers: http://www.seri-sa.org/index.php/component/content/article/id=240

criminal-features/minister-of-justice-and-constitutional-development-and-others"

Courts in several African countries (including Lesotho, Kenya and Zimbabwe) have ruled that criminal defamation punishable by imprisonment is a violation of the principle of free speech— but criminal defamation was upheld as being constitutionally acceptable in South Africa by the Supreme Court of Appeal in the 2008 Hoho case. The African Court on Human and People’s Rights ruled in 2014, in Konaté v Burkina Faso, that long imprisonment for the crimes of criminal defamation, public insult and contempt was a “disproportionate interference” with the right of freedom of expression. The majority of the Court held: “Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.”

Four of the 10 judges on the Court would have gone even farther, with their dissenting opinion asserting that criminal defamation laws are never permissible regardless of the kind of punishment imposed.

The offence remains in force in Namibia, although it is seldom used in practice. Namibia was urged in its 2016 Universal Periodic Review to decriminalise defamation, although this was not included as one of the formal recommendations of that review.

11. Trespass

The Trespass Ordinance 1962 prohibits entry or presence upon land or in buildings without permission of the owner or lawful occupier. This crime could be applicable to some physical manifestations of stalking. Trespass is described (without being explicitly named) as one possible manifestation of domestic violence when a person in a domestic relationship with the complainant enters the complainant’s residence or property without express or implied consent, in a situation where the persons in question do not share the same residence.

12. Extortion

Extortion is a common law crime that takes place when a person unlawfully and intentionally obtains some advantage from another by subjecting the other person to pressure which induces him or her to hand over the advantage. The crime has three essential elements:

1. the accused must intend his words, whether expressed or implied, to operate on the complainant as pressure or as a threat;
2. the accused must intend by means of the pressure or threat to induce the complainant to submit; and
3. the accused must know that this use of pressure or threats is unlawful or improper.

This crime is sometimes informally referred to as “blackmail.” For example, extortion could occur where a person threatens to distribute damaging information or compromising images electronically unless the victim provides money or some other benefit. Extortion of LGBT persons is particularly common in Southern Africa, particularly in countries such as Namibia where sodomy is criminalised.
B. Criminal law cont

13. Allegations of witchcraft

Namibia’s Witchcraft Suppression Proclamation of 1933, amongst other things, makes it a criminal offence to impute to another “the use of non-natural means in causing any disease in any person or property or in causing injury to any person or property”, or to name or indicate another person as being a wizard or witch.\(^{185}\) The punishment is an unspecified fine or imprisonment for up to five years, or both.\(^ {186}\) Although this may seem far-fetched as a form of harassment, sincere or insincere accusations of witchcraft are used to harass people in practice and can damage a person’s reputation.

14. Trafficking offences

The Combating of Trafficking in Persons Act 2018 (which was not in force as of mid-2019) aims to prevent and combat trafficking in persons. It criminalises trafficking and provides measures to protect and assist victims, and includes special provisions relating to the trafficking of children.\(^ {187}\)

A person commits the offence of trafficking in persons if he or she intentionally recruits, transports, delivers, transfers, harbours, sells, exchanges, leases or receives a person for the purposes of exploitation, by means of threat, use of force or other forms of coercion, abduction, fraud, deception, kidnapping, abuse of power or abuse of position of vulnerability or giving or receiving of payments or benefits to obtain the consent of a person who has control over another person. If the person who is trafficked is a child, the means are irrelevant.\(^ {188}\)

To date, trafficking offences in Namibia have generally arisen in the context of sexual exploitation of Namibian children within Namibia.

15. Other criminal offences

Depending on the specific form which harassment takes, it is possible that there may be violations of other criminal laws or municipal regulations – such as -

- public indecency (unlawfully, intentionally and publically performing an act which tends to deprave the morals of others or which outrages the public’s sense of decency);\(^ {189}\)
- malicious damage to property (unlawfully and intentionally damaging property belong to another);\(^ {190}\)
- pointing a firearm;\(^ {191}\)
- fraud (the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another);\(^ {192}\)
- forgery (making a false document with intent to defraud to the actual or potential prejudice of another);\(^ {193}\)
- loitering or committing public nuisances.\(^ {194}\)

### CHILD OFFENDERS

Where the perpetrator of the harassment is a child, the forthcoming Child Justice Bill will be relevant. At the time of writing, this Bill is expected to set the minimum age of criminal responsibility at 14, and to provide for screening, diversion and restorative justice options in certain circumstances. The interaction between this forthcoming law and any criminal approaches to harassment must be kept in mind. More broadly, a question to be considered in respect of any criminal approach is whether minors, or children below a certain age, should be exempted from prosecution for some offences related to online or offline stalking and harassment, in favour of other remedies.
The table identifies and defines existing civil wrongs and civil orders which may apply in cases of harassment, hate speech and sexual exploitation. The application of each civil remedy is then analysed below.

### Table 2: Civil wrongs and civil orders relevant to sexual harassment, hate speech and sexual exploitation

<table>
<thead>
<tr>
<th>Civil wrong or order</th>
<th>Definition</th>
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</table>
| Civil defamation     | Publishing or communicating something with the intent to injure another person’s good name, reputation or status, subject to the defences of:  
  (1) *truth in the public benefit*: that the material facts in the statement were true and its publication was in the public interest;  
  (2) *fair comment*: an expression of opinion on a matter of public interest, based on reasonable inferences from true facts and fair in the sense of being honest, genuine (even if exaggerated or prejudiced), relevant to the facts upon which the comment is based, and not malicious;  
  (3) *qualified privilege*: that the statement was made in a context of privilege (where the person making the statement has some legal, moral or social duty to do so, and where the person to whom the statement was made has some similar duty to receive it) and was fair and reasonably accurate; or  
  (4) *reasonable publication*: that the publication was in the public interest, and that, even though truth is not established, it was nevertheless in the public interest to publish the statements. |
| Civil defamation     | Intentionally committing a wrongful act which impairs dignity of another. |
| Invasion of privacy  | Intentional and unlawful intrusion upon the personal privacy of another (such as by recording or filming them without their consent). Intentional and unlawful publication of private facts about a person. |
| High Court interdict | High Court can issue an interdict restraining a person from committing or continuing to commit any wrongful act. |
| Peace order          | Magistrate’s court can issue a peace order valid for up to six months against a person who “is conducting himself violently towards, or is threatening injury to the person or property of another” or who “has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault”; the respondent can be ordered to give “recognizances”, which refers to a deposit of money that will be forfeited if the order is disobeyed. (This procedure is not well-known and seldom if ever used in practice. To serve as an effective remedy, the maximum “recognizances” would have to be increased above the current R50.) |
| Domestic violence protection order | Magistrate’s court can issue orders forbidding domestic violence (including threats of such violence) if the relationship between a harasser and a victim satisfies the definition of a “domestic relationship”; protection orders can include no-contact provisions, orders to surrender weapons and orders giving the complainant an exclusive right to occupation of the joint residence for a temporary period; breach of a protection order is a criminal offence. |
| Sexual harassment in the workplace | Prohibits unwarranted conduct of a sexual nature towards an employee which constitutes a barrier to equality in employment where (1) the victim has made it known to the perpetrator that he or she finds the conduct offensive; or (2) the perpetrator should have reasonably realised that the conduct is regarded as unacceptable; resigning to escape sexual harassment constitutes constructive dismissal and employer who fails to prevent it may face civil liability. |
C. Civil Law cont

<table>
<thead>
<tr>
<th>Civil wrong or order</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protection against hate speech by political parties (Electoral Act 5 of 2014)</td>
<td>~ Political parties prohibited from discriminating in their membership on the basis of “sex, race, colour, ethnic origin, religion, creed or social or economic status”, from advocating or aiming to carry on political activities on these grounds, and from using words, slogans or symbols which could give rise to division on any of these grounds. ~ Guidelines applicable to election campaigns also prohibit intimidation and incitement to violence by speakers at political rallies or through pamphlets, newsletters or posters issued by political parties.</td>
</tr>
<tr>
<td>Broad protection against discrimination against children: (Child Care and Protection Act 3 of 2015)</td>
<td>Prohibits direct or indirect discrimination against children in “proceedings, actions or decisions in matters concerning a child” on the basis of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth”, or “family status, health status, socio-economic status, HIV-status, residence status or nationality” – as these grounds apply to the child, or to the child’s parents, guardian, care-giver or family members.</td>
</tr>
</tbody>
</table>

1. Infringement of dignity

A claim for the infringement of dignity has three essential elements:

1. an intention on the part of the offender to produce the effect of his or her act;
2. a wrongful act; and
3. a resulting impairment of the dignity of another.195

This wrong can be committed by means of words alone, since a communication of an offensive or insulting nature can constitute a wrongful act.196 Impairment of dignity involves both a subjective and an objective element; the plaintiff must in fact feel insulted (the subjective element) and it must be shown that a reasonable person would feel insulted by the same conduct (the objective element).197 It is not necessary to show that the action affected the injured person’s reputation, but only that it injured his or her self-esteem or feelings and that the injury was reasonably felt.198 While the truth of the insulting statement may be relevant to the degree of damage, truth is not in itself a defence to abusive and insulting statements.199

Calling a black person a “kaffir” has been found by South African courts to constitute a verbal infringement of dignity.200 In similar fashion, the use of a derogatory term such as “cunt” for a female, or “moffie” for a gay person201 could probably support a claim of infringement of dignity.

2. Invasion of privacy

Invasion of privacy may take two forms:

~ an unlawful intrusion upon the personal privacy of another (such as by recording or filming them without their consent);

~ the unlawful publication of private facts about a person.

A damages claim for invasion of privacy must demonstrate three elements:

1. impairment of the applicant’s privacy;
2. wrongfulness; and
3. intention.202

In drawing the boundary between lawfulness and unlawfulness, courts must consider the particular facts of the case in light of the contemporary sense of morality and justice of the community. When the case involves the publication of private facts in the press, for example, the aggrieved person’s interest in preventing the public disclosure of those facts must be weighed against the interest of the public, if any, to be informed about the facts.203

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195 See R v Uutford 1908 15 62 at 66; Delange v Costa 1989 (2) SA 837 (A). Actio iniuriiam is the overarching concept of a civil action for damages in respect of the wrongful and intentional impairment of a person’s physical integrity (corpore), dignity (dignitas), or reputation (fama). These three categories are overlapping in the sense that one act may injure more than one of these personal attributes at the same time. See Le Roux and Others v Day 2011 (3) SA 274 (CC) at para 141 (A claim for damages to a person’s reputation is another way of describing defamation). http://www.saflii.org/za/cases/ZACC/2011/4.html.

196 Delange v Costa 1989 (2) SA 837 (A) at 861.

197 Le Roux and Others v Day 2011 (3) SA 274 (CC) at para 143.


199 Deby#/uba v Zant 1977 (3) SA 711 (D).

200 Cilli v Minister of Police and Another 1976 (4) SA 243 (N), Mphetha v Van Staden 1982 (2) SA 260 (N).

201 Moffie is a derogatory term for gay or effeminate men and a common insult in Southern Africa.


44 Comparative legal view of harassment and sexual exploitation laws across the Commonwealth.
3. Domestic legal framework in Namibia

In a 2007 South African case, damages were awarded for violation of dignity and privacy after the HIV-positive status of the plaintiffs was published without their consent.\(^{204}\) In a 2012 South African case, the High Court found it a “gross invasion of privacy to furnish an individual’s personal contact details on a public forum” (in this case on a Facebook wall) on the basis that this is private information which only the persons concerned have the right to make public. The Court ordered the removal of these details and interdicted any further disclosure of personal or private information concerning the individuals in question.\(^{205}\)

3. Protection from domestic violence

If the relationship between a harasser and a victim satisfies the definition of a “domestic relationship”, the victim can seek protection under the Combating of Domestic Violence Act 2003. The procedures in the Combating of Domestic Violence Act are limited to persons in domestic relationships – which are defined in the Act to include married or engaged couples; couples who have or are expecting a child; people “of different sexes” who live or have lived together in a relationship “in the nature of marriage”; or people “of different sexes” who are or were “in an actual or a perceived intimate or romantic relationship”.\(^{206}\) The law also applies between parents and children\(^{207}\) and between persons who are closely related to blood or by marriage.\(^{208}\)

The law provides a simple procedure for addressing domestic violence in such relationships, with the concept of domestic violence being defined to include physical abuse; sexual abuse; economic abuse; intimidation; harassment; trespassing; emotional, verbal or psychological abuse; or threats to do any of these things.\(^{209}\)

The law gives those who have suffered domestic violence an alternative or an adjunct to criminal charges, by providing a simple procedure for obtaining a protection order from a magistrate’s court. A protection order is a court order directing the abuser to stop the violence. It can also prohibit the abuser from having any contact with the victim and require the surrender of weapons. In cases of physical violence, it can include an order giving the complainant an exclusive right to occupation of the joint residence for a temporary period. Protection orders can also include orders pertaining to the possession of personal property as well as temporary orders for maintenance, child custody and access to children. Temporary protection order can be obtained ex parte (without the presence or participation of the respondent), and then made final after the respondent has been given a chance to oppose the order. Breach of a protection order is a criminal offence punishable by a fine of up to N$8000 or imprisonment for up to two years, or both.\(^{210}\)

No new crimes are created by the Act, but existing crimes between persons in a domestic relationship are classified as “domestic violence offences”. These offences are subject to special provisions which encourage input from the victim on bail and sentencing, as well as protecting the victim’s privacy. The law is widely used in Namibia, with some degree of success.\(^{211}\)

The protection order procedure may be a useful model for remedies for other forms of harassment.

4. Sexual harassment in the workplace

Sexual harassment in the workplace is prohibited under the Labour Act 2007.\(^{212}\) This covers any unwarranted conduct of a sexual nature towards an employee which constitutes a barrier to equality in employment where:

1. the victim has made it known to the perpetrator that he or she finds the conduct offensive; or
2. the perpetrator should have reasonably realised that the conduct is regarded as unacceptable.\(^{213}\)

The consequences for the perpetrator are not entirely clear. However, the Act provides that where a victim resigns to escape the harassment this will be treated as a “constructive dismissal” which entitles the victim to the same remedies as an employee who has been unfairly dismissed.\(^{214}\) The Namibian Labour Court has noted that an employer’s failure to prevent sexual harassment may give rise to civil liability.\(^{215}\)


\(^{205}\) Ibid., s 3.

\(^{206}\) This covers both biological and adoptive children. Ibid., s 3(1)(b).

\(^{207}\) This includes situations where the parties would be closely related by marriage if an opposite-sex couple’s informal cohabitation were formalised. Ibid., s 3(1)(e).

\(^{208}\) Ibid., s 2.

\(^{209}\) Ibid., ss 6-16.


\(^{211}\) Ibid., s 5(9)-(10).

\(^{212}\) Ibid., s 5(7)(b).


\(^{214}\) Ibid., ss.6-16.

5. Prohibition of discrimination against children

The Child Care and Protection Act 2015 gives children protection against discrimination which goes farther than that in the Namibian Constitution. All "proceedings, actions or decisions in matters concerning a child" must protect the child from direct or indirect discrimination on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth" as well as on the grounds of "family status, health status, socio-economic status, HIV-status, residence status or nationality". There must be no discrimination on these grounds as they apply to the child, or to the child's parents, guardian, care-giver or family members.216

6. Harassment and bullying in schools

The government has issued General Rules of Conduct for Learners (2002)217 and a Code of Conduct for the Teaching Service (2004).218 Both of these form part of the gazetted regulations issued under the Education Act 2001. Both codes address sexual harassment and abuse, as well as non-sexual bullying. These codes of conduct are reportedly not being enforced very effectively. A 2010 Namibian research report indicates that the researchers observed situations where learners were bullied by other learners and teachers, with little action being taken either by schools and/or teacher counsellors;219 the researchers were told during discussions at secondary schools that bullying is pervasive and that the problem "is not being effectively addressed and is not prioritised by school counsellors or school management".220 In 2018 the Ministry of Education, Arts and Culture launched a National Safe Schools Framework which focuses on promoting the health, safety and wellbeing of learners – and which includes an emphasis on minimising harms such as bullying, harassment and sexual violence.221

7. High Court interdict

A victim of physical or online harassment could apply to the High Court for an interdict restraining a person from committing or continuing to commit any wrongful act.222 For example, in a recent case known to the Legal Assistance Centre, a family was being harassed by a neighbour who engaged in acts such as throwing garbage over the family's yard fence, shouting aggressively outside their house and waiting for their car to pass by on the road so as to follow them closely at high speed. This behaviour was prohibited by a High Court interdict.223 However, the High Court is relatively expensive and inaccessible to most of the Namibian populace.

8. Peace order

To obtain a peace order under the Criminal Procedure Ordinance 1963, an individual makes a complaint to a magistrate under oath to the effect that the person against whom the order is sought "is conducting himself violently towards, or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault". The magistrate may summon the person or order the person to be arrested and brought to court, and conduct an enquiry into the complaint. The magistrate may then issue a peace order valid for up to six months and order the respondent to give "recognisances" – which refers to a deposit of money that will be forfeited if the order is disobeyed.

There is no automatic arrest or prosecution if the peace order is disobeyed, but the person in question may be committed to prison for up to six months if he refuses to give any recognizance at the initial hearing. This procedure is still valid law, but it is not well-known and seldom if ever used in practice. Because peace orders can be issued by a magistrate's court, they are more accessible to the general public than High Court cases.224

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216 Child Care and Protection Act 3 of 2015, s. 5: http://www.law.org.na/laws/annoSTA/Child%20Care%20and%20Protection%20Act%203%20of%202015.pdf.
220 Ibid., p.36.
222 The requirements for obtaining such an interdict are based on common law, but the underlying wrong could be a common law or statutory violation. The requirements for an interim interdict are:
(a) a prima facie right,
(b) a well-grounded apprehension of irreparable harm if the relief is not granted,
(c) that the balance of convenience favours the granting of an interim interdict; and
(d) that the applicant has no other satisfactory remedy.
See Nakanyala v Inspector-General Namibia 2012 (1) NR 200 (HC), para 36. The requirements for a final interdict are a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. See Naongo and Others v Kakela and Others 2017 (1) NR 66 (HC), para 40: https://www.moe.gov.na/files/downloads/bc0_NSSF_PartA_Introduction&Overview.pdf.
223 Case involving LAC staff member, 2017.
Court interdicts. However, if this remedy were to be effectively utilised, it would need revision. The maximum “recognizances” currently may not exceed “fifty rand” (about US$ 3.50), which is probably an insufficient sum to affect behaviour.

9. Civil defamation

Defamation is to publish or communicate something with the intent to injure another person’s good name, reputation or status.

The three elements required to support a civil suit for defamation generally include:

1. the publication or expression of words or speech;
2. causing wrongful injury to another person’s name, reputation or status; and
3. intention to cause this result.

In Namibia, once it is established the defendant published a defamatory statement, a presumption is created that the statement was both wrongful and intentional. The defendant can rebut the presumption (and thus successfully defend the defamation allegation) by proving:

a. **truth in the public benefit**: that the material facts in the statement were true and its publication was in the public interest;

b. **fair comment**: an expression of opinion on a matter of public interest, based on reasonable inferences from true facts and fair in the sense of being honest, genuine (even if exaggerated or prejudiced), relevant to the facts upon which the comment is based, and not malicious;

c. **qualified privilege**: that the statement was made in a context of privilege (where the person making the statement has some legal, moral or social duty to do so, and where the person to whom the statement was made has some similar duty to receive it) and was fair and reasonably accurate; or
d. **reasonable publication**: that the publication was in the public interest, and that, even though truth is not established, it was nevertheless in the public interest to publish the statements.

In the 2010 case of Trustco Group International Ltd v Shikongo, the Namibian Supreme Court considered whether the law of defamation was repugnant to the protections of freedom of expression enshrined in the Constitution of Namibia. The Court held that “reasonable or responsible publication of facts that are in the public interest” should be a defence to a claim of defamation, but found that this defence requires media defendants to show that they were not negligent – in contrast to requiring them to show only that they did not act with an intention to injure. The Court noted that free speech and free press are “central to a vibrant and stable democracy” but also stated that the press have an obligation to wield their power of free comment “responsibly and with integrity”.

10. Protection against hate speech by political parties

The Electoral Act 2014 prohibits political parties from discriminating in their membership on the basis of “sex, race, colour, ethnic origin, religion, creed or social or economic status”, from advocating or aiming to carry on political activities on these grounds, and from using words, slogans or symbols which could give rise to division on any of these grounds. The Guidelines for the Conduct of Political Activities by Political Parties, Associations, Organisations and Independent Candidates during Election Campaign prohibit intimidation in any form as well as incitement to violence by speakers at political rallies or through pamphlets, newsletters or posters issued by a political party.
C. Civil Law cont

PROS AND CONS OF CIVIL VERSUS CRIMINAL REMEDIES

When it comes to redress for harms such as harassment and hate speech, civil and criminal remedies may be considered in the alternative or in combination. Civil and criminal approaches each have their pros and cons. Criminal remedies are prosecuted by the state prosecutor and so would not require the engagement of a private legal practitioner as a civil case would. Therefore, criminal cases provide a less expensive option for redress. A criminal sanction may also constitute a more drastic remedy than an award of damages. On the other hand, it is not possible under current Namibian law to claim compensation in a criminal case other than for property damage, so monetary damages in respect of a wrongful act could be claimed only through a civil case. Furthermore, the standard of proof in a criminal case is “beyond reasonable doubt” - a higher standard than that required in a civil case, which is “on a balance of probabilities”. In both kinds of cases, if the wrongful act involved speech or expression, the court would have to weigh up the damage done against the constitutional protections for freedom of speech and expression, to ensure that a correct constitutional balance has been drawn. The discussion around the repeal of criminal defamation laws emphasises that civil remedies are generally preferable to criminal remedies in respect of harmful speech, except in very serious cases.

<table>
<thead>
<tr>
<th>Civil cases</th>
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<tr>
<td>Private lawyer</td>
<td>State prosecutor</td>
</tr>
<tr>
<td>Compensation for harm</td>
<td>Criminal sanction but no compensation</td>
</tr>
<tr>
<td>Lower burden of proof</td>
<td>Higher burden of proof</td>
</tr>
</tbody>
</table>

See Hoho v The State 2009 (1) SACR 276 (SCA), para. 33.
4. Comparative review of models of harassment laws
Introduction

The oldest legal prohibition on persistent harassment comes from Denmark, where a criminal provision on this issue was initially conceptualised in 1930.234 The first modern law on stalking is generally considered to be the one enacted in 1990 in the US State of California, inspired by the murder of two actresses by obsessed fans 235 – with this law being credited as the source of the term “stalking” as a legal concept. 236 All 50 US states followed suit by enacting statutes criminalising stalking behaviour during the following three years.237 In 2007, the National Centre for Victims of Crime provided an updated model law - The Model Stalking Code Revisited: Responding to the New Realities of Stalking - designed to assist US states strengthen their stalking legislation.238

Jurisdictions in Canada and Australia enacted laws which criminalised stalking in the early to mid-1990s, 239 with concerns about stalking often initially being linked to domestic violence.240

In the European Union, the idea of anti-stalking legislation initially met with some resistance - because stalking had not emerged as a serious social problem and because of perceptions that existing crimes (such as assault, threat or coercion) combined with judicial interdicts would provide adequate protection against harassing behaviour.241 In 1997, the United Kingdom and Ireland became the first European countries to enact dedicated stalking legislation.242 Impetus towards increased law reform on this topic in recent years has stemmed from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 [Istanbul Convention], which places an obligation on all State Parties to criminalise stalking – or to provide effective, proportionate, and dissuasive non-criminal sanctions.243 Most of the European states which have taken this step to date also provide for some form of associated protection order.244

235 “California Stalking law-Penal Code 646.9 PC”, Shouse California Law Group website, undated, at s.1.1 (“History of Penal Code 646.9 PC, California’s Anti-Stalking Law”).
243 Council of Europe, Convention on preventing and combating violence against women and domestic violence, Article 34. Article 78(3) gives States Parties the option of reserving the right to provide for non-criminal sanctions, as long as they are “effective, proportionate and dissuasive” (Council of Europe, “Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence”, Council of Europe Treaty Series - No. 210, Istanbul, 11.V.2011, para 186).
Fewer than half of the 36 countries in the Asia-Pacific region have dedicated laws on stalking – with those that do including Afghanistan, Australia, Bangladesh, India, Japan, South Korea, Mongolia, New Zealand, the Philippines and Singapore. Some African countries have recently opted to enact separate legislation which covers cyber harassment, likely due to the influence of the SADC Model Law on Computer Crime and Cybercrime and the African Union Convention on Cyber Security and Personal Data Protection 2014. However, many of these countries lack clear corresponding protections for harassment which takes place without the use of online mechanisms.

Part 4 provides a detailed examination of harassment laws from the following three Commonwealth countries:

A. **United Kingdom: England and Wales**
   
   The Protection from Harassment Act 1997 is examined in detail, together with the rich jurisprudence which has developed under this Act in terms of the application of harassment and stalking in a wide variety of contexts. The Act is comprehensive and includes four criminal offences of harassment and stalking and both civil and criminal remedies.

B. **South Africa**
   
   The South African Protection from Harassment Act 2011, in contrast, provides a new civil remedy in the form of protection orders modelled on the protection orders available to victims of domestic violence, but creates no new criminal offences (other than criminal sanctions for violation of protection orders).

C. **Canada**
   
   Demonstrating yet another approach, in 1993 Canada established the offence of criminal harassment within its existing Criminal Code to deal with harassment and stalking behaviour. In respect of civil remedies, Canada relies on a general peace bond (a form of protection order issued by criminal courts), which was already in existence under the Criminal Code.

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246 For example, see Chapter 6 of this report for further details about new legislation on cyber harassment in Botswana and Tanzania.

A. United Kingdom: England & Wales

PROTECTION FROM HARASSMENT ACT 1997

Background to statutory framework

The Protection of Harassment Act was introduced in 1997 “to make provision for protecting persons from harassment and similar conduct.” According to a research briefing published by the UK House of Commons, the statute was aimed primarily at stalking, but formulated to encompass broader types of harassing behaviour, including racial harassment and “anti-social behaviour by neighbours.”

Support for the new law was spearheaded by the National Anti-Stalking and Harassment campaign led by Evonne Von Heussen, who was stalked for 17 years by a stranger. In 1975, she began to receive silent phone calls, envelopes containing photographs of herself and her two young daughters, pornography and underwear. The stalker also left bouquets of dead flowers on her doorstep. She had no idea who was responsible until a man appeared at her door in 1978. She recognised him as someone she had briefly encountered when she was a medical student; she had attended two psychology lectures he gave, and their sole communication had been his apology when he bumped into her on the stairs of the college library. On that day in 1978, he forced his way into her house, attempted unsuccessfully to rape her and then started choking her. A neighbour heard her screams and called the police, who reportedly dismissed the incident as a domestic matter and let the attacker go free with a caution. The man continued to stalk her and her daughters for the next 13 years, making increasingly frequent and obscene phone calls, envelopes containing photographs of herself and her two young daughters, pornography and underwear. Evonne moved out of London, but the stalker tracked her down. The harassment stopped only after she relocated to the USA for several months. Evonne’s daughter, Kirstein, was stalked by a different man for more than two years at age 15. Kirstein’s stalker threatened her repeatedly until she also left England to escape him. As a result of their experiences, Evonne and Kirstein set up the National Anti-Stalking and Harassment Support Association (Nash) and began their campaign for law reform.

Another advocate for this law reform was Tracey Morgan, who was stalked by a man who worked in the same building as her and her husband, and whom she had innocently befriended. The man obtained a set of keys to Morgan’s home and placed listening devices in her bedroom. He stole personal items and left them on her desk at work. He watched her house from his car for hours on end. He pestered her husband, her extended family members and her friends. The stalker spent six months in prison after pouring oil on Morgan’s car, and was imprisoned for another 12 months after he broke into her home. The campaign of harassment lasted for 10 years, until the stalker was sentenced to life imprisonment for the attempted murder of another woman who was his former girlfriend. Morgan founded a group called the Network for Surviving Stalking.

Scope and operation of 1997 Act

The 1997 Act created two new criminal offences:

1. Pursuing a course of conduct amounting to harassment.
2. Engaging in a course of conduct that puts the victim in fear of violence.

Harassment is not defined in the Act, but is described as including alarming a person or causing them distress. A “course of conduct” initially required conduct on at least two occasions, and the law specifically provides that “conduct” includes speech.

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248 Ibid., objecive of Act as stated in its long title.
251 UK Protection from Harassment Act 1997, s.1(1) (2). http://www.legislation.gov.uk/uksi/1997/40/content. House of Commons Library, “The Protection from Harassment Act 1997”, Briefing Paper Number 6648, 9 June 2017 at 3. The penalty for this offence is a maximum penalty of six months’ imprisonment, or an unlimited fine, or both. It is a summary offence, which means that it can be tried in a magistrates’ court. Ibid., p.56.
252 Ibid., s.4. Until April 2017, the maximum penalty for this offence was five years’ imprisonment or an unlimited fine, or both. Trials for this offence can take place either in the magistrates’ court or on indictment in the Crown Court. http://www.legislation.gov.uk/uksi/1997/40/contents. The penalty in cases of indictment was doubled to ten years by the Policing and Crime Act 2017. http://www.legislation.gov.uk/uksi/2017/3/content/enacted. House of Commons Library, “The Protection from Harassment Act 1997”, Briefing Paper Number 6648, 9 June 2017, p.6.
The statute provides specific defences to both crimes, such as a defence that the course of conduct complained of was pursued for the purpose of preventing or detecting crime or in compliance with a condition or requirement imposed by some law, or that it was reasonable under the circumstances. Acting in the public interest is not an enumerated defence, but public interest as a motivation has been considered by courts as part of the question of whether the offending course of conduct was reasonable.

The Act also provides for restraining orders in connection with a criminal charge of stalking or harassment, with these being available since 2009 after either conviction or acquittal. In addition, the behaviour which is the basis of the criminal offences covered by the law can also give rise to a civil claim for damages, or a civil injunction or restraining order enforceable by criminal penalties.

Amendments to the 1997 Act

Amendment to include Indirect harassment

The Protection from Harassment Act was amended in 2001 to introduce an offence aimed at indirect harassment – making a person who aids, abets, counsels or procures harassment liable as if he or she were the direct harasser.

Amendments aimed at extreme protest action

The kinds of harassment originally covered by this Act were further supplemented in 2005 by amendments prompted by the actions of extreme animal rights activists. An offence was added to cover the harassment “of two or more persons” where the harassment is aimed at persuading any person “not to do something that he is entitled or required to do” or “to do something that he is not under any obligation to do”. At the same time, the definition of “course of conduct” was changed to provide that while a course of conduct harassing a single individual must still take place on at least two occasions, a course of conduct directed against two or more people need only take place on one occasion in relation to each person. The changes to the law meant, for example, that harassment directed at two or more people who are connected (such as two people who are employees of the same company) would be actionable even if each individual is harassed on only one occasion.

With extreme protesting in mind, another criminal offence was created in separate legislation (the Criminal Justice and Police Act 2001) to address harassment causing alarm or distress to persons in their homes. This offence is committed if the harasser is attempting to persuade the resident of the home or another individual to do or not to do something, and applies if the presence of the perpetrator harasses, or causes alarm or distress to, the resident, some other person in the resident’s dwelling or a neighbour.

Amendments to enhance protection against stalking

While the Act as originally enacted in 1997 had been intended to apply to stalking, which was viewed as falling within the concept of “harassment”, there were concerns that the law was not being adequately applied to situations popularly understood as stalking. According to the UK Policing College, “the omission of a specific criminal offence of stalking and a lack of understanding of the behaviours associated with stalking, had resulted in the police and prosecutors failing, in many cases, to take a positive and rigorous approach to dealing with stalking offenders”.

256 Ibid., ss.1(3), 4(3). In the case of the more serious offence, the conduct must have been reasonable for the protection of the perpetrator or some other person, or for the protection of the property of the perpetrator or some other person. A belief that behaviour is being pursued for the purpose of preventing or detecting a crime must be a rational one.

257 See, for example, Horvath v Thomson & Ors [2017] EHMC 432 138: http://www.telegraph.co.uk/lawsuits/2017/432.html#board

258 UK Protection from Harassment Act 1997, ss.5-5A. The authority to make a restraining order even after an acquittal was inserted by the Domestic Violence, Crime and Victims Act 2004, with effect from 30 September 2009: http://www.legislation.gov.uk/ukpga/1997/40/contents

259 Ibid., ss.3, 5 and 5A.

260 Ibid., s.73A, inserted by the Criminal Justice and Police Act 2001, s.44.


263 Ibid., s.73A as amended by the Serious Organised Crime and Police Act 2005.

In 2012, responding to these criticisms, the 1997 Act was again amended to add two new criminal offences:

1. Pursuing a course of conduct amounting to stalking.
2. Stalking that creates a fear of violence or serious alarm or distress which has a substantial adverse effect on the victim’s day-to-day activities.

The Act lists acts or omissions which may constitute stalking, including:

- contacting or attempting to contact another person by any means;
- following another person;
- publishing statements or other material about another person or purporting to originate from that person;
- monitoring another person’s use of any form of electronic communication;
- littering;
- interfering with another person’s property; or
- watching or spying on another person.

The Act leaves open the question of what constitutes a “substantial adverse effect on the victim’s day-to-day activities”, which is part of the more serious stalking offence, but a government circular suggests that evidence of such a substantial adverse effect might include:

- changing routes to work, work patterns, or employment;
- arranging for friends or family to pick up children from school (to avoid contact with the stalker);
- putting in place additional security measures in the home;
- physical or mental ill-health;
- deterioration in performance at work due to stress; and
- stopping/or changing social behaviour.

The same defences that apply to the two original harassment offences apply in the same way to the two additional specific stalking offences.

It is noteworthy that a 2017 report recorded that despite the 2012 legislative amendments, challenges with police responses to and prosecution of stalking offences remain. The report found that police struggled with identifying the differences between stalking and harassment; that the number of charged and prosecuted cases was very low; and that this was largely due to the absence of a clear definition or exhaustive list of conduct constituting stalking in the amended legislation.

**Application of the Act in practice**

When it comes to criminal complaints under the Act, a 2007 case stated that when courts consider whether the quality of a course of conduct amounts to harassment, they must keep in mind the fact that:

“[I]rritations, annoyances, even a measure of upset, arise at times in everybody’s day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability [...]”.

**Harassment or stalking motivated by specific kinds of hostility**

If harassment or stalking under the Protection from Harassment Act 1997 is motivated by race or religion, it becomes the offence of “racially or religiously aggravated harassment” which attracts a heavier penalty. Also, any crime motivated wholly or in part by hostility based on disability, sexual orientation or transgender identity attracts an aggravated sentence.

**A. United Kingdom: England & Wales**

**UK Criminal Justice Act 2003, s.146**: https://www.legislation.gov.uk/ukpga/2003/44/contents. The aggravated sentences apply if the offender, at the time of committing the offence or immediately before or afterwards, demonstrated hostility towards the victim based on the victim’s membership (or presumed membership) of a racial or religious group – or if the offence was motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group. “Racial group” is defined as “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”, and “religious group” means a group of persons defined by reference to religious belief or lack of religious belief. See also UK Criminal Justice Act 2003, s.145, which applies in the same way to offences not covered by the Crime and Disorder Act 1998, s.32 (as amended) read together with s.28: http://www.legislation.gov.uk/ukpga/1998/37/contents. This provision applies if the offender, at the time of committing the offence or immediately before or afterwards, demonstrated hostility towards the victim based on the victim’s membership (or presumed membership) of a racial or religious group – or if the offence was motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group. “Racial group” is defined as “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”, and “religious group” means a group of persons defined by reference to religious belief or lack of religious belief. See also UK Criminal Justice Act 2003, s.145, which applies in the same way to offences not covered by the Crime and Disorder Act 1998, s.32 (as amended) read together with s.28: http://www.legislation.gov.uk/ukpga/1998/37/contents.

**UK Crime and Disorder Act 1998, s.32** (as amended) read together with s.28: [https://www.legislation.gov.uk/ukpga/1998/37/contents](https://www.legislation.gov.uk/ukpga/1998/37/contents). This provision applies if the offender, at the time of committing the offence or immediately before or afterwards, demonstrated hostility towards the victim based on the victim’s membership (or presumed membership) of a racial or religious group – or if the offence was motivated (wholly or partly) by hostility towards persons who are of a particular sexual orientation, have a disability or persons who are transgender.

265 Ibid., s.2A (inserted by the Protection from Freedoms Act 2012). The maximum penalty for this offence is six months’ imprisonment, an unlimited fine or both.

266 Ibid., s.4A (inserted by the Protection from Freedoms Act 2012). Until April 2017, the maximum penalty for this offence was five years’ imprisonment or an unlimited fine, or both. It was doubled to ten years by the Policing and Crime Act 2017. See House of Commons Library, “Stalking: Developments in the law”, Briefing Paper Number 06261, 21 November 2018 at 6. [https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06261](https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06261).


270 Ibid.

271 UK Crime and Disorder Act 1998, s.32 (as amended) read together with s.28: [https://www.legislation.gov.uk/ukpga/1998/37/contents](https://www.legislation.gov.uk/ukpga/1998/37/contents). This provision applies if the offender, at the time of committing the offence or immediately before or afterwards, demonstrated hostility towards the victim based on the victim’s membership (or presumed membership) of a racial or religious group – or if the offence was motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group. “Racial group” is defined as “a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins”, and “religious group” means a group of persons defined by reference to religious belief or lack of religious belief. See also UK Criminal Justice Act 2003, s.145, which applies in the same way to offences not covered by the Crime and Disorder Act 1998. Section 2(2) of this provision states: “If the offence was racially or religiously aggravated, the court – (a) must treat that fact as an aggravating factor, and (b) must state in open court that the offence was so aggravated. ” [https://www.legislation.gov.uk/ukpga/2003/44/contents](https://www.legislation.gov.uk/ukpga/2003/44/contents).

272 UK Criminal Justice Act 2003, s.146 [https://www.legislation.gov.uk/ukpga/2003/44/contents]. The aggravated sentences apply if the offender, at the time of committing the offence or immediately before or afterwards, demonstrated hostility towards the victim based on the victim’s membership (or presumed membership) of a racial or religious group – or if the offence was motivated (wholly or partly) by hostility towards persons who are of a particular sexual orientation, have a disability or persons who are transgender.

Behaviour constituting stalking and harassment

The official guidance for prosecutors lists examples of behaviour which might form “part of a campaign of stalking and harassment”, which include the following:

- frequent unwanted contact, such as visiting the home or the workplace of the victim, making telephone calls, sending text messages or emails, or making contact via mechanisms such as social networking sites;
- driving past the victim’s home or workplace;
- following or watching the victim;
- sending letters or unwanted “gifts” or other items to the victim;
- arranging for others to deliver unwanted items to the victim;
- damaging the victim’s property;
- boasting about awareness of the location or address of the victim’s family members or children;
- burglary or robbery of the victim’s home, workplace or vehicle;
- becoming inappropriately involved in a victim’s life, such as by making contact with their friends and family;
- threats of physical harm to the victim;
- physical and/or sexual assault of the victim.  

Behaviour constituting cyberstalking

Examples of harassment which takes the form of “cyberstalking” include using the internet:

- to locate personal information about a victim;
- to communicate with the victim;
- as a means of surveillance of the victim;
- for identity theft such as subscribing the victim to services, or purchasing goods and services in their name;
- to damage the reputation of the victim;
- to commit electronic sabotage such as spamming and sending viruses; or
- to trick other internet users into harassing or threatening a victim.  

Case law has defined a wide range to behaviours to constitute a course of conduct amounting to harassment, including many which involve forms of speech and expression, such as direct personal speech; letters; emails; telephone calls; voicemail messages; banners flown from aeroplanes; the distribution of leaflets; and the publication of articles in newspapers or online.  

The official guidance on the Act for prosecutors provides four scenarios to illustrate the range of incidents which the Act covers in practice:  

**Case 1: Harassment, with the added element of being a hate crime on the basis of disability**

The victim is in her 80’s and suffers from a disability which causes her to walk with a limp. The defendant Rex and his family who live down the street from her, constantly mock her at her disability. When she was walking past the house, the defendant made fun of how slow she walks and started following her very closely up the street laughing at her. The victim felt distressed. A few days later someone banged on her door for 5 minutes very loudly and she could hear a male laughing and saw it was Rex standing outside her door. He has since followed her making fun of her age and mobility problems on two further occasions when she has walked past the house. She feels very intimidated by Rex’s behaviour and is starting to feel trapped in her home. She is scared that if she reports Rex to the police, his family will make more trouble for her.  

**Case 2: Stalking**

A woman walks past a man as she leaves work and recognises him as an old work colleague. He stops her and says hello and states that he is just visiting some old colleagues. Two days later the woman sees the same man standing outside her house for ten minutes, hiding behind the hedge but runs off when she approaches him. The woman’s friend is visiting and says that she passed a strange man sitting in a car outside her house. The woman states that this might be someone she used to work with. She explains that she bumped in to him at work a couple of weeks ago and since then has seen him 4 or 5 times standing outside her house in the evening and watching her. The woman has become nervous and anxious and begins resorting to locking up all the windows and doors and keeps on checking a number of times. The friend suggests he may be living close by but the woman says she is sure he moved away from the area years ago. The woman says that the man has been watching her all the time and is making her feel anxious.  

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275 Ibid.


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Case 3: Stalking which causes the victim serious alarm or distress and has had a substantial adverse effect on the day-to-day activities of the victim:

A young woman had a brief relationship with a man some years her senior who she had met through a dating agency. When she terminated the liaison by text message, he refused to accept her decision. He repeatedly telephoned her, stating that they were destined to be together and insisting she should marry him. He sent hundreds of emails at her work and personal email accounts. He kept turning up at her door and began following her to work. He contacted her family to announce their engagement. When she still refused to have anything to do with him, his tone shifted and he wrote to her, stating that, if he could not have her, no-one would. As a result of his behaviour the victim moved out of her address, changed her mobile telephone number and moved to another job.

Other examples highlighted in the official guidance are “collective harassment” of closely connected groups of people and “stalking by proxy”.

Collective harassment: The primary intention of this type of harassment is not generally directed at an individual but rather at members of a group. This could include members of the same family; residents of a particular neighbourhood; groups of a specific identity including ethnicity or sexuality, for example, the racial harassment of the users of a specific ethnic community centre; harassment of a group of disabled people; harassment of gay clubs; or of those engaged in a specific trade or profession.

Stalking by proxy: Harassment of an individual can also occur when a person is harassing others connected with the individual, knowing that this behaviour will affect their victim as well as the other people that the person appears to be targeting their actions towards. Family members, friends and employees of the victim may be subjected to this.

Case 4: Stalking which causes the victim serious alarm or distress and has had a substantial adverse effect on the day-to-day activities of the victim

The executive of a bank began receiving emails from a woman who appeared to hold him responsible for the failure of her business, the matter relating to a refusal to give a loan two years previously. Her tone was hostile. Over a period of months, her emails became more threatening in tone, and she demanded not only financial recompense, but a public apology. She started sending emails to his seniors and to clients of the bank, claiming negligence, then persecution and conspiracy. She set up a website dedicated to her cause, containing inflammatory statements about the bank employee. His home address was published on the website with an exhortation that others should use it to write and protest on her behalf.

The effect of the woman’s behaviours caused serious distress to the extent that the victim went on stress leave and was prescribed medication.


See, for example, @ (2015) EWCA Civ 206, which held that a person who was foreseeably affected by the harassment can bring a civil action for damages based on harm suffered as a result of the harassment, even if that person was not the specific target of the harassment. According to the Court, the harassment must be targeted at the complainant. (para 29) For example, a stalker “may typically target his or her conduct at a former sexual partner who has, by the time the objectionable course of conduct begins, formed a new partnership with someone else. The stalking may be as alarming and distressing to that new partner as it is to the target, or even more so” (para 30).
Case law has established some additional important principles regarding the application of the Act including the following:

1. In considering what constitutes a “course of conduct”, the number of incidents and the time period between them will be relevant, as well as whether the separate incidents are connected in terms of type and context.
2. Harassment can be committed by a legal person such as a company as well as by an individual.
3. A “legal person” such as a company cannot use the law for protection. The law applies only to individual victims, but a company can bring action under the Act to stop the harassment of its employees.
4. Employers can be held vicariously liable for harassment by their employees.

Implementation issues

In addition to confusion regarding the differences between “harassment” and “stalking”, the police in England and Wales have also struggled with the issue of how to gather evidence of these crimes when they involve an online element. Another problem is that police and prosecutors sometimes fail to understand the context for threatening behaviours, viewing specific incidents in isolation without giving sufficient attention to patterns of behaviour which can make seemingly innocuous acts very threatening.

It is also important to consider the ways in which the law has been applied in contexts which are very different from the kind of stalking and harassment typically directed at women by male strangers or acquaintances, which was the type of harm envisaged when the law was originally enacted. There are a number of instances where this has been a positive development, but also certain contexts which cause concern. The potential of newspaper articles constituting harassment has been discussed above. The law on harassment has also been applied to disputes between neighbours, harassment of service providers such as doctors or lawyers by dissatisfied clients, the hounding of celebrities by paparazzi, the harassment of political figures by their constituents, to various protest actions (large and small), and to harassment of consumers by companies trying to collect alleged debts.

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291 See, for example, "Harassment by Journalists and Photographers", Carruthers Law, 29 April 2012: https://www.carruthers-law.co.uk/articles/harassment-by-journalists-and-photographers-
**Harassing speech versus freedom of speech**

In the case of Thomas v News Group Newspapers Ltd decided by the Court of Appeal in 2001, a single newspaper article was found to constitute harassment, in a ruling which has been criticised as an inroad into press freedom. The Court was satisfied that the newspaper could be found to have harassed the complainant “by publishing racist criticism of her which was foreseeably likely to stimulate a racist reaction on the part of their readers and cause her distress”.296

In contrast, in a 2012 case alleging harassment by means of newspaper publications, Trimingham v Associated Newspapers Ltd, the Court did not find criminal harassment.297 This case involved a series of articles about an affair between a prominent male MP who was married and a woman who had been living in a relationship with a lesbian civil partner. The offending publications, and many of the readers’ comments publishing along with them, called the woman ugly and masculine, and referred to her sexual orientation in ways that “reduced her to a crude stereotype and played upon homophobic prejudice”.298

The Court found, in principle, that repeated publication in the press of offensive or insulting words about a person’s appearance can amount to harassment, particularly if combined with repeated mocking of that person’s sexual orientation.299 However, it did not find that harassment had taken place here for several reasons - including the fact that the complainant had made herself a public figure, that the statements about her sexual identity were factual, and that the “scandal” was newsworthy.300 Most importantly, the Court found that it would be “a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based on subjective claims by individuals that they feel offended or insulted”.

**OTHER LEGISLATION DEALING WITH HARASSMENT**

The legal regime on harassment in England and Wales operates across multiple statutes. In addition to the Protection of Harassment Act 1997 (as amended) discussed above, there are several other laws relevant to harassment and stalking. These are discussed below.

**The Public Order Act 1986**

The Public Order Act 1986 (as amended) includes a number of offences related to, including the following:

- **Fear or provocation of violence where a person** uses “threatening, abusive or insulting words or behaviour” towards another person, or “distributes or displays to another person any writing, sign or other 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 some other person, or to provoke the immediate use of unlawful violence.302

- **Intentional harassment, alarm or distress**, where “threatening, abusive or insulting words or behaviour, or disorderly behaviour” or the display of “any writing, sign or other visible representation which is threatening, abusive or insulting” is done with the intent to cause another person “harassment, alarm or distress”, and does in fact cause such a response.303

- **Harassment, alarm or distress**, where a person engages in such actions “within the hearing or sight of a person likely to be caused harassment, alarm or distress”304, with the mental requirement here being foreseeability rather than intent. This offence applies only to threatening or abusive words, behaviour and signs; a reference to “insulting” actions was removed in 2013 on the basis that it made the application of the offence too broad.305

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299 Ibid., para 267.

300 Ibid., para 249-255.

301 Ibid., para 267.

302 Public Order Act 1986, s.4.

303 Ibid., s.4A.

304 Ibid., s.5.

305 “Section 5 has been used to arrest and/or prosecute (for example) religious campaigners against homosexuality; a British National Party member who displayed anti-Islamic posters in his window and people who have sworn at the police. Police charged a teenage anti-Scientology protestor, although the charges were later dropped, as they were in a well-publicised case of a student arrested for calling a police horse ‘gay’. Hotel owners were charged (although later acquitted) following a religious discussion with a Muslim guest.” House of Commons Library, “Insulting words or behaviour.” Section 5 of the Public Order Act 1986”, 15 January 2013; https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05760.

Comparative review of models of harassment laws

Using threatening, abusive or insulting words, behaviour or written materials which intend, or are likely, to stir up racial hatred, religious hatred or hatred on the grounds of sexual orientation subject to a specific provision on the protection of freedom of expression which provides that this offence shall not be applied “in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system”, noting further that “any discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices”, and “any discussion or criticism of marriage which concerns the sex of the parties to marriage” shall not in themselves be understood to be threatening or intended to stir up hatred.

Malicious Communications Act 1988

The Malicious Communications Act 1988 includes a number of relevant offences including the following:

- Sending a letter, electronic communication or article of any description which conveys an indecent or grossly offensive message, a threat or false information, or which is in itself wholly or partly “of an indecent or grossly offensive nature”; this offence requires that the purpose of the message must have been, at least in part, to cause distress or anxiety to its recipient.

Communications Act 2003

The Communications Act 2003 includes a number of relevant offences including sending a message of a menacing character, with no requirement that it be aimed at a specific recipient (thus covering general communications such as a blog or a comment posted on a website); this offence requires either an intention that the message should be of a menacing character, or awareness of a risk that the message may create fear or apprehension in a reasonable member of the public who reads it or sees it.

Government guidelines on prosecuting communications offences under the Malicious Communications Act 1988 or the Communications Act 2003 in respect of messages sent via social media direct that prosecution should proceed only where there is sufficient evidence that the communication has crossed the high threshold necessary to protect freedom of expression, which includes even unwelcome freedom of expression. Thus, communication must go beyond being:

- offensive, shocking or disturbing;
- satirical, iconoclastic or rude comment;
- the expression of unpopular or unfashionable opinion;
- banter or humour, even if distasteful or painful to some;
- an uninhibited and ill thought out contribution to a casual conversation where participants expect a certain amount of “give and take”.

The question of whether the communication in its particular context has gone beyond what is tolerable must be considered with reference to the “contemporary standards” of “an open and just multi-racial society”.

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307 Ibid., ss. 29A and 29B.
308 Ibid., ss. 294B and 29B.
309 Ibid., s. 29A.
310 Ibid., s. 29A.
A. United Kingdom: England & Wales cont

Sexual Offences Act 2003

The Sexual Offences Act 2003 includes a number of relevant offences including:

- **Voyeurism**, which consists of observing a person doing a private act for the purpose of sexual gratification, knowing that the person does not consent to being observed, whether directly or by means of operating equipment or making a recording, where this is done for the sexual gratification of the culprit or another person; it is also an offence to install equipment, or to construct or adapt a structure for the purpose of voyeurism. Some have criticised the voyeurism offences for being too restrictive with respect to purpose.

- **Upskirting**, which refers to using a camera, cell phone or some other device to view or record a voyeuristic image up someone's skirt (or underneath other clothing) without their permission, where this is done for sexual gratification for the culprit or another person, or to humiliate, alarm or distress the victim.

There have been calls for explicit bans in England and Wales on “deepfake pornography”, a growing form of online abuse where images of one person’s face are digitally manipulated onto explicit photographs or videos of other persons – a process which is becoming easier due to software designed specifically for this purpose.

Equality Act 2010

The Equality Act came into force in England & Wales in October 2010. The twin objectives of the Act are to protect individuals from unfair treatment and promote a fair and more equal society. Amongst other things, the Act prohibits discrimination, harassment and victimisation on the grounds of a protected characteristic, defined as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Section 26 of the Act defines what is meant by harassment and sets out three types of harassment:

1. The first type applies to all the protected characteristics (apart from pregnancy and maternity, and marriage and civil partnership) and involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant’s dignity.

2. The second type is sexual harassment, which is unwanted conduct of a sexual nature where this has the same purpose or effect as the first type of harassment.

3. The third type is treating someone less favourably because he or she has either submitted to or rejected sexual harassment, or harassment related to sex or gender reassignment.
The Stalking Protection Act 2019

The Stalking Protection Act 2019 came into force in March 2019 in England and Wales.318 The bill which led to the Act was introduced into Parliament in 2017, after consultations highlighted the need for earlier intervention in stalking cases to address emerging patterns of behaviour by perpetrators before they resulted in serious harm.319 The Act does not define stalking (following the approach of the Protection from Harassment Act 1997 which gives examples of acts associated with stalking rather than a definition).320

A consultation which preceded the enactment of the law included the following statement on the difference between stalking and harassment:

“While some behaviours that constitute harassment will be similar to those manifesting in stalking situations, a key difference between these offences is that a stalker is more likely to be obsessively fixated on one specific individual – their victim. The stalker may have delusions that they are in a relationship with the victim when no relationship actually exists for example and even if the victim moves or changes their name, the stalker will do everything possible to track them down.”321

The new Act provides for “stalking protection orders” which are available from the courts on application by the police (as opposed to application by the victim) to address stalking in any context (from domestic abuse to “stranger stalking”) – even in cases where the actions in question have not yet reached the level of a crime or in instances where the victim prefers not to lay a criminal charge. The basis for such orders is “acts associated with stalking”, which are described with reference to the examples in the Protection from Harassment Act 1997. It is also necessary for the court to be satisfied that the defendant poses a risk to another person associated with stalking, and that there is “reasonable cause to believe the proposed order is necessary” to protect another person from this risk (whether the person is the victim of the stalking acts or someone else).322

The Act specifically notes that a risk associated with stalking may involve physical or psychological harm, and that it may arise “from acts which the defendant knows or ought to know are unwelcome to the other person even if, in other circumstances, the acts would appear harmless in themselves”.323 The Act also provides for interim stalking orders which can be issued immediately upon application, to provide protection until the main application is heard.324

Courts are empowered to impose duties as well as restrictions on the perpetrator.325 For example, perpetrators can be required to undergo psychological assessments or attend an anger management programme.326 A breach of a Stalking Protection Order is a criminal offence punishable by a fine or by imprisonment for up to 12 months on summary conviction or up to five years on indictment.327

318 UK Stalking Protection Act 2019 (c. 9) http://www.legislation.gov.uk/ukpga/2019/9/contents/enacted
320 UK Stalking Protection Act 2019, s.1(1) and (6): http://www.legislation.gov.uk/ukpga/2019/9/contents/enacted
322 UK Stalking Protection Act 2019, s.1(1) and (6): http://www.legislation.gov.uk/ukpga/2019/9/contents/enacted
323 Ibid., s.1(4)
324 Ibid., s.5
325 Ibid., s.1(12)
327 Op.cit. at fn 322, s.8(1).
The South African Law Reform Commission (SALRC) issued a report on stalking in 2006.³²⁸ It considered three possible approaches to the problem of stalking:

1. **Expansion of the domestic violence legislation:** At that time, South Africa already had in place domestic violence legislation which covered stalking (defined as “repeatedly following, pursuing, or accosting the complainant”). This legislation provided a procedure for obtaining protection orders prohibiting persons from engaging in certain behaviour in the context of domestic relationships.³²⁹ One option was to extend this Act to cover stalking outside of domestic relationships as well. This option was rejected, however, on the basis that domestic disputes involve “issues of financial dependence, physical and emotional power and control and shared emotional history” which set them apart from non-domestic contexts.³³⁰ There was also concern that adding non-domestic stalking to the Act would create confusion and undermine the specific focus on domestic violence in the existing law.³³¹ This reasoning is of interest in Namibia, as its Combating of Domestic Violence Act also provides a protection order procedure, and includes the concept of “harassment.”³³²

2. **Adaptation of peace orders:** South Africa also had in place at the time a procedure for “peace orders” which is analogous to Namibia’s statutory provision on this topic (which is seldom if ever used).³³³ However, it was reported that the peace order procedure is not structured to address repetitive behaviour such as stalking, and would not be appropriate because it is not appealable or reviewable and is not taken seriously in practice.³³⁴ Furthermore, while stalking may encompass a breach of the peace, this is not necessarily the case.³³⁵

3. **Independent new legislation on stalking:** This third option was the one which was recommended, on the theory that a specific conceptual and legal framework is necessary for the consideration of separate acts of harassment which may be minor in themselves while adding up to something more serious. This view was influenced by the fact that many other jurisdictions have such legislation. However, the SALRC recommended that this legislation should focus on civil remedies in the form of protection orders, without providing a new criminal offence of stalking on the theory that existing common law crimes such as crimen iniuria and assault could be utilised in conjunction with the statutory remedies as appropriate.³³⁶

The SALRC explained its thinking on why a civil approach would be more effective as follows:

“It could be argued that enacting legislation which specifically criminalises stalking behaviour would make the law easier for the general public to access. However the defining character of stalking and harassment in policing terms is its perceived complexity. In an attempt to retain some modicum of flexibility some foreign jurisdictions have criminalised stalking in such an open ended way that it is not clear what exactly is criminalised. In Queensland, contrary to the intention of the legislator, charges of stalking are mostly brought to address disputes or altercations between neighbours. Legislatively defining a crime binds the state to proving

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³²⁹ Ibid., paras 2.69.

³³⁰ Ibid., para 2.59.

³³¹ Ibid., para 2.6.

³³² Ibid., paras 2.11, 2.46, 2.48.


³³⁵ Ibid., para 2.69.
the exact elements of the crime. Where the behaviour does not fit the definition and the conduct consequently does not satisfy the elements of the crime, the state will be unable to prove the crime.\textsuperscript{337}

The SALRC suggested that more effective use of existing criminal remedies such as \textit{crimen iniuria} and assault could be promoted by government announcements raising public awareness of their availability for this purpose, and official guidelines for police and prosecutors on this topic.\textsuperscript{338}

After the SALRC report was published, the issue of stalking was given impetus by the stalking and murder of one of South Africa’s most respected investigative journalists, Shadi Rapitso, in 2009. The stalker had pursued Rapitso for some time; according to her roommate, he had been calling her frequently and saying that he could not live without her. He managed to gain access to her house, where he declared his love for her and threatened to kill himself if she did not enter into a romantic relationship with him. She rejected his advances, and he became enraged a few days later when he saw her with her boyfriend. He kidnapped her, held her hostage at his house for some time and then stabbed her to death before inflicting stab wounds on himself as well. He was eventually sentenced to 10 years imprisonment for the crime. This murder, which had been preceded by both online and offline harassment, sparked a national debate about the adequacy of the existing legal framework to address stalking and harassment.\textsuperscript{339}

The SALRC’s proposal was utilised as the basis for the Protection from Harassment Act 2011 which came into force in 2013.\textsuperscript{340} However, the law which was enacted was expanded to incorporate provisions aimed specifically at cyber harassment which were not included in the SALRC proposal.

\textbf{The concept of harassment}

The Act contains a brief definition of “harassment” which mirrors to a great extent the definition of “harassment” in the South African Domestic Violence Act.\textsuperscript{341} The actions which constitute harassment fall into four categories: physical stalking, engaging in communications, sending items or communications, and sexual harassment (which has a separate definition):

\textbf{Harassment} is defined under the Act as directly or indirectly engaging in conduct that the respondent knows or ought to know-

\begin{itemize}
  \item[(a)] causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-
  \item[(ii)] following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
  \item[(ii)] engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
\end{itemize}
B. South Africa cont

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person.

The actions listed can be actionable if aimed at the complainant or a “related person”, broadly defined as “any member of the family or household of a complainant, or any other person in a close relationship to the complainant.”

Sexual harassment is defined under the Act as:

(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually-oriented request; or

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.

The salient features of the Act’s approach to the concept of harassment include that there is no requirement that the conduct which constitutes harassment (or sexual harassment) must involve serious, repeated or persistent actions, and no reference to a pattern of conduct.

The Protection from Harassment Act 2011 relies instead on the concept of unreasonableness. For the purpose of deciding whether conduct complained of is unreasonable, the Act requires a court to consider whether the conduct was:

(a) for the purpose of detecting or preventing an offence;

(b) to reveal a threat to public safety or the environment;

(c) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or

(d) to comply with a legal duty.

The SALRC explained the reasoning behind this approach as follows:

“The Commission agrees that use of the word ‘repetition’ on its own should be avoided as it would restrict the conduct to a recurrence of the same acts. Consideration was given to the applicability of the words ‘series’, ‘course of conduct’ and ‘pattern’ to describe actions which are carried out with regularity showing evidence of a continuity of purpose. However, […] the Commission is reluctant to accept that a single occasion cannot provide proof of harassment. It is the view of the Commission that whether or not a single instance will amount to stalking will depend on the context in which the behaviour occurs. The Commission recommends that harassing behaviour should not be restricted to a pattern of behaviour or a protracted act.

It is of the opinion that where there is proof of harm or the reasonable belief that harm may be caused a once-off incident could amount to stalking.

In order to avoid a Constitutional challenge based on overbreadth or vagueness the Commission is of the opinion that the prerequisite that an act has to at least be protracted should be excluded from the definition of harassment.”

Although the law is intended to cover cyber harassment, there was a conscious decision not to use that term, based on the recommendation of the SALRC which observed that “cyberstalking” fundamentally amounts to an extension of physical stalking. One is merely dealing with a different medium.

In contrast to the UK Protection from Harassment Act, the South African Protection from Harassment Act’s approach to harassment requires communication to the target of the harassment or a related person – and does not seem to apply to communications about the target to the general public, such as posting intimate pictures or derogatory information online or sending it to unrelated persons. This element could be particularly limiting in the context of cyber harassment.

343 Ibid.
344 Ibid.
348 Report on Stalking, South African Law Reform Commission, Project 130, November 2006 at paras 3.24-3.25. Submissions to the SALRC noted that the inclusion of an indefinite period of time such as “protracted” would make it difficult for persons to know with reasonable certainty when the law was being contravened (para 3.21).
349 Ibid., para 3.88.
Although the law uses the term “harassment”, it seems to be oriented around the concept of stalking. In fact, one government document states: “The essence of the Act is to provide a quick, easy and affordable civil remedy in the form of a protection order for incidences of stalking.”

The Act has been criticised for its failure to address harassment on specific protected grounds such as race, sex or sexual orientation. This omission may have been occasioned by the fact that harassment in any environment on the basis of a variety of personal characteristics was already prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (which is discussed in more detail in Chapter 7 of this report).

**Protection orders as the key remedy**

The thrust of the South African statute is to provide an accessible mechanism for obtaining a protection order to stop the harassment. The procedures provided are very similar to those which apply in terms of a protection order prohibiting domestic violence. Following on the SAURC’s recommendation, the Protection from Harassment Act 2011 creates no new crimes to address the problem of harassment – other than making breach of a protection order issued under the Act a criminal offence. It also provides no new grounds for bringing a civil lawsuit for damages.

Someone who has been harassed can apply to a magistrate’s court for an interim protection order. An interim order can be issued without notice to the respondent if the court is satisfied that there is prima facie evidence of three things:

(a) the respondent is engaging or has engaged in harassment;
(b) harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and
(c) the protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent.

Children under age 18 can approach the courts on their own for this purpose, and someone may apply for a protection order on behalf of another person with that person’s written consent, or in circumstances where the complainant is unable to give consent.

An application for an interim protection order can be considered outside ordinary working hours if there is reason to believe that harm may otherwise result. If an interim order is granted, it will be served on the respondent with a return date when the respondent can come to court to object to the order - with this return date typically being about three months after the interim order was issued, although the respondent has the power to move this date forward if the complainant and the court receive at least 24 hours prior written notice.

The interim order will be made final if the respondent fails to appear in court despite having been properly served with the interim order, or if, after hearing from the respondent, the court finds on a balance of probabilities that the respondent has engaged or is engaging in harassment. (The court may refuse to issue an interim order because it first wants to hear evidence from both parties, or on the return date, in which case it can decide at that stage whether or not to issue a final order.) A final protection order remains in force for a period of five years or a longer period determined by the court, unless it is set aside.

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352 The “prohibited grounds” in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (listed in section 1) are:
   (i) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status, or
   (ii) any other ground where discrimination based on that other ground:
      (a) causes or perpetuates systemic disadvantage;
      (b) undermines human dignity; or
      (c) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).
355 The Act has been criticised for its failure to address harassment on specific protected grounds such as race, sex or sexual orientation. This omission may have been occasioned by the fact that harassment in any environment on the basis of a variety of personal characteristics was already prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (which is discussed in more detail in Chapter 7 of this report).
356 † See Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality as Amicus Curiae) 2006 (2) SA 289 (CC), para 38: [http://saull.co.za/wp-content/uploads/2017/02/OmarGovernmentofSouthAfrica2006CC.pdf](http://saull.co.za/wp-content/uploads/2017/02/OmarGovernmentofSouthAfrica2006CC.pdf), discussing a similar procedure in domestic violence legislation: “The procedure provided for to obtain a protection order is not uncommon for situations where a party who feels threatened by the immediate conduct of another approaches a court for urgent relief without giving notice to the respondent. Interim relief is granted by courts on a daily basis and respondents are called upon to appear before the court on a specified return date to show cause why the interim relief should not be made final. On the return date the court, after a proper hearing, decides whether to discharge an interim order or to grant final relief. It is also quite common that the return date may be anticipated by the respondent and that an interim order can be varied or set aside. It is not surprising that the legislature has opted to utilise established and well-known procedures for dealing with emergency situations, to adapt those to meet the needs related to domestic violence and to codify them in a statute.”
An interim or final protection order may prohibit the respondent from engaging in (or attempting to engage in) harassment; from enlisting the help of anyone else to engage in harassment; or from committing any other act specified in the order. The court is also empowered to "impose any additional conditions on the respondent which it deems reasonably necessary to protect and provide for the safety or well-being of the complainant or related person". In addition, the court can order the police to seize any weapon in the possession or under the control of the respondent, to accompany the complainant or a related person to a specified place to collect personal property or to investigate the case with a view to possible criminal charges in connection with the harassment. Any protection order is accompanied by a suspended arrest warrant for the respondent, to be used in case the order is violated in a manner which puts the safety or well-being of the complainant or a related person at risk; if there are insufficient grounds for arrest, the police will give the respondent a notice to appear in court to answer to the breach of the order. Violation of a protection order is a crime punishable by a fine or imprisonment for up to five years.

Either the complainant or the respondent may apply for the variation or setting aside of a protection order, with notice to the other party. The court may vary the order or set it aside if finds materially changed circumstances as well as good cause for granting the request. If the request is made by the complainant, the court must be satisfied the application is made freely and voluntarily, to guard against intimidation.

Further protection for the complainant is provided by the court's power to hold protection order proceedings in closed court, and to prohibit publication of information about the proceedings, or of information about the complainant's identity and address.

The respondent is protected by the fact that the Act makes it a crime for a complainant to make materially false statements in an affidavit alleging breach of the protection order. The Act has been criticised for failing to include a corresponding offence for false statements in the affidavits submitted in the initial application for an interim protection order; however, this would constitute perjury.

If the harassment amounts to a crime, the complainant can lay a charge at the same time as applying for a protection order. In fact, if the complainant is unrepresented, the clerk of the court must inform the complainant of the right to lodge a criminal complaint against the respondent for "crimen injuria, assault, trespass, extortion or any other offence which has a bearing on the persona or property of the complainant or related person".

A complainant may not seek a protection order under this law at the same time as holding or seeking a protection order against the same behaviour in terms of the domestic violence legislation. However, the court may not refuse to provide a protection order under the Protection from Harassment Act just because the complainant has some other legal remedy available, such as an order under the domestic violence law. In fact, some persons in domestic relationships may choose to act under the Protection from Harassment Act instead of the domestic violence law because the Protection from Harassment Act contains some specific tools for addressing cyber harassment which the domestic violence law lacks.

The Act gives the court authority to make a costs order against a party who has acted frivolously, vexatiously or unreasonably. In practice, it is rare for a costs order to be made against a complainant.

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361 Ibid., s.10(1)(2)
362 Ibid., s.10(3)
363 Ibid., s.11. See Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality as Amicus Curiae 2006 015 SA 289 JCC)
364 Ibid., s.10(4)
365 Ibid., s.13
366 Ibid., s.8. See also s.10(6), which requires that the physical, home and work address of the complainant or a related person must be omitted from the protection order, unless the nature of the order necessitates their inclusion, and authorises the court to issue directions to ensure that a physical address is not disclosed in any manner which might endanger the safety or well-being of the complainant or a related person. See also s.18(2), which makes it an offence for any person to reveal the identity or address of any person in contravention of a court order restricting publication of this information.
368 Katherine Butler, "Do protection orders for domestic violence and harassment work?", De Rebus, 1 November 2018 http://www.debus.org.za/deprotection ordersforharmthonestcyberharassmentwork/
369 Perjury is the unlawful and intentional making of a false statement in the course of a judicial proceeding by an individual who has taken an oath or made an affirmation before a body that is competent to administer or accept it. This includes statements made under oath which are admissible by law as evidence at a judicial proceeding, if such a use is contemplated by the person making the statement when the statement is made. Thus, a false statement in an affidavit given in support of an application for a protection order would be grounds for a charge of perjury. See, for example, CR Snyman, Criminal Law, 2nd edition (Durban: Butterworth), 1989, pages 333ff.
370 In a 2019 review proceeding, the High Court found that the magistrate in question had erred by dismissing several applications for protection orders against harassment on the grounds that the complainants had the option of laying criminal charges. Chilibwe v Manyukwa; Phiri v Sandula; Tshabalane v Ndama; Bester v Kemp; Malangatwa v Akopfhi; Kobla v Sebokadze 2016 (9) SA 547 (HC) 2016 (9) SA 547 (HC) 2019 (2019) ZAGPHC 198 (J 1 April 2019) http://www.sflb.org.za/sites/default/files/acts/ZAGPHC%202019%20198.pdf
372 Ibid., s.10(3)
373 Amanda Mmanaye, "Are your hands tied when it comes to cyber harassment?", De Rebus, 1 September 2018 http://www.debus.org.za/whichhandsfo whenwomen tochobeharassment/
375 Katherine Butler, "Do protection orders for domestic violence and harassment work?", De Rebus, 1 November 2018 http://www.debus.org.za/deprotection ordersforharmthonestcyberharassmentwork/
The key characteristics of the legal procedure – the fact that it is straightforward, that it can be navigated without legal representation and that it takes place in magistrate’s courts (as opposed to the less accessible High Courts) – are all designed to make the law workable for all sectors of society. According to the Department of Justice and Constitutional Development:

Crucially, the Act seeks to afford protection to some of the most vulnerable in society who may be victims of harassment – it will, for example, benefit the poor and indigent who are not able to afford expensive legal remedies, children who are subject to bullying in schools (which is regarded as a form of harassment), individuals who are being harassed by cyber stalkers and those who are subjected to sexual harassment.376

Harassment laws and restrictions on journalistic freedom

During public hearings on the Protection from Harassment Bill, some media groups cited concerns that the law might result in curtailing legitimate journalistic activities and suggested a public interest defence in addition to the test of reasonableness.377 One of South Africa’s leading media companies also expressed concern about the potential impact of the Bill on news gathering activities as well as news publications:

“...The Bill might affect some techniques that were acceptable and genuine journalistic techniques. These were hidden cameras, following a subject and door stepping. Door stepping was where a subject had continuously ignored the calls and emails of a journalist; the journalist then could wait for the subject when they left their home or work place and try and get a response. There was a potential for abuse, where a prominent public figure that was being tried for a crime could just say that they were being harassed and obtain a protection order against the media.”378

They proposed the inclusion of a requirement that there be an intention to harass and an explicit “lawful excuse” defence, making it impossible to find harassment where there is a lawful entitlement to engage in the conduct in question. However, the Act did not incorporate any specific defences.379

On the question of requiring specific intent, the Parliamentary Committee responsible for the bill unanimously felt that the inclusion of “knowingly” in the definition of harassment would make the burden of proof too onerous for an applicant seeking a protection order. The Committee also stressed the need to balance the rights of journalists who are pursuing a story with the rights of individuals who require protection – even in instances where the conduct is for a legitimate purpose.380

No general public interest justification was added to the Bill, but the specific justifications for behaviour provided to guide the court’s assessment of the reasonableness of the behaviour in question (whether the conduct was carried out for the purpose of detecting or preventing an offence; to reveal a threat to public safety or the environment; to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or to comply with a legal duty)381 were reportedly added to the Bill to respond to the concerns about its impact on journalists as well as police. There would be no chance to assert such justifications in an interim protection order given ex parte, but journalists could use the mechanisms in the Act for moving return dates forward on 24 hours’ notice to the complainant, to avoid delaying publication.382

It was also stated in Parliament that the procedural framework and the concept of reasonableness in the Act would assist journalists in particular:

“Firstly, nobody will be prohibited in any way from performing their day-to-day activities. If someone believes that their behaviour amounts to harassment, they must approach a court for an order. Before the court grants such an order, it will have to be satisfied that the conduct does in fact amount to harassment. An integral part of the definition of harassment is that the conduct must be unreasonable.”383

Cybercrime and harassment by unknown persons

The Act gives the court powers, in order to identify perpetrators of cyber harassment, to direct electronic communications service providers to provide the name, identity number and address of the person to whom the relevant IP address, email or cellphone number belongs – or any other information that may assist the court – within five days of receiving the request.384

378 Ibid.
379 Ibid.
380 Ibid.
384 Ibid., 14. The law requires that the government must compile and maintain a list of contact details of electronic communications service providers to assist the courts with utilizing this provision (s.47(1)). It also authorises the Minister to “prescribe reasonable tariffs of compensation payable to electronic communications service providers” for providing the requested information (s. 48(1)).
The electronic communications service provider must inform the respondent (the alleged harasser) by providing any information to the court, of:

- what information is going to be provided to the public;
- the reference number of the court's direction to provide the information; and
- the name and address of the court.385

Electronic communications service providers are entitled to a small amount of compensation for the time and effort involved in providing information to the court – as of early 2019, this compensation was set at R80 per court directive.386

It has been pointed out that there are practical problems with involving electronic communications service providers in this approach. For one thing, it may be difficult to know which service provider to approach to seek the necessary information. Another problem is that the harassment may be taking place on an international online platform such as Facebook which is outside the court's jurisdiction.387

If the identity or address of a harasser is unknown, the court can instruct the station commander of the relevant police station to attempt to identity and trace the person. If the identity or address of a harasser is unknown, the court can instruct the station commander of the relevant police station to attempt to identity and trace the person.387

Seeking the necessary information. Another problem is that the harassment may be taking place on an international online platform such as Facebook which is outside the court's jurisdiction.387

This provision is necessary because the police would not normally assist with an investigation related to a civil action. It is a useful provision as anonymity can embolden a stalker; having the police uncover the identity of a harasser could in some cases be sufficient to bring an end to the harassing behaviour.

Additional tools to combat cyber harassment are under discussion in South Africa, including possible new criminal offences in the Cybercrimes Bill, which is still under consideration by South Africa's Parliament as of July 2019.388 (The provisions of this Bill on cyber harassment are discussed in more detail in Chapter 6 of this report.)

Application of the Act in practice

Only a handful of court cases applying the Protection from Harassment Act could be located as of mid-2019. The dearth of jurisprudence stems from the fact that protection order applications are decided in magistrate's courts and the decisions of those courts are not published; thus, the application of the Act generally comes to light in only in cases where there is a review or an appeal, or in cases concerning other issues which mention protection orders against harassment in passing. These cases show that the Act has been applied in several instances to disputes between neighbours.389 It has also been applied to disputes between employers and employees,390 a dispute between a landowner and his tenant,391 a dispute between the director of business and a dissatisfied customer,392 a dispute between shareholders and a director of a company,393 and a dispute between a businessman and a high-ranking political figure, with the businessman alleging that he had been harassed because he had taken a stand against state corruption and acted as a whistle-blower.394

385 ibid., § 46.
386 Government Notice R. 275 of 12 April 2013 (Government Gazette 36357).
387 Nicola Mawson, "Cyber bully Act becomes law," TWeb (Business Technology Media Company), 29 April 2013, quoting the Internet Service Providers' Association regulatory advisor:
389 The Bill was initiated as the Cybercrimes and Cybersecurity Bill [8 (6-7-2017)] https://www.parliament.gov.za/images/pps/docs/bill/16565.pdf. The name has been altered to the Cybercrimes Bill [8 (6-7-2017)] https://www.parliament.gov.za/images/pps/docs/bill/201906211274.pdf as the provisions dealing with cybersecurity have been removed. The amended bill was introduced in Parliament by the Minister of Justice and attended by the National Assembly and sent to the National Council of Provinces (NCOP) for concurrence in November 2018. In February 2019, the NCOP's Select Committee on Security and Justice called for comment on the proposed legislation with a closing date of 8 March 2019. "Comment Sought on Cybercrimes Bill," Sabefal, 6 February 2019: https://legal.sabinet.co.za/article/commensafacts/cybercrimesbid/.
391 Application of the Act in practice: "only a handful of court cases applying the Protection from Harassment Act could be located as of mid-2019. The dearth of jurisprudence stems from the fact that protection order applications are decided in magistrate's courts and the decisions of those courts are not published; thus, the application of the Act generally comes to light in only in cases where there is a review or an appeal, or in cases concerning other issues which mention protection orders against harassment in passing. These cases show that the Act has been applied in several instances to disputes between neighbours. It has also been applied to disputes between employers and employees, a dispute between a landowner and his tenant, a dispute between the director of business and a dissatisfied customer, a dispute between shareholders and a director of a company, and a dispute between a businessman and a high-ranking political figure, with the businessman alleging that he had been harassed because he had taken a stand against state corruption and acted as a whistle-blower.
393 Application of the Act in practice: "only a handful of court cases applying the Protection from Harassment Act could be located as of mid-2019. The dearth of jurisprudence stems from the fact that protection order applications are decided in magistrate's courts and the decisions of those courts are not published; thus, the application of the Act generally comes to light in only in cases where there is a review or an appeal, or in cases concerning other issues which mention protection orders against harassment in passing. These cases show that the Act has been applied in several instances to disputes between neighbours. It has also been applied to disputes between employers and employees, a dispute between a landowner and his tenant, a dispute between the director of business and a dissatisfied customer, a dispute between shareholders and a director of a company, and a dispute between a businessman and a high-ranking political figure, with the businessman alleging that he had been harassed because he had taken a stand against state corruption and acted as a whistle-blower.

In a 2016 case, the High Court provided procedural guidelines for allegations of harassment by minors, ordering that:

a. service of an interim order protection order must be effected on the parent and/or guardian as well as on the minor child;

b. an interim protection order against a minor must direct that the parent and/or guardian appear on the return date of the order together with the minor child who is the respondent; and

c. where there appears to be no parent or guardian, this shall be reported to the court that issued the interim protection order by the person tasked with service of the order, in which event the court may give further directions for the minor to be assisted and supported.396

The most significant case to date on the interpretation of the Act is the 2017 Myandu case, which involved an appeal against a final protection order issued by a magistrate's court.397 The alleged harassment involved a single email sent by an employee to her work supervisor and several co-workers, alleging that she had been "verbally and emotionally abused" by people at a recent company meeting. After considering the evidence presented, the High Court agreed with the assessment of the magistrate that the email contained a false description of the meeting in question and that sending it was "unreasonable conduct" on the part of the employee in question. However, the question was whether the sending of the email constituted harassment. The High Court pointed out that the onus was on the respondent to prove, on a balance of probabilities, that the author of the email knew or ought to have known (a) that sending the email would cause harm to her supervisor, or inspire a reasonable belief on his part that harm would be caused to him (in the form of mental, psychological, physical or economic harm); as well as (b) that her conduct was unreasonable in the circumstances.398

The Court noted that, unlike the UK statute on harassment, the South African statute refers to "conduct", as opposed to a "course of conduct". It held that there were two options:

"[...] the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim. Alternatively the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked."399

Applying this test to the situation at hand, the Court held that the conduct of sending the email in question may have been unreasonable, particularly since the author allowed her emotions to cloud her perception, but the Court was not persuaded that this conduct was "objectively oppressive or had the gravity to constitute harassment".400 This finding was buttressed by the fact that the supervisor who sought the protection order did not present any evidence of the many forms of harm which he cited as having resulted from the email.401 The Court concluded that the facts could not sustain a finding that the conduct of the appellant constituted harassment as contemplated by the Act.402

Future direction

Although the South African Protection from Harassment Act 2011 is still relatively new, with little reported case law, concerns have been raised about possible abuse of the law:

"In practice, a recurring issue which has emerged, is that a disgruntled former partner or neighbour with a long-standing grudge can approach the court, making false or exaggerated allegations in their affidavits and, based on this, an interim protection order can be granted, without respondents being given notice or having an opportunity to defend themselves. Particularly when parties have legal representatives, court proceedings can be drawn out for months with parties incurring unnecessary legal costs and experiencing heightened frustration. The court may decide not to issue a final protection order only after thorough cross-examination of both the complainant, respondent and any witnesses called on to testify during the trial."403

397  Myandu v Padayachi 2017 (1) SA 151 (KZP) http://www.saflii.org/za/cases/ZAKZPHC/2016/78.html
398  ibid., para 40.
400  Myandu v Padayachi 2017 (1) SA 151 (KZP), para 71: http://www.saflii.org/za/cases/ZAKZPHC/2016/78.html
401  ibid., para 72.
402  ibid., para 73. The Court also took a different approach to "harassment" than that in the case of SAKHU v Onus Dlamini v Transnet Freight Rail, a Division of Transnet Ltd and Another (2009) 2 SA 2442 (KZD), which addresses harassment in a different context. That case went primary attention to the effect on the complainant, assessed with reference to the attitude of a "reasonable victim." In the Myandu case, the Court stated: "In my view this construction of the Act runs contrary to the application of the objective legal test as it shifts the evaluation from the conduct of the perpetrator to the impact on the victim." It concluded that, an order to ensure consistency, the focus should be on the conduct of the perpetrator. Myandu v Padayachi 2017 (1) SA 151 (KZP) at paras 66-67.
In short, particularly because of the possibility of utilising an ex parte procedure, the law on harassment could be utilised as a means of harassment – and it has been asserted that the broad definitions and the procedures provided are insufficient to prevent vexatious applications. Proposed solutions include stricter threshold requirements for granting ex parte applications for interim protection orders, robust use of costs orders against vexatious litigants and referral of complainants for prosecution when they make materially false statements in affidavits which support enforcement of warrants of arrest.404

Looking ahead, it has been suggested that the Protection from Harassment Act might be usefully applied to bullying in schools, particularly given that a child can apply for a protection order without the assistance of a parent or guardian – keeping in mind the case law holding that a child respondent must be supported by a parent, guardian or other adult. The court’s power to include additional conditions in a protection order could be utilised to enrol the bully in a therapeutic programme, to involve the family in positive ways or to order a restorative justice process.405

It has also been suggested that the Protection from Harassment Act might be helpful where harassment has been actioned through cloned Facebook accounts,406 or to protect whistle-blowers who fall outside the parameters of the relevant legislation on their protection.407

**OTHER RELEVANT LEGISLATION**

**The Promotion of Equality and Prevention of Unfair Discrimination Act 2000**

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is South Africa’s anti-discrimination legislation and gives effect to s.9(4) of the South African Constitution which calls for the enactment of legislation to prevent unfair discrimination. The main objective of PEPUDA is to prevent and prohibit unfair discrimination, harassment and hate speech.

PEPUDA established Equality Courts to adjudicate cases of unfair discrimination, harassment and hate speech with the objective of promoting equality and providing remedies in a cost effective and less formal manner. Although the remedies provided are of a more restorative nature, provision is made for the criminal prosecution of certain matters. The Equality Courts adjudicate cases of discrimination on both the listed and unlisted grounds of discrimination.

**Definition of harassment under PEPUDA**

PEPUDA defines harassment as follows:

“harassment” means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to:

a. sex, gender or sexual orientation; or
b. a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.408

The prohibited grounds referred to in the definition are the grounds listed in section 9(3) of the Constitution in relation to which no unfair discrimination, whether directly or indirectly, may take place. These grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. In the view of a well-known expert of constitutional law in South Africa, Prof. Pierre de Vos, the definition of harassment as set out in the PEPUDA can be given either a narrow interpretation, or it could be given a wider interpretation that would include once-off verbal attacks of, for example, a racist nature – as long as the verbal attack is considered to be serious. If the latter interpretation is preferred, it would mean that as long as the abuse was serious and as long as it could be shown to have humiliated or demeaned the other person (based on race, sex, gender, sexual orientation or another ground listed in the Constitution), the court would find that harassment occurred.

PEPUDA does not apply to the employer-employee relationship by virtue of s.5(3) which provides that the Act “does not apply to any person to whom and to the extent to which the Employment Equity Act 55 of 1998 applies”.409

PEPUDA also provides no definition of sexual harassment.

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404 Ibid.
408 PEPUDA, s.1.
409 The objectives of the Employment Equity Act 1998 are to achieve equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and implementing affirmative action measures to address the disadvantages in employment experienced by designated groups.
Comparative review of models of harassment laws

C. Canada

CRIMINAL HARASSMENT LAWS AND PEACE BONDS

Unlike England & Wales and South Africa, Canada has not enacted specific legislation to address harassment and stalking. Rather, a harassment provision was added to the federal Criminal Code, while access to injunctions/protection orders is provided through existing civil processes.

Background to the legislative framework

Canada’s Criminal Code has contained a provision on harassment since 1993. Prior to this amendment to the Criminal Code, harassment was addressed piecemeal under different sections of the law. The particular “criminal harassment” section (s.264 of the Criminal Code) was introduced largely in response to domestic violence against women.

As in England & Wales, a driving impetus behind the change was a series of high-profile cases involving women who had suffered systematic stalking and other forms of harassment from their former partners, culminating in fatal attacks.

However, the offence of harassment is not limited to cases of domestic violence and applies equally to a range of other contexts. The law is also meant to be a preventative measure – the intention is that the charge is laid an early stage in order to prevent the occurrence of harm.

The offence of harassment under the s.264 of the Criminal Code does not explicitly address cyber harassment. In March 2015, a new law was introduced in Canada that specifically addresses cyber harassment – the Protecting Canadians from Online Crime Act.

Overview of criminal harassment

The offences of stalking, harassment, and some forms of cyber harassment, are all encompassed under the umbrella of “criminal harassment” in s.264 of the Criminal Code, which provides as follows:

“(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

(a) repeatedly following from place to place the other person or anyone known to them;
(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
(c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
(d) engaging in threatening conduct directed at the other person or any member of their family.”

It is noteworthy that the offence is defined with reference to both perpetrator intent and victim response. The reasonable fear standard is an objective one – the decision-maker, whether it be judge or jury, is asked to consider whether a “reasonable person” would have feared for their safety or the safety of someone linked to them, if put in the same situation.

414 Ibid.
416 Canada Protecting Canadians from Online Crime Act (S.C. 2014, c. 31). The Act was assented to on 9 December 2014 and came into force three months later (s.47): https://laws-lois.justice.gc.ca/eng/annualstatutes/2014_31/
C. Canada cont

The provision includes a closed list of types of conduct which constitute criminal harassment. For two of these types of conduct – following and communicating – there is a requirement that it must occur “repeatedly”, while “besetting or watching” the victim’s home or habitual locations or “engaging in threatening conduct” does not include this requirement. The Ontario Court of Appeal held in R v Ohenhen that the term “repeatedly” (as it applies to the prohibited acts of “following” and “communicating”) can entail as few as two incidents, depending on the circumstances of the case.  With respect to the prohibited acts of “besetting or watching” or “engaging in threatening conduct”, which are not qualified by the term “repeatedly” in the legislation, a single incident is sufficient.

Canadian courts have also held that “repeatedly” does not have to mean conduct on separate occasions which are separated in time, but can be satisfied by persistent conduct on a single occasion, such as an instance where an accused, over a half-hour period, sat beside a stranger on the subway, took her hand, asked her if she had a pimp, and followed her off the subway and out of the station while aware that she appeared agitated and afraid.

“Besetting” has been held to mean “conduct by someone that causes another person to feel hemmed in or a person to feel surrounded, for a person to feel attacked on all sides”. An example in one case was driving by the complainant’s home repeatedly, in the context of the parties’ complicated relationship, and in another sitting outside the complainant’s home in a parked car and staring. To “beset” has also been held to include “to trouble”, “harass”, “assail”, “hem in or surround”. The meaning of “threatening conduct” in terms of s.264(2)(d) has been considered in a number of cases depending on the circumstances of the case.

No defences to the crime are expressly stated, but they are built into the legislative approach. Accused persons can argue that they were neither aware of nor reckless towards the presence of harassment, or that there was no reasonable basis upon which the complainant should have been in fear for his or her safety, or they can dispute that the behaviours actually occurred. It is also a defence for an accused to show that he or she acted with lawful authority.

A person who is convicted under s.264 of the Criminal Code in Canada receives a mandatory weapons prohibition order, which covers firearms and restricted weapons. Any weapons in the convicted person’s possession must be forfeited to the police, even if this person previously had a valid licence for them. In fact, even at the bail stage, a judge is obligated to order a weapons prohibition in cases of criminal harassment, unless there is no suggestion that there is a need to protect the safety of any individual through this measure.

In Canada, criminal charges are pursued either by indictment or by summary conviction, depending on the seriousness of the offence. Criminal harassment is a hybrid offence, which means that the accused is entitled to proceed with the Prosecution if the Prosecution

421 Ibid.
428 Ibid., paras 34.
431 Vandebroek (2009) 86 WCB (2d) 90 (On Sup Ct), as described in “A Handbook for Police and Crown Prosecutors on Criminal Harassment”, Department of Justice Canada, 2017, Part 3.4.6: https://www.justice.gc.ca/eng/cpp/cps/hhs/har/part1.html. This case found that lawful authority can be found in any law which specifically allows a person to do what the accused did in the circumstances in question, and is not limited to more official types of authority such as police or government-sanctioned authority.
433 Ibid., s.51.9(1).
proceeds by way of indictment and the accused is found guilty, there is no possibility of house arrest – the accused will automatically go to jail.\(^{435}\) The maximum punishment for one count of criminal harassment is currently 10 years’ imprisonment. There is no mandatory minimum for this offence.\(^{436}\)

In 1997, s.264 was amended to increase the criminal sanctions related to criminal harassment. This included making a murder committed in the course of criminal harassment automatically a first degree murder offence.\(^{437}\) The amendment also expressly made a harassment offence involving a breach of a protective court order an aggravating factor for sentencing purposes.\(^{438}\) In 2002, the initial maximum penalty of five years’ imprisonment was doubled to ten years.\(^{439}\)

### Peace bonds and other protection orders

Canadian law provides for different protective measures to be instituted prior to a charge of criminal harassment being made. These can be useful tools to prevent escalation of the situation – protection orders minimise time in court for the applicant and do not in itself create a criminal record for the accused unless the order is breached, which constitutes a criminal offence.\(^{440}\)

Punishment for breach of a court order is often imprisonment of between one and three months, but can be years for the most egregious breaches.\(^{441}\)

Federally, the procedure is to apply for a peace bond under the Criminal Code (s.810).\(^{442}\) The basis for a peace bond application is that the applicant fears “on reasonable grounds” that another person will:

- injure him or her or his or her spouse, common law partner or child;
- damage his or her property; or
- commit an offence relating to the publication or distribution of an intimate image without consent.\(^{443}\)

A peace bond is essentially a protection order which requires a person to keep the peace and be of good behaviour; it may also require that person to pledge an amount of money to the court as surety. Additional conditions can be placed on a peace bond depending on the circumstances, including prohibitions on specific forms of contact, a requirement that the defendant abstain from using non-prescription drugs or alcohol (including an order that compliance must be verified by the provision of bodily samples) or a prohibition on the ownership of weapons.\(^{444}\) A peace bond can remain in force for a maximum of one year, but it can be renewed if the threat persists. Violation of a peace bond constitutes a criminal offence and can lead to the forfeiture of any surety which was pledged. The process of obtaining a peace bond can take weeks or even months, so this remedy is not useful in emergency situations.\(^{445}\) A peace bond can be consented to or can be ordered following a hearing. Consenting to a peace bond is not an admission of guilt.\(^{446}\) Some people will agree to a peace bond being registered against them as they want no contact with the instigator anyway, or they might want a dual peace bond placed on both themselves and the other party.\(^{447}\)

A further type of protection order in instances of family violence is available via provincial/territorial legislation, with all such orders being variations on a Restraining Order or an Emergency Protection Order (EPO); although different provinces have individual family violence laws, the substantive requirements for EPOs are essentially the same. “Family violence” or “domestic violence” is broadly defined in these Acts, and can encompass not just physical assault, but also other behaviour such as conduct that instils fear, physical confinement, and deprivation of the necessities of life. Generally, EPOs are used by spouses, ex-spouses, common law partners, and other partners where one is a danger to the other or to their children. EPOs are therefore more appropriate than peace bonds in situations of domestic violence. They can also be granted on an emergency basis. Such orders typically remain in force for only 30 to 90 days. Their effect can be wide-ranging, with terms such as granting sole possession of the family home to the applicant for a period of time, granting sole custody of children to the applicant or forbidding contact with the applicant and/or children. Such orders can also be obtained without notification to the abusive partner, and are sometimes granted by a judge in chambers, without hearing oral evidence. Due to the typical seriousness of the allegations in family violence situations, judges tend to err on the side of caution by granting EPO applications. Unwarranted orders can be rectified when the respondent brings the matter back to court to have the order overturned.

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\(^{436}\) Ibid., s.264(3)(a).

\(^{437}\) Ibid., s.231(6).

\(^{438}\) Ibid., s.264(4)(5).


\(^{444}\) Ibid.

\(^{445}\) Ibid.

\(^{446}\) Ibid.

before the expiry of the EPO period. There is an inherent danger in allowing orders such as this to be granted before evidence from the other side is introduced. However, the idea behind this type of order is that the danger is immediate and warrants a rapid response.448

Both peace bonds and EPOs can be used alongside charges of criminal harassment, or as an alternative to criminal charges.

Application of the law in practice

There is now a substantial body of jurisprudence from the Canadian courts that has interpreted and applied the offence of criminal harassment under the Criminal Code. Most of the Canadian cases occur in the context of domestic or intimate partner violence. However there is at least one case in which the statute on criminal harassment was applied in the context of an aggressive animal rights protest.449 Criminal harassment has also been successfully applied to instances of cyber harassment, where it has been observed:

“To date in Canada, because section 264 of the Criminal Code is not restricted to a specific method of communication, it has not been necessary to update it for it to apply to emerging technologies. It remains that so long as the user of the technology has knowledge that his or her conduct is harassing another person, and that person has a reasonable fear for his or her safety, the elements of the offence of criminal harassment will likely be satisfied.

As fact situations involving the use of new technologies to stalk and criminally harass began entering the courts, reported decisions did not reflect any challenges or reluctance in applying the established jurisprudence to these fact situations. In other words, the elements of the offence remain the same, and no new legal tests have appeared. The ways in which these cases do appear to differ, though, is in the kind of evidence that is presented to the court […] and in the recognition that is being given to the unique ways in which this type of harassment affects victims.

This impact on victims has been noted both in reference to the reasonableness of the victim’s fear and at sentencing.450

In the leading appellate decision on criminal harassment, R v Sillipp, the Court interpreted the concept of “harassment” as requiring more than causing the complainant to be “vexed, disquieted or annoyed”.451 The Court emphasised that the test is articulated in the wording of the statute, which requires that the target of the harassment must “fear for their safety or the safety of anyone known to them”.452

The Court also outlined five essential elements of criminal harassment offence which must be proved beyond a reasonable doubt:

1. It must be established that the accused has engaged in the conduct set out in s. 264(2)(a), (b), (c), or (d) of the Criminal Code.
2. It must be established that the complainant was harassed.
3. It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed.
4. It must be established that the conduct caused the complainant to fear for his or her safety or the safety of anyone known to him or her.
5. It must be established that the complainant’s fear was, in all of the circumstances, reasonable.453

The Sillipp case also clarified the mens rea requirement for the offence, noting that the statute requires that the culprit must have the intention to engage in the prohibited conduct with the knowledge that the complainant is thereby harassed, or “at minimum, recklessness or wilful blindness, relative to that conduct”.454 This is not the same as an intention on the part of the accused to cause fear,455 the actual motive of the accused is not relevant to the mens rea of the


452 Ibid., para 18


454 Ibid., paras 32-33

455 R v Davies 1999 CanLII 14505 (MB QB): https://www.canlii.org/en/mb/mbqa/doc/1999/1999mbqa14505/1999mbqa14505.pdf, affirmed 2000 MBCA 42, states at paragraph 35: “The mental element of the offence does not include a requirement that the accused foresee that his conduct will cause the complainant to be fearful. It is sufficient if it is proven beyond a reasonable doubt that the accused knew that the complainant would be harassed by his or her conduct, or was reckless or wilfully blind in that regard. Intention or knowledge is an awareness of a circumstance or consequence as being certain or practically certain, in other words a foreseeable certainty. Recklessness is foreseeable probability or an awareness of probability.”

456 R v Cornwall 2008 NSCA 60 (CanLII), para 40: https://www.canlii.org/en/ns/nsca/doc/2008/2008nsca60/2008nsca60.html#r43
mens rea. It was explained by another Court that the assessment of the accused's state of mind is an objective one, meaning that the required mens rea can be inferred from the circumstances without direct evidence of the accused's subjective state of mind.457

Importantly, the courts have repeatedly affirmed that fear for safety does not refer only to physical violence, but also to emotional or psychological harm.458 As explained by the Court in R v Gowing:

“[…] it was the intention of the legislature that a victim's fear for his or her safety must include psychological and emotional security. To restrict it narrowly, to the risk of physical harm by assailant behaviour[,] would ignore the very real possibility of destroying a victim's psychological and emotional well-being by a campaign of deliberate harassment.”469

For example, in R v Goodwin, the British Columbia Court of Appeal upheld a conviction of criminal harassment against a female who had relentlessly pursued a male lawyer at her law firm, accosting him in the street, accessing a secure area of his apartment and causing him to change his phone number to avoid her calls.470 While it was agreed that her conduct entailed no real or perceived threat of physical violence, the victim felt a “prevailing sense of unease and discomfort” as well as concern for his safety.471 The Court affirmed that this was sufficient to meet the requirements for criminal harassment, and that victims need not demonstrate “ill health or major disruption in their lives”.472

The question of the victim’s “fear for safety” is made up of two components. The first is subjective, based on each victim’s own perception of the situation. However, there is also a requirement that the victim’s perception of fear must be reasonable, which requires an objective assessment of how a reasonable person would have felt in similar circumstances – in light of factors such as the history and relationship between the parties; the age, sex and race of the complainant; whether there were explicit directions to the accused to leave the complainant alone; and the duration of the harassment. This objective component protects accused persons against over-reactions by excessively sensitive or unreasonable complainants.463

The Ontario Court of Appeal held in R v Kordrastami that applying the objective analysis to assess the reasonableness of the victim’s fear requires consideration of “the entire factual context”.464 For example, in this case, the accused, a 39-year-old male, had repeatedly telephoned and made sexual comments to a 14-year-old female victim whom he had met in a restaurant. She had clearly told him to stop contacting her and when he did not, she reported the incident to the police. She testified at trial that she had feared for her safety.465 In upholding his conviction for criminal harassment, and in response to his claim that the conduct was too minor to amount to criminal harassment, the court cited the repeated nature of the contact, which the victim had made clear was unwelcome, as well as the victim’s young age, coupled with her fear that she was being “stalked”.466 Other cases have likewise emphasised that a victim’s clear communication that the conduct should stop will be treated as an important factor in conviction.467

Harassing behaviour in the context of a domestic or romantic relationship is viewed particularly seriously by the courts. As stated by the Ontario Court of Appeal in R v Bates:

“The courts have been made increasingly aware of the escalation of domestic violence and predatory criminal harassment in our society. Crimes involving abuse in domestic relationships are particularly heinous because they are not isolated events in the life of the victim. Rather, the victim is often subjected not only to continuing abuse, both physical and emotional, but also experiences perpetual fear of the offender.”468

In this case, the perpetrator had engaged in a series of threatening actions against his former girlfriend, including stalking, threats of violence and physical assault, breaching a court order prohibiting contact with her in the process. In overturning the suspended sentence imposed at trial and imposing a term of imprisonment of 30 months, the Court emphasised that cases involving criminal harassment of former partners or spouses must be treated especially seriously, stating that “when an offender like the respondent comes before the court for sentencing, it is important for the court to denounce his conduct in the clearest terms by fashioning a heavy sentence”.469

461 Ibid., para 21.
462 Ibid., para 22.
465 Ibid., para 1-3.
466 Ibid., para 12-14.
467 See, for example, R v Slots 2008 CanLII 31397 (ON SC) at paras 104, 106; https://www.canlii.org/en/on/doc/2008/2008canlii31397/2008canlii31397.html?resultIndex=2. See also Bell 2009 ONCJ 312, where only communications made after the complainant told the accused to stop contacting her were found to constitute harassment.
469 Ibid., para 36.
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Constitutional challenge

Case law in Canada has considered claims that the criminal harassment provision violates the Canadian Charter of Rights and Freedoms (“the Charter”)470 in that it is too vague or broad, or that it is a violation of freedom of expression, freedom of association or a the principles of fundamental justice. So far, there has been no finding that the legislation is unconstitutional. Similarly, there have been challenges to the section of the Code which automatically elevates a murder involving criminal harassment to murder in the first degree, but these have also been unsuccessful.471

The lower court in the Sillipp case dismissed an argument that the definition of criminal harassment was impermissibly vague (an issue which was not considered on appeal). Noting that many facets of the offence will have to be interpreted by the courts, the Court nonetheless found that this could not be equated with permitting a “standardless sweep” which would allow the police or the judiciary to simply use their discretion in how they interpret or apply the law, if held that the statute satisfies the relevant test of providing “an adequate basis for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria”.472

At the trial level, the judge in the Sillipp case also found that speech which forms part of a criminal harassment charge would not be protected expression for the purpose of the Charter,473 holding that any limitation on expression by reason of the statute, given the great importance of its objective, would be reasonable and demonstrably justified in a free and democratic society.474 This finding was not challenged when the case went to appeal.475

Freedom of expression was again raised in the case of R v Davis. The accused argued that s.264 violated his freedom of expression, particularly with respect to its coverage of “indirect communications with the complainant” and “communications with anyone known to the complainant”.476 The Court noted that the legislation does not prohibit all communication, but only that which harasses the complainant and reasonably causes fear – thus striking a reasonable balance between the accused’s right to speak to people other than the complainant and the rights of the complainant not to be harassed. Furthermore, the Court ruled that the freedom of expression associated with criminal harassment would attract a low bar of protection, similar to hate speech, and that the “laudable objective of the criminal harassment legislation far outweighs the negative impact that it has on freedom of expression”. The Charter argument thus failed.477

The Davis case also considered the issue of whether the statute violated the right of freedom of association guaranteed by the Charter.478 The Court rejected this argument, holding that the statute prohibits only communication with persons known to the complainant in respect of which the accused knows, or recklessly risks, the result of harassing the complainant and reasonably causing the complainant to experience fear. Thus, it is not an unlimited restriction on communicating or associating with anyone.479

In the Sillipp appellate case, the accused argued that s.264 violated the right in terms of section 7 of the Charter not to be deprived of life, liberty or security except in accordance with the principles of fundamental justice. His theory was that the statute’s approach to the accused’s state of mind allows the “morally innocent” to be punished, on the grounds that the statute does not require a sufficient link between the accused’s state of mind and the fear caused by his conduct.480 The Alberta Court of Appeal held that the statute requires that an accused must engage in the conduct covered by the statute with knowledge, or at least recklessness or wilful blindness, that the conduct is causing the complainant to be harassed. The Court rejected the argument that the Charter requires that the element of mental culpability be linked to the consequence of causing actual fear in the complainant, funding that it is an acceptable form of culpability for the statute to prohibit conduct which, by objective standards, is of a nature and extent as to reasonably cause fear. This constitutes sufficient blameworthiness to hold the accused responsible for the results of his conduct.481

The validity of treating criminal harassment as a contributing factor to a first-degree murder was argued to be “cruel and unusual punishment” under section 12 of the Charter in the case of R v Lintreau.482 The Court

477 Ibid., paras 130-131.
held that the purpose of classifying criminal harassment in this way was to uphold the life, liberty and security of victims of this type of conduct. The accused’s argument was based on the fact that criminal harassment was not inherently threatening, but the judge ruled that this crime is very serious and dangerous, and that it was appropriate for it to be listed as a qualifying factor for first-degree murder.483

**Implementation issues**

Implementation issues in Canada primarily concern low reporting rates and challenges related to the gendered nature of the crime. While most criminal harassment cases in Canada appear to involve incidents occurring within a domestic relationship or between intimate partners or acquaintances, there are cases where criminal harassment provisions have been applied to other types of incidents, including severe bullying amongst teenage girls484 and disputes between neighbours.485

According to a national survey conducted in 2014,486 nearly 2 million Canadians experienced stalking at some point in the preceding five years, constituting 8% of women and 5% of men aged 15 years and above.487 The survey reflects a decline by one third in reports of stalking since the previous survey conducted in 2004,488 but the rates of stalking in cases involving intimate partners has not declined.489 Stalking continues to be a highly gendered crime, with women constituting the majority of victims while most perpetrators are male.490 Stalking victims also tend to be young, with just under half between 15 and 34 years of age.491

Other key findings from the 2014 national survey include the following:

- Most stalkers are known to their victims and are often past or present intimate partners.492
- Members of marginalised groups, including Aboriginals (10%) and LGBT persons (16%), experience higher rates of stalking.493
- Most often, the kind of stalking or harassing behaviour that victims experienced was threats or intimidation against someone else in the victim’s life, such as the victim’s child or other family member, reported by four in ten victims. Just under a third of victims reported repeated, silent or obscene phone calls, while 28% said that they had received fear-inducing emails, texts or social media messages. Damage to property was reported by almost one-quarter of stalking victims.494

Just under one third of all stalking victims reported that during the most recent incident of stalking that they had experienced, the person responsible had physically intimidated them or threatened them with violence.495

Stalking is linked with sexual assault – victims of stalking were also the victims of sexual assault at a rate over ten times higher than people who had not been stalked.496

Only 2 in 5 victims (39%) report the stalking to the police,497 but this did not always lead to criminal charges or restraining orders of any kind.498

A ten year review of the s.264 criminal harassment provision in 2003 identified three main problems with the legislation:

“First, the requirement that the conduct in question be repeated could sometimes put women in danger. Second, the requirement that a woman’s fear be ‘reasonable’ could trivialize their actual responses to repeated harassment. Third, and most important, the subjective fault standard enables an accused to assert that, rather than harassing the woman, he was ‘courting’ her in an attempt to (re)establish a romantic relationship. A reasonable doubt in this regard results in an acquittal.”499

In short, although the law is widely viewed as a useful tool to combat harassment and stalking, challenges with effective implementation continue, with particular implications for female victims.

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484 See, for example, R v DV[2002] B.C.J. No. 627 (Youth Ct.). In this high-profile case, the victim committed suicide, leaving behind a note describing the harassment she had suffered, two teenage girls who bullied her were subsequently charged with harassment.

485 See, for example, R v Whitehead (2001) O.J. No. 774 (Q.J.).

486 The study referenced is the 2014 General Social Survey (GSS) on Canadians’ Safety (Victimization). The results of the data related to stalking and criminal harassment were published and analysed in Section 1 of Marta Burczycka and Shana Conroy, "Family violence in Canada: A statistical profile, 2016", Canadian Centre for Justice Statistics, 2018: https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54893-eng.pdf


488 Ibid. p. 6. This is in line with a general decline in violent crime. During the same time period, the overall rate of self-reported violent victimization decreased by 28%.


490 Ibid. pp. 8, 10.

491 Ibid. p. 7.

492 Ibid. p. 12.

493 Ibid. p. 10.

494 Ibid. p. 8.

495 Ibid. p. 10.

496 Ibid. p. 10.


