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**STALKING LEGISLATION – PROTECTION AT THE  
EXPENSE OF CONSTITUTIONAL PRINCIPLES?**

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## ABSTRACT

This paper deals with the legal issues in context of stalking behaviour and focuses on constitutional problems. It will give a historical background on stalking and briefly highlight to what extent changes in society helped to acknowledge the damage done to victims by stalking behaviour. To understand the offence of stalking a general overview of stalking behaviour will be given. Problems arising from anti-stalking legislation will be highlighted and discussed with regard to New Zealand and Germany after illustrating the way of how this behaviour is penalised in both countries. This paper will present the Harassment Act 1997 and the relevant provisions. It will then illustrate the relationship between the New Zealand Bill of Rights Act 1990 (NZBORA) and the Harassment Act 1997. Freedom of expression, freedom of association and freedom of movement under the NZBORA might be affected when a court grants an order. This paper will examine how to achieve a balance between the competing rights of victim and perpetrator. It will be concluded that a limit to rights guaranteed under the NZBORA can be justified in a free and democratic society.

Furthermore, the paper will then illustrate how victims are protected against stalking behaviour under the current German legislation and examine whether the existing law is inadequate and legislative changes are needed taking into account a new German Bill that seeks to criminalise stalking behaviour by amending the German Penal Code. It will be shown that legal remedies for stalking victims are not sufficient and a new criminal provision is needed. The paper will examine objections against the wording of the new Bill in the light of general principles of criminal law and will come to the conclusion that parts of the proposed provision are objectionable. This paper submits omitting the questionable part in order to comply with general principles of criminal law as well as the Basic Law.

## STATEMENT ON WORD LENGTH

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises 14,134 words.



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## I INTRODUCTION

Stalking is a complex behaviour and often includes following, harassing or threatening a person. The degree of obsessive stalking is only limited by the imagination of the perpetrator. Contrary to the popular belief that only high-profile stars are being stalked, surveys revealed that most of the victims were stalked by a former intimate partner. The US American 'National Violence Against Women Survey' unveiled that a striking 80 per cent of stalking victims were women.<sup>1</sup> Furthermore, the survey showed a clear link between stalking and domestic relationships as most victims knew their stalker and were more likely to be stalked by a former intimate partner.

Stalking conduct mostly includes 'traditional' stalking behaviour such as being followed and spied on, receiving unwanted phone calls and letters or items or even being threatened by the death of a family pet. Sometimes, however, stalking behaviour is more bizarre. One stalker erected posters of his naked ex-girlfriend in a city mall, another searched through the complainant's rubbish bins. Another obsessive stalker searched the complainant's school bag, collecting hair from her hair brush, licking an apple and sniffing the crotch of her running pants.<sup>2</sup> While this behaviour is obviously disturbing the question has to be raised how the victim has to be protected. Is it sufficient to grant civil remedies such as restraining orders or is it necessary to frighten off stalkers by making stalking a criminal offence?

In New Zealand, stalking behaviour is covered by the Domestic Violence Act 1995 as well as the Harassment Act 1997. The major difference between both Acts, as described in *Woodman v Brooks*, is that the Harassment Act 1997, in particular, is designed to protect the very people that cannot be brought within the framework of the Domestic Violence Act 1995,<sup>3</sup> namely, those are persons not living or having lived in a domestic relationship with another person.<sup>4</sup>

<sup>1</sup> Patricia Tjaden and Nancy Thoennes "Stalking in America: Findings From the National Violence Against Women Survey" (1998) U S Department of Justice – National Institute of Justice – Centers for Disease Control and Prevention – Research in Brief, available on <www.ncjrs.org> (last accessed 12 September 2005).

<sup>2</sup> Examples taken from R A Swanwick „Stalkees Strike Back – the Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland“(1996) 19 QUTLJ 34.

<sup>3</sup> *Woodman v Brooks* [1999] NZFLR 64, 86 Giles J.

<sup>4</sup> S 4 Domestic Violence Act 1995.

In Germany, the civil side of stalking behaviour is covered by the Civil Code (*Bürgerliches Gesetzbuch*)<sup>5</sup> as well as the Violence and Harassment Act (*Gewaltschutzgesetz*)<sup>6</sup>. A special provision, similar to criminal harassment in New Zealand, does not exist under the German Penal Code (*Strafgesetzbuch*). The absence of such a provision is considered a gap in the system of victims' protection. Therefore, the *Bundestag* introduced a new Bill that focuses on making harassment and stalking a criminal offence.

## II HISTORICAL BACKGROUND ON STALKING

Stalking, like shoplifting and mugging, is a description of an offence rather than a legal category in its own right.<sup>7</sup> One might think that stalking has developed as an behavioural pattern just recently but despite this assumption it is not a phenomenon of modern times.

### A *Stalking is not a new phenomenon*

In the fourth title of the fourth Book of Iustinian's *Institutes*<sup>8</sup> of 533 it is said that "an injury is inflicted by constantly following a matron, or a young boy or girl below the age of puberty."<sup>9</sup> In eighteenth-century England, Parliament outlawed demand letters that threatened the receiver with arson, threatened to maliciously shoot a person, or demanded any valuable thing and soon expanded the law to make the sending of non-demanding threatening letters a felony as well.<sup>10</sup> The newly enacted statute prescribed the death penalty for those convicted of sending such non-demanding letters.<sup>11</sup>

<sup>5</sup> Bürgerliches Gesetzbuch of 18 August 1896, Law Gazette of the German Reich 1896, 195.

<sup>6</sup> Gesetz zur Verbesserung des zivilgerichtlichen Schutzes bei Gewalttaten und Nachstellungen sowie zur Erleichterung der Überlassung der Ehewohnung bei Trennung of 11 December 2001, Federal Law Gazette I 2001, 3513.

<sup>7</sup> Hamish Brown "Stalking and other forms of Harassment – An investigators guide" Metropolitan Police Service 2000, Introduction.

<sup>8</sup> The *Institutes* was intended as sort of a legal textbook for law schools.

<sup>9</sup> Iniuria autem committitur sive quis matrem familias aut praetextatum praetextatamve adsectatus fuerit. <<http://www.fordham.edu>> (last accessed 14 August 2005).

<sup>10</sup> Kathleen G Mc Ananey, Laura A Curliss and C Elizabeth Abeyta-Price "From Imprudence to Crime: Anti-Stalking Law" (1993) 68 NTDLR 864.

<sup>11</sup> Kathleen G Mc Ananey, Laura A Curliss and C Elizabeth Abeyta-Price "From Imprudence to Crime: Anti-Stalking Law" (1993) 68 NTDLR 864.



The first stalking case to make it into the Law Reports, however, was *R v Dunn* in 1840.<sup>12</sup> Richard Dunn, a barrister, stalked Ms Coutts for nearly two years. He showed 'classic' stalking behaviour: he wrote countless letters, followed Ms Coutts wherever she went, spied on her and approached her in public. Alarmed by this behaviour, Ms Coutts only left the house when accompanied by a male servant and changed her daily patterns. Finally, she obtained a surety of the peace on the basis that she feared for her personal safety. After Mr Dunn was released from jail he resumed his stalking behaviour and, amongst others, wrote a letter stating "[i]f you refuse this request, you will, when it is too late, repent a course, the consequences of which will sooner or later fall on yourself and your family." Again, Ms Coutts sought judicial remedy. The court referred to the lack of an allegation of threat in Ms Coutts' writ and unanimously held that:<sup>13</sup>

Perhaps the law of England may be justly reproached with its inadequacy to repress the mischief, and obviate the danger, which the prisoner's proceedings render too probable; and we may naturally feel surprise if none of the numerous Police Acts have made specific provisions for that purpose. But, the power of the sessions and of the justice of the peace to make the order now challenged before us depending wholly on the words of the commission; and those words not being satisfied by the articles exhibited, we are bound to decide that the prisoner must be discharged.

This early case illustrates the shortcomings in tackling the problem of stalking. Although existing judicial remedies were seen to be insufficient as early as 1840, no relief was produced. A possible explanation for this situation might be a different understanding of values at that time.

For a long time, bodily integrity was protected only if harm was already done or there was an imminent danger of something happening. Stalking and its impact on the victim have not been taken seriously and stalkers were at best seen as a distressing nuisance. Victims were urged to be more lenient toward the stalker as their behaviour was seen as a petty offence. In addition, mental or emotional distress alone, without suffering physical symptoms arising from the inflicted distress, was not regarded sufficient as a ground for recovery in civil law. A certain behaviour was also not considered an offence under criminal law as long as a certain threshold was not crossed and the behaviour did not amount to threatening conduct outlawed by criminal

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<sup>12</sup> *R v Dunn* (1840) 113 ER 939.

<sup>13</sup> *R v Dunn* (1840) 113 ER 939, 948.

law. Being a complex behaviour and difficult to describe in legal terms, stalking was not considered a crime until the past decade.

### **B Scandal promotes change**

However, the attitude towards stalking as an offence changed. Sometimes scandal provokes and promotes change, especially legal change.<sup>14</sup> This is especially true for stalking which has been classified as a crime category on its own only recently. Coverage of high-profile stalking victims has helped this offence to come to the fore. The list of celebrities who have been stalked seems to be endless. Steven Spielberg, Jerry Lewis, Jodie Foster, David Letterman and Madonna are just a few examples. For example, Madonna's most threatening and intimidating stalker was a man who claimed that she was his wife, and when she rejected his proposals, threatened to slice her throat from ear to ear. The intense media attention, that stalking and stalkers have attracted in the last decade due to events like the above, has generated a public consciousness and concern which has found political expression in a series of anti-stalking laws.<sup>15</sup> Largely as a result of agitation in the media, stalking has come to be regarded as both new and increasingly prevalent, requiring immediate political and legislative responses.<sup>16</sup>

The incident that finally set the ball rolling was the murder of upcoming American sitcom actress Rebecca Schaeffer in 1989 by an obsessed fan who had pursued her for two years. This was due to the fact that Schaeffer, a famous actress was killed, but in the aftermath of the media frenzy following Schaeffer's death five Californian women, all of whom obtained restraining orders against former spouses or boyfriends due to harassment, were killed by their former intimate partners.<sup>17</sup>

Realising a gap in criminal law and acknowledging an inadequate protection of stalking victims by civil means, California swiftly enacted the first criminal anti-stalking legislation

<sup>14</sup> Matthew Goode "Stalking: Crime of the '90s?" (1995) 19 Crim L JI 21.

<sup>15</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 11.

<sup>16</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 249.

<sup>17</sup> Kathleen G Mc Ananey, Laura A Curliss and C Elizabeth Abeyta-Price "From Imprudence to Crime: Anti-Stalking Law" (1993) 68 NTDLR 823.

worldwide.<sup>18</sup> The media hype surrounding the phenomenon of stalking has grown to such proportions that many referred to stalking as the most out-of-control crime of our time.<sup>19</sup> State Governments all over the United States felt compelled to act and anti-stalking legislation has been fervently promoted by legislatures keen to be seen as 'doing something'.<sup>20</sup>

### C *'It's time to do something'*

This newly political activism finally acknowledged the immense emotional pressure the victim is being put through by the stalker and the fact that being stalked can result in life-long trauma. For a long time, the impact of stalking was underestimated and it was thought that, as long as there was no bodily harm, it was not 'that bad'. Surveys now show that stalking often has a deleterious effect on the psychological, social and occupational functioning of victims – most victims reacted with major lifestyle changes and modification of their daily activities and some relocated or even migrated to another country.<sup>21</sup> Differing from the United States where stalking legislation was first put in place, where the major concern was celebrity stalking, most other countries understood that stalking often occurs in the context of domestic violence and can affect everybody, not only the rich and famous. This whole process of acknowledging the ordeal of – mainly female – stalking victims reflects the legislature's efforts to keep up with social, cultural and economic changes relating to all aspects of law and especially paying attention to women's issues. Criminal law in particular has been subject to noticeable changes as it always reflects changing moral standards and governmental policy.

The German Penal Code was enacted in 1871 and, since then, experienced innumerable amendments. The offence of adultery as well as the offence of homosexual conduct, for example, has been removed in 1969. However, it at all times took extensive legal and political discussions – and sometimes even decades – to achieve those changes. Marital rape, for example, was not considered a criminal offence due to the wording of the applicable section which merely

<sup>18</sup> Kathleen G Mc Ananey, Laura A Curliss and C Elizabeth Abeyta-Price "From Imprudence to Crime: Anti-Stalking Law" (1993) 68 NTDLR 821; Robert A Guy "The Nature and Constitutionality of Stalking Laws" (1993) 46 Vand L Rev 992.

<sup>19</sup> Lambèr Royakkers „The Dutch Approach to Stalking Laws“ (2000) 3 Cal Crim L Rev 1.

<sup>20</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 249.

<sup>21</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 60.

penalised forced extramarital sexual intercourse. Largely, this was identified as being a problem and undesirable, but despite a relevant Amendment Bill that dated back to 1973, the section in question was changed as recently as 1998.<sup>22</sup> Although women's issues were at least to some extent, albeit slowly, recognised by society, this example shows that it took a long time until they were also recognised by law. This process, however, was not exclusive to German law. Also dealing with rape and marital exemption, in the case of *R v R (A Husband)* of 1992 the House of Lords, as well as the previous courts, overturned the principle set out in Hale's History of the Pleas of the Crown of 1736 that a wife irrevocably consented to sexual intercourse with her husband on marriage.<sup>23</sup> Their Lordships confirmed that the assumption was no longer applicable in modern times when marriage was viewed as a partnership of equals.<sup>24</sup>

Adapting criminal law to changing values in society, the German legislature of 1998 ascribed more weight to objects of legal protection such as life, prevention of bodily harm, and sexual self-determination than to property, falsification of documents, and perjury than the legislature of 1871. In addition, experiences of crime victims have just recently been recognised as being traumatic and the victim has become more than a witness reproducing its experienced physical or mental injury during criminal proceedings.<sup>25</sup> The German Government attached greater importance to strengthening victim's perspectives and experiences, especially during criminal proceedings, by enacting new laws. In particular, this applied to victims of sexual offences. Regardless of general politically motivated changes, shifts in popular beliefs added to these reforms.

This briefly illustrates how social values change and influence Government policy and the law-making process. Stalking was identified as a problem not only to be solved by non-legal means but also by legal means. Legal remedies and protection in almost every country worldwide were insufficient to meet a stalking victim's special needs and governments eagerly embarked on a crusade against this unwanted conduct.

<sup>22</sup> Sechstes Strafrechtsänderungsgesetz of 1 April 1998, Federal Law Gazette I 164.

<sup>23</sup> *R v R (A Husband)* [1992] 1 A C 599

<sup>24</sup> *R v R (A Husband)* [1992] 1 A C 599, 616 (HL) Lord Cane CJ.

<sup>25</sup> Opferschutzgesetz of 1 September 2004, Federal Law Gazette I 1190.

### III STALKING – WHAT IS IT?

Stalking is a collective term for numerous activities that are mostly not considered criminal offences on their own but can, when taken together, seriously disrupt the life of the victim and amount to results as serious as any other crime.<sup>26</sup> Unlike other 'normal' offences, stalking can be distinguished by its repetition and persistence as it might go on for several years.<sup>27</sup>

Stalking generally refers to harassing or threatening behaviour that an individual engages in repeatedly. This includes following a person, appearing at a person's home or place of business, making harassing phone calls, leaving written messages or objects, or vandalising a person's property.<sup>28</sup> It can be defined as a series of two or more incidents that amounted to a course of action causing fear, alarm or distress.<sup>29</sup> Stalking is often closely related to domestic violence and to former intimate relationships gone awry.<sup>30</sup> In order to better understand the phenomenon of stalking, this paper will shortly examine different types of stalkers and show the immense impact stalking behaviour has on the victim.

#### A Classifying different types of stalkers

Mullen et al. classified stalkers mainly according to their predominant motivation and the context in which stalking occurred.<sup>31</sup> The primary types classifying stalkers were the rejected, the intimacy seekers, the incompetent, the resentful and the predatory stalkers.<sup>32</sup> The rejected stalkers emerge as one the commonest forms of stalking in the context of the breakdown of a close relationship and surveys conducted showed an average stalking duration of 38 months. The

<sup>26</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 249; Lambèr Royakkers "The Dutch Approach to Stalking Laws" (2000) 3 Cal Crim L Rev 2.

<sup>27</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 58.

<sup>28</sup> Patricia Tjaden and Nancy Thoennes "Stalking in America: Findings From the National Violence Against Women Survey" (1998) U S Department of Justice – National Institute of Justice – Centers for Disease Control and Prevention – Research in Brief, 1.

<sup>29</sup> Sylvia Walby and Jonathan Allen "Domestic violence, sexual assault and stalking: Findings from the British Crime Survey" Home Office Research Study 276, 5.

<sup>30</sup> Robert A Guy "The Nature and Constitutionality of Stalking Laws" (1993) 46 Vand L Rev 994.

<sup>31</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 75.

<sup>32</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 75.

intimacy seekers, in contrast, wish to establish a loving relationship with the object of their unwanted attention. The incompetent suitors are often impaired in their social skills and most particularly in their courting skills as they seek to build a relationship by means that are counterproductive and terrifying. Erotomania, which is the erotic delusion that one is loved by another person who may not even know of the other persons existence, falls into this category and can be classified as a mental illness.<sup>33</sup> The resentful stalkers consider themselves being the real victim and react to an insult or injury by stalking the assumed oppressor. The predatory stalkers' behaviour is intended as preparatory to an assault, usually sexual, upon the victim. Those perpetrators are serial murderers and rapists who stalk their victims, although often not with the intent to make their surveillance known.<sup>34</sup> Those stalkers show the shortest stalking duration, which is an average of 9 months. The statistics clearly show how long victims have to take up with their ordeal of being followed, spied on and have their life and privacy intruded.

### **B The impact of stalking on victims**

Because stalking is an ongoing behaviour the victim is usually exposed to multiple forms of harassment, the consequence of which may be chronic fear and apprehension.<sup>35</sup> Most of the victims are women.<sup>36</sup> Female victims reported being stalked almost always by a male perpetrator.<sup>37</sup> The US American National Violence against Women Survey revealed a clear relationship existed between stalking and other emotionally controlling and physically abusive behaviours carried out in a relationship.<sup>38</sup> The survey assessed that about half of the female victims had been stalked by a current or former marital or de facto partner. About 80 per cent of

<sup>33</sup> Kathleen G Mc Ananey, Laura A Curliss and C Elizabeth Abeyta-Price "From Imprudence to Crime: Anti-Stalking Law" (1993) 68 NTDLR 832; Robert P Faulkner and Douglas H Hsiao "And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation" (1994) 31 HVJL 4.

<sup>34</sup> Robert P Faulkner and Douglas H Hsiao "And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation" (1994) 31 HVJL 5.

<sup>35</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 58.

<sup>36</sup> Callie Marie Rennison "Intimate Partner Violence 1993-2001" (2003) U S Department of Justice - Crime Data Brief, 1; Patricia Tjaden "The Crime of Stalking: How Big Is the Problem?" (1997) US Department of Justice - National Institute of Justice - Research Preview, 1.

<sup>37</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 33.

<sup>38</sup> Patricia Tjaden and Nancy Thoennes "Stalking in America: Findings From the National Violence Against Women Survey" (1998) U S Department of Justice - National Institute of Justice - Centers for Disease Control and Prevention - Research in Brief, 8; Patricia Tjaden "The Crime of Stalking: How Big Is the Problem?" (1997) US Department of Justice - National Institute of Justice Research Preview.

these women were, at some point in the relationship, physically assaulted by that partner, and 31 per cent were sexually assaulted.

Types of conduct often reported by stalking victims include harassing letters and threatening phone calls, repeated drive bys of the victim's house or place of work, sitting in a car watching the victim, following the victim down the street, and appearing at any times in any places.<sup>39</sup> All this behaviour seems trivial and innocent when viewed on its own. It is surely not illegal to walk down the street or to sit in a parked car. But these activities taken together can cause fear and intimidation and are able to infringe on the victim's individual freedoms, as victims usually are not able to pursue their lives as they used to do.<sup>40</sup> This paper believes that the legislature needs to keep abreast of contemporary behaviour in order to accurately recognise possible criminal behaviour. It can legislate for this type of conduct to protect the victims, their life, and their privacy but needs to observe the rights of the perpetrators as well.

It shows how disturbing stalking behaviour can be and what impact it has on the victim. Stalking is not a harmless conduct which is not worth investigating by law enforcement agencies. It can destroy a person's life and career to the same extent as any other 'classic' offence, for example rape. Most victims of single, violent crimes develop posttraumatic stress disorders and the same often applies to stalking victims as well.<sup>41</sup> An Australian radio broadcaster and comedienne, who was stalked by a man with the delusional belief that she was his wife remarked in an interview:<sup>42</sup>

I never wanted to turn into one of those paranoid, home-invasional type of people, but I have, and it's sad to be so paranoid. Being stalked would shake anyone. It depends on the individual's reaction but I just felt incapable of defending myself and I don't know why.

<sup>39</sup> J M Walker "Anti-stalking legislation: Does it Protect the Victim Without Violating the Rights of the Accused?" (1993) 71 Denver University Law Review 277.

<sup>40</sup> J M Walker "Anti-stalking legislation: Does it Protect the Victim Without Violating the Rights of the Accused?" (1993) 71 Denver University Law Review 278.

<sup>41</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 58.

<sup>42</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 58.

#### IV PROBLEMS RELATING TO ANTI-STALKING LEGISLATION

Laws penalising stalking as criminal behaviour have proved difficult to draft.<sup>43</sup> Since their enactment, US American anti-stalking statutes, for example, have been the source of much controversy.<sup>44</sup> Many statutes have been deemed unconstitutional by state courts, while others were seen as too narrowly drawn to encompass much dangerous behaviour.<sup>45</sup> While a swift legislative reaction on a loophole in the law - revealed by a spectacular incident - might strengthen the public opinion on protection offered by criminal law, it can also lead to constitutional problems regarding the wording of the statutes.

The most common objections and critiques regarding mostly criminal anti-stalking legislation are the fact that the statutes' scope is considered overbroad and violates the principle of definiteness, and a collision with constitutional rights and values can occur. Incorporating anti-stalking or anti-harassment statutes and remedies in civil law also leads to criticism mainly because of the fact that, facing the same problems as defining a criminal conduct, defining stalking behaviour to justify a restraining order is not easy. Also, as different rights are competing, proportionality has to be observed and the courts have to assess which right should prevail.

##### A Restriction of constitutional rights

Several constitutional rights and freedoms can be affected by anti-stalking legislation. It has to be examined to what extent civil and criminal provisions affect those rights.

##### 1 New Zealand

In New Zealand, restriction of rights, namely granting a restraining order in respect of a stalker, means a possible clash with rights guaranteed to every person by the New Zealand Bill of

<sup>43</sup> Sally Kift "Stalking in Queensland: From the Nineties to Y2K" (1999) 11 Bond LR 145.

<sup>44</sup> Robert A Guy "The Nature and Constitutionality of Stalking Laws" (1993) 46 Vand L Rev 993.

<sup>45</sup> Robert P Faulkner and Douglas H Hsiao "And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation" (1994) 31 HVJL 1; Kathleen G Mc Ananey, Laura A Curliss and C Elizabeth Abeyta-Price "From Imprudence to Crime: Anti-Stalking Law" (1993) 68 NTDLR 906.



Rights Act 1990 (NZBORA). In particular, a stalker's freedom of expression, freedom of association and freedom of movement might be affected when a court grants an order.

Although this paper will highlight the legal provisions on civil harassment as well as criminal harassment, it will solely address the interaction of the provisions on civil harassment and their relationship to the NZBORA. This paper wants to point out how New Zealand courts attach importance to the rights set out by the NZBORA when granting a restraining order under the Harassment Act 1997. It will be discussed what, under section 5 of the NZBORA, can serve as a justifiable limitation of the perpetrator's guaranteed rights.

## 2 Germany

The situation regarding constitutional rights in Germany is different and the German Basic Law is considered to rank before every single piece of legislation. Each Act has to be measured upon the principles set out in the Basic Law prior to enactment. A rigid test is applied as to whether a new Bill meets the requirements and is a legitimate restriction of fundamental freedoms guaranteed by the Basic Law. The Federal Constitutional Court formulated an elaborate test based on the assumption that a restriction is only acceptable where it is required and as long as it is vital for the public agenda.<sup>46</sup> If the Act passes the test it will be enacted. In this context, it has to be noted that the Federal Constitutional Court can abolish any Act adopted by Parliament if it deems this Act to be incompatible with the Basic Law. Due to the doctrine Parliamentary supremacy, this option does not exist in New Zealand.

The above mentioned test was also applied when enacting the Violence and Harassment Act.<sup>47</sup> Similar to New Zealand's Harassment Act 1997, the German Act might limit such fundamental rights as freedom of action under Article 2(1) of the Basic Law and freedom of expression under Article 5 of the Basic Law. Freedom of movement stipulated in Article 11 of the Basic Law, however, is not affected as this article only protects citizens against any restrictions of leaving or entering the federal territory. Freedom of action stipulated in Article

<sup>46</sup> Bundesverfassungsgericht (*Federal Constitutional Court*) Judgment of 14 July 1999, 1 BvR 2226/94 <[www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)> (last accessed 20 September 2005).

<sup>47</sup> Bundestags-Drucksache 14/5429 of 5 March 2001, Dokumentations- und Informationssystem für Parlamentarische Vorgänge <<http://dip.bundestag.de>> (last accessed 30 September 2005).

2(1) Basic Law acts as a catchall element as it protects every person's "right to free development of a person's personality insofar as the person does not violate the rights of others or offend against the constitutional law." Therefore, the right to stay in one place and move freely to another place is protected under this article rather than Article 11 of the Basic Law.

Because of these preconditions, German courts do not have to discuss every time they apply the Act on whether the principle of proportionality was observed when this Act was enacted. Bearing this in mind, this paper will not examine constitutional problems, namely restrictions to fundamental freedoms, which might arise from granting a restraining order under the German Civil Code and the Violence and Harassment Act. This paper will focus on the new German anti-stalking Bill that seeks to outlaw stalking and make it a criminal offence. It will be examined whether this Bill will be able to pass the test of the principle of clarity and definiteness set out by the Federal Constitutional Court. This paper will highlight constitutional problems connected to this legislative attempt as the Bill seeks to criminalise stalking behaviour by incorporating a new section to the German Penal Code.

### ***B Defining stalking - the wording of statutes***

Another difficulty arising in the context of outlawing stalking behaviour is the problem of drafting an anti-stalking statute. It is the complexity of the issue that can cause problems and the crux of the controversy surrounding legislation lies in the definition of conduct both outlawed by criminal and civil law.<sup>48</sup> This issue is inevitably linked to the constitutional difficulties mentioned before because it might affect the principle of clarity and definiteness.

Comparing different legal systems and criminal codes, there is no uniform definition of stalking. Legal definitions in the United States, for example, vary widely from state to state.<sup>49</sup> This is due to the fact, that threatening behaviour can appear in many ways. While one legislature might only see the need for implementing a basic protection, another might want to protect victims from a variety of threatening behaviour and lower the threshold for certain

<sup>48</sup> Robert P Faulkner and Douglas H Hsiao "And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation" (1994) 31 HVJL 6.

<sup>49</sup> Patricia Tjaden and Nancy Thoennes „Stalking in America: Findings From the National Violence Against Women Survey“ National Institute of Justice Centers for Disease Control and Prevention – Research in Brief April 1998, 1.

actions becoming illegal. There are a number of ways in which stalking has been described and requirements vary and depend on the perpetrator's conduct and the impact this conduct has on the victim. For example, the course of conduct can be described very broadly or quite narrowly and the intent-requirement for committing an offence can be a high or a low one.

This paper argues that to draft a definition fitting all individual cases is almost impossible given the different manifestations of stalking behaviour. Stalking is usually described by monster statutes defining one term after the other – and defining uncertain definitions with even more uncertain descriptions.

## ***V ANTI-STALKING LEGISLATION IN NEW ZEALAND AND GERMANY – HOW ARE VICTIMS PROTECTED?***

Since the first anti-stalking statute was enacted in 1990 in California, there has been a wide-spread movement to outlaw stalking behaviour not only by civil but also by criminal law means. In 1993, Canada amended the Criminal Code to cover stalking behaviour.<sup>50</sup> In Australia, the state of Queensland did so the same year and soon all other Australian states followed. Almost all countries followed suit and in Europe, the United Kingdom, Ireland, the Netherlands, Belgium and Sweden have all enacted legislation outlawing stalking.

### ***A New Zealand***

New Zealand enacted the 'Act to provide criminal and civil remedies in respect of harassment', the Harassment Act 1997. The Act came into force in two parts. Most provisions of this Act, including criminal harassment, came into force on 1 January 1998 while provisions on civil harassment came into force on 1 May 1998. Although victims of stalking behaviour were protected to some extent by existing legislation because this legislation addressed many aspects of stalking, legal provisions were nevertheless considered to be incomplete.

<sup>50</sup> Criminal Code RS 1985 c C-46, s 264.

## 1 Relationship between Harassment Act 1997 and Domestic Violence Act 1995

Prior to the enactment of the Harassment Act 1997, a victim of harassment or threatening behaviour was only able to apply for a protection order under the Domestic Violence Act 1995. This Act regulates for a more limited scope than the Harassment Act 1997 as it regards harassment as psychological abuse that is considered to be violence.<sup>51</sup> As pointed out by Potter J in *Beadle v Allen*, the Harassment Act 1997, in contrast, concentrates on the victim's distress.<sup>52</sup> Nevertheless, the Harassment Act 1997 is modelled upon the Domestic Violence Act.

In contrast to the Harassment Act 1997, the Domestic Violence Act 1995 requires both victim and stalker to be engaged in a 'domestic relationship'.<sup>53</sup> Those victims who were not within the scope of the Domestic Violence Act 1995 and were stalked by a stranger, colleague or a mere acquaintance had to rely on the criminal or civil law for protection which neither of those could provide before the enactment of the Harassment Act 1997. In *Woodman v Brooks*, Giles J described the relationship of both Acts stating that "[t]he Harassment Act 1997 in particular is designed to protect the very people that cannot be brought within the framework of the Domestic Violence Act 1995; section 6(2)(b) of the Harassment Act 1997 says exactly that."<sup>54</sup> Hence, the Harassment Act 1997 aims to regulate harassment within social relationships generally not just with respect to domestic relationships.<sup>55</sup> Because of this, the Act covers stalking behaviour as well as other threatening and intimidating conduct carried out against a person.

## 2 Object of the Harassment Act 1997

The Harassment Act 1997 has the objective of providing greater protection to victims of harassment by recognising that behaviour, that may appear innocent or trivial when viewed in isolation, may amount to harassment when viewed in context and ensuring that there is a legal protection for all victims of harassment.<sup>56</sup> This perfectly correlates with the general problems encountered by stalking victims. Stalking itself is not a single illegal act, but a collective term for

<sup>51</sup> S 3(2) Domestic Violence Act 1995.

<sup>52</sup> *Beadle v Allen* [2000] NZFLR 639, 652 (HC) Potter J.

<sup>53</sup> S 7 Domestic Violence Act 1995.

<sup>54</sup> *Woodman v Brooks* [1999] NZFLR 64, 86 (HC) Giles J.

<sup>55</sup> *Beadle v Allen* [2000] NZFLR 639, 640 (HC) Potter J.

<sup>56</sup> S 6(1) Harassment Act 1997.

numerous activities that are mostly not considered criminal offences on their own but can, when taken together, seriously disrupt the life of the victim and amount to results as serious as any other crime.<sup>57</sup> The Act aims to achieve the above object by making the most serious types of harassment criminal offences.<sup>58</sup> Moreover, the Courts are empowered to make orders to protect victims of harassment who are not covered by the domestic violence legislation to provide effective sanctions for breaches of the criminal and civil law relating to harassment. Here, the general idea of the Harassment Act 1997 shows: this Act is designed to complement the Domestic Violence Act 1995 as it covers for those victims not protected by the latter.

Because of using the broader term 'harassment' rather than 'stalking', the Harassment Act 1997 covers not only 'classic' stalking behaviour but all harassing behaviour such as a dispute between neighbours that gets out of hand. This paper is in favour of using the broader term and not limiting the Act to stalking behaviour as this enables the courts to provide adequate legal protection for every victim.

### 3 *Meaning of harassment*

The Act recognises two classes of harassment, civil and criminal. Both classes of harassment require that the perpetrator harasses the victim. This precondition is set out in section 3 of the Harassment Act 1997 and is fulfilled if a person

engages in a pattern of behaviour that is directed against another person, being a pattern of behaviour that includes doing any specified act to the other person on at least two separate occasions within a period of twelve months.

In contrast to the opinion of Tompkins J in *Bakker v The District Court of Te Awamutu*,<sup>59</sup> Potter J in *Beadle v Allen* held that the two required specified acts need not occur on at least two separate occasions in the period commencing twelve months before filing the application as this would unnecessarily limit the scope of the Harassment Act 1997.<sup>60</sup>

<sup>57</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 249; Lambèr Royakkers "The Dutch Approach to Stalking Laws" (2000) 3 Cal Crim L Rev 2.

<sup>58</sup> S 6(2)(a) Harassment Act 1997.

<sup>59</sup> *Bakker v The District Court of Te Awamutu* (4 August 1999) HC CP 35/99 Tompkins J.

<sup>60</sup> *Beadle v Allen* [2000] NZFLR 639, 650 (HC) Potter J.

(a) Pattern of behaviour

Section 3 of the Harassment Act 1997 sets out that harassment is a pattern of behaviour that is directed against another person. This 'pattern of behaviour' requires doing a specified act on at least two occasions. The dictionary meaning of the term 'pattern' is described as "a consistent, characteristic form, style, or method, as a composite of traits or features characteristic of an individual or a group: *one's pattern of behaviour*."<sup>61</sup> This paper submits that it is not sufficient to commit a specified act on only two occasions to engage in a 'pattern of behaviour.' It is argued that this cannot constitute a pattern because a pattern requires a reliable tendency to carry out certain behaviour. This paper believes that the threshold set out by section 3 of the Harassment Act 1997 has been set to low and it would have been preferable to adopt a higher threshold of committing specified acts on at least five different occasions. It would then have been easier to refer to a 'pattern of behaviour'. Furthermore, adopting a higher threshold might also have made abuse of the provisions of the Harassment Act 1997 arduous.

(b) Specified act

The perpetrator has to engage in a pattern of behaviour doing any specified act. But what is regarded as a specified act able to constitute harassment? This requirement is described in section 4(1) of the Harassment Act 1997 and is of the utmost importance as the specified act constituting harassment is a requirement for the court to grant a restraining order if it deems this to be necessary to protect the victim from further harassment. The specified acts include

- (a) watching, loitering near or preventing or hindering access to or from a person's place of residence, business, employment or any other place that the person frequents for any purpose;
- (b) following, stopping, or accosting a person;
- (c) entering, or interfering with, property in that person's possession;
- (d) making contact with a person (whether by telephone, correspondence, or in any other way);

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<sup>61</sup> Online Dictionary <<http://www.dictionary.com>> (last accessed 29 September 2005).

(e) giving offensive material to a person, or leaving that material where it will be found by, given to, or brought to the attention of that person;

(f) acting in any other way that causes that person ("A") to fear for his or her safety and that would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

This extensive list explicitly covers most 'classic' forms of stalking behaviour such as watching and following a person or making contact with that person. Any other behaviour might be covered by section 4(1)(f) of the Harassment Act 1997.

(c) The test in section 4(1)(f) Harassment Act 1997

Behaviour under sections 4(1)(a) to (e) can be easily established as the wording is very precise and leaves little scope for interpretation. Behaviour, however, that is not explicitly mentioned in the list of specified acts is covered by the catchall element in section 4(1)(f). The components of the term 'acting in any other way' are, compared to the list, very broad and not defined. Differing from the list of specified acts under (a) to (e), the act under (f) requires the person to fear for their safety as well as that any reasonable person in the victim's particular circumstances would fear for their safety as well. Because of the explicit wording in subsection (1), the victim only has to fear for his or her safety if the perpetrator acted in 'any other way'. Fear for personal safety is not a requisite component of any specified act.<sup>62</sup> The test under section 4(1)(f) sets a higher threshold than the tests described under section 4(a) to (e).<sup>63</sup>

This paper believes that this higher threshold is, firstly, needed and useful and, secondly, proportional because the undesired behaviour is not as concrete as the conduct described under section 4(1)(a) to (e) and therefore the standard has to be different. The perpetrator might not know that the behaviour he or she engages in will subjectively be experienced as harassment by the victim. Therefore, it is necessary to not only apply a subjective test based on the victim's perception of the behaviour but also to apply an objective test. It has to be determined whether 'acting in any other way' would cause a reasonable person in the victim's particular

<sup>62</sup> *Beadle v Allen* [2000] NZFLR 639, 647 (HC) Potter J.

<sup>63</sup> *C v G* [1998] DCR 805 Judge Shaw.

circumstances to fear for his or her safety. This objective requirement serves as regulative component in order to protect a possible perpetrator of an oversensitive or overreacting victim. Surely, the most important objective of the Harassment Act 1997 is to protect the victim. But also the perpetrator's rights have to be taken into account when determining whether an act constitutes a specified act under the Act. There is always the possibility of an over-reacting victim seeking protection by legal means and dragging an innocent person in front of the court.

The importance of a combined objective and subjective test under section 4(1)(f) shall be presented by an exaggerated example. To meet the requirements set out under section 4(1)(f) it would, for example, be sufficient to send another person a bunch of flowers twice in twelve months as this has to be considered acting in 'any other way' not described in 4(1)(a) to (e). Some people might be flattered, some might find it an act of friendship, others might call it harassment and feel threatened. This shows the need for an objective regulation when determining specified acts that are committed in 'any other way'. Would a reasonable person fear for his or her safety when send two bunches of flowers in a one-year period? If there are no other acts committed by the perpetrator this behaviour would definitely not be regarded as sufficient to constitute a specified act under section 4(1)(f). Once again, the objective of the Harassment Act 1997 is shown. This is the aim of ensuring an *adequate* legal protection for every victim. Protection should never be disproportionate and abusive of rights.

(d) When does stalking behaviour amount to harassment?

Stalking behaviour is sometimes bizarre. In an example, Swanwick stated that one obsessive stalker searched the appellant's school bag, collecting hair from her hair brush, licking an apple and sniffing the crotch of her running pants.<sup>64</sup> This behaviour is disturbing but can it also justify a restraining order? The question arises when stalking behaviour crosses the line and amounts to harassment. This paper believes that a certain threshold has to be reached to intervene by legal means. This is the fundamental idea of the concept of law. Society has to keep up with confused people and frustrated suitors to some extent. Nevertheless, an intrusion into people's life and privacy cannot be accepted when it amounts to disturbance and curtails the life and

<sup>64</sup> R A Swanwick „Stalkees Strike Back – the Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland“(1996) 19 QUTLJ 34.



freedom of the person affected. Here, the law must intervene. But by doing so, a fair balance has to be achieved and competing rights have to be assessed and weighed up against each other. The principle of proportionality has to be strictly observed.

#### 4 Criminal Harassment

Criminal harassment under section 8 of the Harassment Act 1997 is an offence. This section reads as follows:

##### 8 Criminal harassment

(1) Every person commits an offence who harasses another person in any case where—

(a) The first-mentioned person intends that harassment to cause that other person to fear for—

(i) That person's safety; or

(ii) The safety of any person with whom that other person is in a family relationship; or

(b) The first-mentioned person knows that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for—

(i) That person's safety; or

(ii) The safety of any person with whom that other person is in a family relationship.

(2) Every person who commits an offence against this section is liable, on summary conviction, to imprisonment not exceeding 2 years.

"Safety" is defined to include a person's "mental well-being" although the Harassment Act 1997 comprises no guidance on how to define this term.<sup>65</sup> This paper argues that this prerequisite is difficult to define as it comprises a broad outcome. In *Durkin v Police* Williams J noted that the criminal harassment provisions were not at all easy to construe or to apply, that by reason of the extended meaning given to 'safety' by section 2, Parliament did not intend that safety should be confined solely to physical safety and that the Harassment Act 1997 still is a

<sup>65</sup> S 2(1) Harassment Act 1997.

largely untried statute.<sup>66</sup> The possible outcome of stalking behaviour is almost unlimited and can range from distress to a severe psychological trauma. So far, there are no judicial guidelines on how to define 'fear of safety' in regard of mental well-being and to identify its scope. This is, however, of vital importance for determining whether or not there has been criminal or civil harassment. In *Beadle v Allen* Potter J tried to find an explanation on the applicability of this requirement.<sup>67</sup> Potter J sought to compare 'fear for a person's safety' under the Harassment Act 1997 with the notion of fear for personal safety which is implied under the Domestic Violence Act 1995. It has been held that those two definitions cannot be compared as they are deliberately distinct because they derive from Acts that differ significantly.<sup>68</sup>

Under section 8 of the Harassment Act 1997, a person can be harassed either with intent or recklessly. First, both alternatives, of course, require a determination whether the accused committed harassment, namely a specified act under section 4(1)(a) to (f). Then it has to be established whether the accused *intended* harassing the victim *to cause* the victim fear for his or her safety or whether the accused *knew* that the harassment was *likely* to cause the victim *reasonable* fear for his or her safety.

(a) Section 8(1)(a) Harassment Act 1997

Differing from section 8(1)(b), the victim does not need to *reasonably* fear for his or her safety. If the perpetrator acted with intent, it is sufficient under this subsection that the outcome of this act was the victim's fear for his or her safety as this was the perpetrators main motivation to act. In this context, the issue arises as to how it can be proved that a person, for example, drove past their acquaintance's house repeatedly to cause this other person fear? This paper believes that the facts constituting a specified act under section 4(1) have to be evaluated and assessed upon their severity. The more threatening a certain conduct will be viewed by courts, the better the possibility of determining the intent to cause the victim to fear for his or her safety. For example, sending a letter containing bullets might more easily allow the conclusion that the perpetrator acted with intent to cause fear.

<sup>66</sup> *Durkin v Police* (8 September 1999) HC A 106/99, 17 Williams J.

<sup>67</sup> *Beadle v Allen* [2000] NZFLR 639, 653 (HC) Potter J.

<sup>68</sup> *Beadle v Allen* [2000] NZFLR 639, 653 (HC) Potter J.

(b) Section 8(1)(b) Harassment Act 1997

Section 8(1)(b) Harassment Act 1997 makes harassment an offence if the perpetrator knows that the harassment is likely to cause the other person, given the person's particular circumstances. Pointing out the immanent difficulty of stalking legislation, Potter J stated that:

Great concern has been expressed by commentators about defining acts of stalking and of the dangers that behaviour innocent on the surface, may in fact be innocent but be interpreted as stalking. However, commentators generally agree that legislation for the offence of stalking needs to be widely drawn in order to be effective. Universally it has proved very difficult to draw legislation widely enough to include all relevant situations whilst at the same time limiting the operation of the legislation to the desired target groups. In New Zealand many apparently innocuous activities can constitute a "specified act" for the purposes of the Act. A requirement of only two specified acts over a period of 12 months means that there is the potential for innocent persons to be caught in its net. On the other hand legislation too narrowly drawn would exclude situations not covered by existing legislation and for which the Act was specifically designed.

An example for how courts can sometimes be at a loss with certain new provisions is *R v D*.<sup>69</sup> This case illustrates a misunderstanding of the Harassment Act 1997 and was therefore considered a "miscarriage of justice" by Elias CJ in the Court of Appeal.<sup>70</sup>

Briefly summarised, the facts of the case were as follows: the appellant (the 'stalker') fell in love with the complainant (the 'victim') but her feelings were not returned. After an argument the complainant received a letter from the appellant which the appellant considered to be a rape threat. The Court of Appeal had to decide whether the appellant under section 8(1)(b) of the Harassment Act 1997 had knowledge that her actions, sending the letter and calling the complainant, were likely to cause the complainant, given her personal circumstances, to reasonably fear for her safety. The appellant was convicted to six months' imprisonment, suspended for a period of 12 months by the District Court and her appeal to the High Court was dismissed. She was of the opinion that, in both the District and High Court, the judges misconstrued the statutory provisions and that the sentence was manifestly excessive. The appeal was allowed and the conviction quashed. The Court of Appeal stated that there was no evidence

<sup>69</sup> *R v D* [2000] 2 NZLR 641 (CA) Elias CJ.

<sup>70</sup> *R v D* [2000] 2 NZLR 641, 655 (CA) Elias CJ.

to suggest that the appellant was or should have been aware that her contact with the complainant was causing the complainant any distress.<sup>71</sup>

This paper believes that the judgments of both the District Court and High Court show no understanding of the Harassment Act 1997, its objective and provisions and it appears that they even lack the most basic principles of criminal law.

Firstly, Elias CJ pointed out that Williams J, in the High Court, was of the view that the relationship between section 4(1)(f) and section 8(1)(b) is a difficult one because section 4(1)(f) imposes an objective standard whereas section 8(1)(b) requires the accused to know that the harassment is likely to cause the other person, given his or her particular circumstances, to reasonably fear for the person's safety.<sup>72</sup> Elias CJ correctly observed that the two tests in both sections are directed at separate inquiries.<sup>73</sup>

This paper argues that this is almost self explanatory, as section 4(1)(f) provides the constituents of harassment and determines what the Harassment Act 1997 actually qualifies as being a specified act. When determining which behaviour shall be liable for prosecution, the starting point always has to be an objective one. Otherwise, no one would ever know which conduct is considered legal and which is considered illegal. One can definitely not peek into the victim's mind. The offence of criminal harassment concerns behaviour that is highly subjective and difficult to manifest as its culpability results from the victim's fear and distress. Therefore, there has to be an objective requirement to curtail unrestricted application when establishing whether there has been a 'specified act'. This objective requirement is the 'reasonable person' test. Elias CJ held that "since section 4(1)(f) is a provision designed to catch unusual acts outside the categories identified in section 4(1)(a) to (e), some qualitative restriction [...] was clearly thought by Parliament to be necessary."<sup>74</sup> This paper agrees with those findings. In contrast, section 8(1)(b) requires a test to determine the knowledge of the perpetrator about the behaviour and its impact on the victim. Both requirements differ considerably from each other and cannot be mixed together.

<sup>71</sup> *R v D* [2000] 2 NZLR 641, 651 (CA) Elias CJ.

<sup>72</sup> *R v D* [2000] 2 NZLR 641, 646 (CA) Elias CJ.

<sup>73</sup> *R v D* [2000] 2 NZLR 641, 646 (CA) Elias CJ.

<sup>74</sup> *R v D* [2000] 2 NZLR 641, 646 (CA) Elias CJ.

Further, the District Court decision shows fundamental errors in reasoning and clearly shows the lack of understanding of the most basic principles of criminal law. The existence of the required knowledge under section 8(1)(b) always has to be assessed for the time of each 'specified act'. The correlation of act and intent is one of the fundamental principles of criminal law. Nevertheless, the judges both in the District Court and the High Court did not assess the incidents at the time they occurred but simply considered them to be 'specified acts' under the Harassment Act 1997. Elias CJ addressed this by stating that:<sup>75</sup>

It is not sufficient to conclude, as the High Court Judge did, that 'there was ample evidence from which the learned District Court Judge could conclude that all the elements of the charge under section 8(1)(b) had been made out, notwithstanding his lack of expressed reference to the complainant's circumstances.'

The case of *R v D* shows, how behaviour, although not being innocent but also clearly not being serious enough to be considered criminal conduct punishable with imprisonment, can be seen as being 'the most serious type of harassment' in regard to section 6 of the Harassment Act 1997 and constitute a criminal offence. This paper views the constituents 'knowledge' and 'given his or her particular circumstances' under section 8(1)(b) highly problematic ones. Criminal judges have to be careful when applying this provision and should never lose sight of the overall objects of the Harassment Act 1997. Not every behaviour can be seen as 'the most serious type of harassment' and the tests set out in sections 4 and 8 have to be strictly adhered to in order to avoid repeating making mistakes such as in *R v D*.

## 5 Civil Harassment

Where the necessary elements of intent or knowledge are not present there is no criminal aspect, but the person being stalked may apply for a restraining order under s 9 of the Harassment Act 1997. When stalking behaviour amounts to civil harassment, a court may make a restraining order under section 16 of the Harassment Act 1997. Section 16 provides:

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<sup>75</sup> *R v D* [2000] 2 NZLR 641, 655 (CA) Elias CJ.

16 Power to make a restraining order

(1) [...] [T]he Court may make a restraining order if it is satisfied that –

(a) The respondent has harassed, or is harassing, the applicant; and

(b) The following requirements are met:

(i) The behaviour in respect of which the application is made causes the applicant distress, or threatens to cause the applicant distress; and

(ii) That behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances; and

(iii) In all the circumstances, the degree of distress caused or threatened by that behaviour justifies the making of an order; and

(c) The making of an order is necessary to protect the applicant from further harassment.

In *Irvine v Edwards*, Judge Kerr correctly observed that the word 'may' indicates that it is in the court's discretion to decide whether or not a restraining order will be granted.<sup>76</sup> This paper agrees with this conclusion as the wording of the section clearly stipulates the court's discretion.

(a) The prerequisite of harassment

According to section 9 of the Harassment Act 1997 any person who is being or has been harassed by another person may apply to the court for a restraining order in respect of this other person. First of all, it has to be established whether the objectionable behaviour constitutes harassment. As clearly stated, this requirement not only applies for persons who are still being harassed but also for victims who have been harassed in the past. This will be the case if the behaviour can be qualified as a specified act under section 4 of the Harassment Act 1997.<sup>77</sup>

<sup>76</sup> *Irvine v Edwards* [1999] DCR 171 Judge Kerr.

<sup>77</sup> S 9(1) Harassment Act 1997.

(b) Requirements to grant a restraining order

Section 16 sets out the requirements when the court may grant such an order. All of the requirements have to be established in combination by the court. This is indicated by using the word 'and' at the end of each sentence.

(i) Harassing behaviour causes the applicant distress or threatens to cause distress

Furthermore, this harassing behaviour is required to cause the applicant distress, or threat to cause the applicant distress. It is of course necessary that the victim is still distressed or threatened to be distressed even if the harassing behaviour has already stopped. Otherwise, a restraining order would be of no use and could not be regarded as proportionate with respect to the respondent's rights. Restraining the respondent's rights cannot be lawful when there is actually no distress the victim is suffering from. A restraining order is a legal remedy, not a punishment for the perpetrator, and because of this, it always has to be tied up with the current situation. This requirement adds a subjective constituent of the provision because only the victim's view of the conduct is important. This component correlates with the subjective requirement of fear for safety under section 4(1)(f)(i) although there is no requirement under section 16 that the applicant fears for his or her personal safety.<sup>78</sup>

It is necessary that the subjective requirement is restricted by an objective requirement. Otherwise a restraining order could be immediately granted to the most sensible victim who is distressed easily even if this distress is irreproducible for a reasonable person examining the behaviour from a non-victim's perspective.

(ii) Behaviour would cause distress to a reasonable person

The Harassment Act 1997 stipulates an objective requirement as it requests that "that behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances."<sup>79</sup> This prerequisite is needed to restrict the wide scope

<sup>78</sup> *Beadle v Allen* [2000] NZFLR 639, 640 (HC) Potter J.

<sup>79</sup> S 16(1)(b)(ii) Harassment Act 1997.

opened up by the subjective requirement stated above. It would be not proportionate to enable the court to restrict the respondent's rights just because of the victim's view of the respondent's behaviour. This could lead to false accusations and would not protect the respondent's rights. In *C v G*, Judge Shaw clearly stated that it was not enough that a person was angered, annoyed or upset to grant the remedy set out in the Harassment Act 1997.<sup>80</sup> Intimidating glances, exchanged at a party, cannot justify a restraining order.

(iii) Degree of distress justifies making a restraining order

This requirement is the most judgmental because the court has to assess the degree of distress caused or threatened by the behaviour in all circumstances of the case. As Potter J in *Beadle v Allen* put it, "this is the [criterion] under the Act for the exercise of the Court's discretion to a restraining order once a specified act has been established."<sup>81</sup> The degree of distress has to be sufficient and has to justify the making of a restraining order. Determining this component under section 16, the court has to carefully balance competing rights and freedoms of the appellant as well as the respondent. In this context, rights guaranteed by the NZBORA have to be observed and evaluated.

(iv) Restraining order must be necessary

Under section 16(1)(c) of the Harassment Act 1997, the making of an order must be necessary to protect the applicant from further harassment. This requirement demands from the court to use restraining orders only if there are no other measures available to protect the victim. A restraining order is an intrusion in the perpetrator's rights and freedoms and should always be used carefully. In *E v O* Judge Hole stated that the Court must bear in mind all the circumstances of the case and determine if the degree of distress experienced by the applicant justifies the making of an order, and that the intrusion on rights and freedoms must be so limited only to the extent necessary to protect the victim of harassment.<sup>82</sup> When it comes to the question whether or

<sup>80</sup> *C v G* [1998] DCR 805, 806 Judge Shaw.

<sup>81</sup> *Beadle v Allen* [2000] NZFLR 639, 653 (HC) Potter J.

<sup>82</sup> *E v O* [2004] DCR 281, 287 Judge Hole.



not to grant a restraining order, this paper agrees with Judge Shaw who stated in *C v G* that “the Harassment Act and in particular the provision relating to the issuing of restraining orders must be interpreted with a degree of common sense.”<sup>83</sup>

(c) Effects of restraining orders

A restraining order may be made for such a period as the court considers necessary to protect the victim from further harassment.<sup>84</sup> This period of time will usually be one year but it can be made for a longer or shorter period as the court considers it necessary to protect the victim. If the order is breached by the respondent, this is considered an offence under section 25 of the Harassment Act 1997.

(d) Balance of competing rights – NZBORA and Harassment Act 1997

As stated above, the requirement of the ‘degree of distress’ is the indicator as to whether or not a restriction to rights and freedoms might be justifiable. When granting a restraining order, the court will inevitably restrict the respondent’s rights. *Beadle v Allen* vividly shows the effects of the Harassment Act 1997 on rights and freedoms guaranteed in a free and democratic society. Potter J extensively considered the effect of the NZBORA on the Harassment Act 1997.<sup>85</sup> In addition, Judge Hole in *E v O* held that it is the purpose of the Act is to restrict freedom of expression to the extent necessary to provide protection for the victims of harassment.<sup>86</sup>

In particular, freedom of expression, freedom of association and freedom of movement under the NZBORA might be affected when a court grants an order. A restraining order under the Harassment Act 1997 has to comply with the principles, rights and freedoms set out by the NZBORA. In considering what a justifiable limitation on the perpetrator’s freedoms is, it is necessary as in all cases where there is a conflict between competing rights and freedoms, to balance the competing rights.<sup>87</sup>

<sup>83</sup> *C v G* [1998] DCR 805, 808 Judge Shaw.

<sup>84</sup> S 21 Harassment Act 1997.

<sup>85</sup> *Beadle v Allen* [2000] NZFLR 639, 653 (HC) Potter J.

<sup>86</sup> *E v O* [2004] DCR 281, 287 Judge Hole.

<sup>87</sup> *Beadle v Allen* [2000] NZFLR 639, 653 (HC) Potter J.

Section 5 NZBORA recognises explicitly that there are limits on guaranteed rights and freedoms as it stipulates that “[...] the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In *Ministry of Transport v Noort*, Richardson J held that “[i]t reflects the reality that rights do not exist in a vacuum and that they may be modified in the public interest to take account of the rights of others and of the interests of the whole community.”<sup>88</sup>

Therefore, the most important issue is to determine if the protection afforded by the Harassment Act 1997 is justifiable in a free and democratic society.<sup>89</sup> The question is whether the degree of restraint is reasonably justifiable to protect the victim but, at the same time, curtails as little as possible the rights and freedoms of the perpetrator.<sup>90</sup> In section 17, the Harassment Act 1997 itself already contains a provision to help balance the victim’s and the perpetrator’s rights as harassment cannot be established if the specified act was done for a lawful purpose.

The decision of Parliament to implement the Harassment Act 1997 was carried by the intention to provide a remedy for people who are subject to obsessive behaviour by other persons and for whom no satisfactory legal remedies are otherwise available. The Act was designed to provide adequate legal protection for all victims. By vesting the courts with the possibility to grant restraining orders and making the most serious types of harassment a criminal offence, Parliament reached a decision of valuing the rights of victims higher than the rights and freedoms of perpetrators. The victim has the right to be left alone, live in solitude and seclusion and not have their privacy intruded. Although those rights are not explicitly established under the NZBORA, this paper believes that they have to have the same importance as the perpetrator’s freedom of expression or movement.

In *E v O* Judge Hole was of the opinion that, in the context of freedom of expression, the problem was not so much in the fact that the perpetrator has sought to express certain opinions but more in the way it was done. By using offensive language and by distributing material as often and as widely as the perpetrator has, the line from mere expression of opinion to

<sup>88</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) Richardson J.

<sup>89</sup> *E v O* [2004] DCR 281, 287 Judge Hole.

<sup>90</sup> *E v O* [2004] DCR 281, 287 Judge Hole.

harassment was crossed.<sup>91</sup> In *B v Reardon*, referring to freedom of expression, Judge Robinson, however, held in that the defence of truth and honest opinion must also apply under the Harassment Act 1997. He stated that acts cannot constitute harassment if they are justified and a publication, for example, could not be prevented by the granting of an injunction under the existing law with regard to defamation.<sup>92</sup> This paper contends that by stating these underlying principles, it becomes clear that protection under the Harassment Act 1997 should not contravene existing law and has to be balanced against the perpetrator's rights.

The victim's distress caused by behaviour protected under the NZBORA has to reach a level where the purpose of the Harassment Act 1997 kicks in, which is to restrict rights and freedoms to the extent necessary to provide protection for the victims of harassment. The protection of harassment victims from behaviour that might appear innocent or trivial when viewed in isolation but amount to harassment when viewed in context is a legitimate intention and is in the public interest.

This paper argues that, to eliminate an abusive use of legal protection by granting restraining orders, a stringent application of the provisions set out under the Harassment Act 1997 has to take place. The courts must especially pay attention to all circumstances of the case in deciding whether the degree of distress experienced by the victim justifies making a restraining order. They have to evaluate competing rights carefully, be aware of the most judgmental requirement and assess the degree of distress caused or threatened by the behaviour in all circumstances of the case. Furthermore, the duration of a restraining order will normally be one year.<sup>93</sup> This requirement can also secure that a restriction of rights will only be made to an extent and for a period of time necessary to protect the victim. Of course, the longer the period of restriction for the perpetrator, the more accurate the reasoning and balancing of competing rights has to be. It might be reasonable to restrict the perpetrator's rights for six months or a year, but the test has to be more strictly applied there longer a restraining order is valid. The balance of competing rights certainly has to be a different, the impact on the victim more intense and no other means available if an order would be granted for five years.

<sup>91</sup> *E v O* [2004] DCR 281, 287 Judge Hole.

<sup>92</sup> *B v Reardon* [2000] DCR 575, 581 Judge Robinson.

<sup>93</sup> S 21 Harassment Act 1997.

Therefore, the Harassment Act 1997 can of course limit certain rights and freedoms under the NZBORA. As each other Act enacted by Parliament, this Act will inevitably contain an assessment of values and protective measures. In order to comply with the Parliamentary objectives and guidelines the intrusion of rights and freedoms should be so limited as to impinge only the extent necessary to protect a victim of harassment as can be demonstrably justified in a free and democratic society.

## **B Germany**

German stalking victims must rely on criminal or civil law for protection. Compared to the previous situation in other countries before the enactment of new anti-stalking legislation, whether civil or criminal, Germany faces the same difficulties in tackling this problem. Following the general trend in most European countries, a new Bill on stalking was introduced into the *Bundestag* in April 2005. So far, there has been no ruling on this proposal to amend the law. The intention of the legislature is to make stalking behaviour a criminal conduct under the German Penal Code, comparable with criminal harassment under section 8 of the Harassment Act 1997.

Civil remedies against stalking have been available under section 823 in connection with section 1004 of the Civil Code since the enactment of this code in the year 1900, but it has to be noted that this protection was merely a side effect of the general protection from intrusion guaranteed by this special section. This was one of the main reasons why Government sought to improve existing remedies by enacting the Violence and Harassment Act. This Act was passed as a result of the new 'Plan of Action on the Combat of Violence against Women' which the Government agreed on at the end of 1999.<sup>94</sup> The main aim of this 'Plan of Action' is to ensure a tighter cooperation of Government agencies in order to improve the combat against violence against women and make sure legislative changes will not only produce isolated relief but help to tackle the problem of violence against women in its complexity.

<sup>94</sup> "Aktionsplan der Bundesregierung zur Bekämpfung von Gewalt gegen Frauen" Federal Ministry of Family, Senior Citizen, Women and Youth <<http://www.bmfsfj.de>> (last accessed 30 September 2005).

This paper believes that civil remedies can be helpful in the first place and will probably mostly prevent 'soft' stalkers from carrying out further unwanted behaviour. Nevertheless, it has to be examined what happens with the relentless or the unknown perpetrator. Here, the question emerges whether a change of criminal law provisions is required. Is the existing law actually inadequate? This paper will analyse protection of stalking victims both under German civil and criminal law and discuss shortcomings. It will highlight the current attempts on criminalising stalking behaviour and some of the new Bill's imperfections in relation to constitutional law.

*1 How are victims protected against stalking under the current legislation in Germany?*

Stalking behaviour can lead to a restraining order carried out by the victim in respect of the stalker if the conduct in dispute amounts to civil harassment. This is comparable to the proceeding under sections 9 and 16 of the Harassment Act 1997. Stalking behaviour might also result in a conviction under criminal law if the stalker is guilty of committing an offence under the Penal Code. But it has to be noted that there is, so far, no offence of criminal harassment comparable to section 8 of the Harassment Act 1997.

(a) Protection under the Civil Code

A victim can file for an injunctive relief on the basis of sections 823 in conjunction with 1004 of the Civil Code. This requires an unlawful intrusion, already occurred or imminent to happen, into a certain right, namely life, bodily integrity, personal liberty or property. An application for an injunctive relief on the basis of those sections will not help a stalking victim, if the stalker restricts him or herself to disturbing and annoying but still 'legal' actions.

(b) Protection under the Violence and Harassment Act

To give greater protection to victims of harassment the Violence and Harassment Act was enacted in December 2001 and came into force on 1 January 2002. In addition to the afore mentioned procedure under the Civil Code, a victim can now apply for a restraining order under section 1 of this Act, if the requirements set out by the relevant sections are met.

(i) The scope of the Violence and Harassment Act

In contrast to New Zealand's Domestic Violence Act 1995, the Violence and Harassment Act is not limited to domestic relationships.<sup>95</sup> Every stalking victim can apply for a court order when he or she is being harassed. This possibility of filing for a court order is explicitly acknowledged to stalking victims.<sup>96</sup> To put it short, the German Violence and Harassment Act can be viewed as a mixture of the Domestic Violence Act 1995 and the Harassment Act 1997.

In relation to stalking – based on the assumption that there has been no criminal offence committed by the stalker – section 1 subsection 2(1)(b) of the Violence and Harassment Act is of particular interest. This section stipulates that the court, on application of the victim, has to make an order accommodating 'required actions' in respect of a person who

- (1) harasses another person in an unacceptable manner; or
  - (2) follows and stalks the person contrary to the other persons explicitly expressed wish;
- or
- (3) makes contact with the person by telephone or any other means of communication.

Section 1 of the Violence and Harassment Act provides that a German court *has* to grant an order accommodating 'required actions' if all requirements of this section are met. In contrast to section 16 of the Harassment Act 1997, which vests New Zealand courts with an overall discretion regarding restraining orders, there is no discretion on the question whether to grant an order. If the victim applies for it and the prerequisites of the relevant sections are met, it has to be granted.

The 'required action' taken by the court to protect the victim will most often be an injunction prohibiting the stalker any contact whatsoever with the victim as well as a non-molestation order. It has to be observed that an injunction will only be granted if the stalker's behaviour is deemed 'unacceptable' by the court as this is a prerequisite of the relevant section. A definition of unacceptable behaviour is not given but section 1(2)(2) defines that a person's

<sup>95</sup> Dieter Schwab "2002 – Ein Jahr für Juristen" (2002) 1 FamRZ 2.

<sup>96</sup> Otto Palandt and Dieter Bassenge *Bürgerliches Gesetzbuch* (64ed, C H Beck, München, 2005) Section 1 GewSchG 8

conduct will not result in a court order while performing a 'legitimate interest' that results in contact to the other person. The term 'legitimate interest' itself is not defined either and it lies with the discretion of the court to establish a workable definition. Here, the immanent problem of all anti-stalking legislation shows: undefined legal terms that have to be interpreted by the courts. It is completely in the discretion of the courts to establish whether the harassment was conducted in an 'unacceptable manner'. This paper believes that the legislature should at least have given some guidelines on interpretation. The German courts established that, for example, contact with joint custody children might constitute a legitimate interest.<sup>97</sup>

Similar to the New Zealand Harassment Act 1997, the German Act makes it an offence to contravene a court order.<sup>98</sup> A person contravening the court order is liable to imprisonment for a term not exceeding one year or a fine. The section also establishes that the perpetrator might still be criminally liable if he or she additionally commits any criminal offences. A form of 'aggravated' contravention similar to section 25(3) of the Harassment Act 1997, however, does not exist.

(ii) Did the enactment of the Violence and Harassment Act produce better protection for victims?

Without doubt, the Violence and Harassment Act is of great use when it comes to fighting stalking behaviour. But it has to be observed that there are many difficulties inherent in civil remedies. One of the main problems is that, as with any civil remedy, the victim has to start proceedings and has the onus of proof.<sup>99</sup> A survey, conducted by the German Federal Ministry of Justice in cooperation with the Institute of Family Research at the University of Bamberg, evaluated the benefits and downsides of the new Violence and Harassment Act.<sup>100</sup> Experts were

<sup>97</sup> Otto Palandt and Dieter Bassenge *Bürgerliches Gesetzbuch* (64ed, C H Beck, München, 2005) Section 1 GewSchG 8.

<sup>98</sup> S 4 Violence and Harassment Act.

<sup>99</sup> Björn Kerbein and Philipp Pröbsting "Stalking" (2002) 2 ZRP 77.

<sup>100</sup> Marina Rupp "Rechtsstaatliche Untersuchungen zum Gewaltschutzgesetz", Federal Ministry of Justice <<http://www.bmj.bund.de>> (last accessed 16 September 2005).

asked to review the recently enacted legislation.<sup>101</sup> In general, they found the obstacles for stalking victims to file for a restraining order higher than for a victim of domestic violence.<sup>102</sup>

The question arises why the experts, on the one hand, find the Act being an immense legal improvement but, on the other hand, think that the Act does not provide efficient help for staking victims.<sup>103</sup>

This paper believes that those practical barriers might arise from the unfamiliarity of stalking victims with the Violence and Harassment Act and the fact that they might assume that this Act only governs domestic violence. Another point could be the lack of faith in civil remedies. Victims might think that – although it is an offence to contravene a restraining order – a civil remedy might not be as powerful as a criminal conviction. This paper argues that the main concern emerges from the fact that the onus of proof is with the victim. It will be difficult for the victim to prove that another person is persistently harassing the victim against the victim's explicitly expressed wish. Furthermore, the victim has to make sure that all actions in relation to the stalker are observed by a friend or family member so that this person could give evidence should there be a court hearing. This paper is of the opinion that those requirement can add to the despair of the victim. In addition, police and judges have to be convinced of the relevance of the amount of harassment. This paper is of the opinion that psychological stress that might amount to injury is still not taken seriously enough.

A further difficulty is that the victim has to become active in order to be left alone and has to find a lawyer in order to file for a restraining order. A provision resembling section 13 Harassment Act 1997, which allows applications on behalf of victims under certain circumstances, does not exist under German law. Therefore, the victim might be unable to start proceedings because of fear of harm from the stalker. This paper is in favour of the possibility of applying on behalf of certain persons and proposes the insertion of a similar clause into the Violence and Harassment Act. It is argued that this would acknowledge the fear and mental distress a stalking victim is put through by enduring stalking behaviour for a long time.

<sup>101</sup> The survey included judges, lawyers, police, bailiffs, staff at outreach clinics and women's refuges.

<sup>102</sup> Marina Rupp "Rechtsstaatliche Untersuchungen zum Gewaltschutzgesetz" 304, Federal Ministry of Justice <<http://www.bmj.bund.de>> (last accessed 16 September 2005).

<sup>103</sup> Marina Rupp "Rechtsstaatliche Untersuchungen zum Gewaltschutzgesetz" 311, Federal Ministry of Justice <<http://www.bmj.bund.de>> (last accessed 16 September 2005).



Moreover, it could guarantee that perpetrators could be accused of civil harassment and face the consequences of their wrongdoing.

Another shortcoming of civil remedies in general is that under German law a restraining order always has to be enforced by the victim. The victim and the lawyer respectively is responsible for serving the restraining order to the perpetrator. Here, it shows that a restraining order is of little use when the victim is being stalked by an anonymous perpetrator. The victim, or another person on behalf of the victim, would have to investigate the stalker's identity in order to be able to file an application with the court.

It is submitted that, although not flawless, the Violence and Harassment Act is a very helpful improvement of German civil law. Nevertheless, its scope is not as broad as the one stipulated in the Harassment Act 1997 as the German Violence and Harassment Act merely seeks to complement existing legislation. It should be reviewed using the findings of the survey conducted by the German Federal Ministry of Justice in cooperation with the Institute of Family Research at the University of Bamberg.

#### (c) Protection under the Criminal Code

Criminal law provides some protection for stalking victims. Under current law, a stalker can violate several provisions ranging from bodily harm, coercion, threatening conduct or trespass for example. Mostly, however, stalking conduct will be just below the legal requirements of an offence like this and the prosecutor will therefore not be able to charge the stalker with illegal conduct.

The benefit of criminal proceedings for the victim is the fact that, in contrast to civil proceedings, they are conducted by the prosecutor *ex officio*. The victim does not need to provide evidence and find out about the identity of an anonymous stalker but only has to testify during court proceedings. Then again, the cardinal impairment of criminal law, not only the German criminal law, lies in the fact that the stalker must 'do something', such as physically attack the victim, before the law will strongly intervene.<sup>104</sup> Before this happens, victims might

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<sup>104</sup> Robert A Guy "The Nature and Constitutionality of Stalking Laws" (1993) 46 Vand L Rev 999.

feel helpless and think the criminal system has failed them. Although German police are compelled to intervene if a victim explains and proves fear of severe bodily harm or even death, stalking is still a phenomenon which is not taken seriously, because the grave effects this conduct has on the victim are commonly unknown or underestimated. When reporting harassing behaviour to the police, officers might sometimes assume the victim is over-sensitive and simply over-reacting to certain behaviour.

This paper holds the opinion that law enforcement authorities need to be trained on the topic of stalking in order to take it more seriously and be aware of individually occurring and common offences such as trespass in the context of the complex situation. Changes, though, are taking place, albeit slowly. In the city of Bremen, for example, the police have established a 'stalking representative'.<sup>105</sup> This representative's aim is to sharpen the awareness of police officers towards stalking behaviour by training them on this topic and explaining about the phenomenon of stalking, its impact on the victim and the remedies offered under current law. Also, raising the public awareness is focussed on. The 'stalking representative' organises information sessions and law clinics and distributes information leaflets. This paper highly appreciates training of people in contact with stalking behaviour like police officers. It is believed that a law, perfectly elaborated and drafted, will be of no use if the people applying it are not trained to detect the offence and do not take victims seriously.

## 2 *Is existing law inadequate and are legislative changes needed?*

Given the above facts, this paper holds the opinion that existing laws are in fact inadequate in combating the problem of stalking. Because of the aforementioned shortcomings, civil remedies alone are not sufficient and restraining orders might not discourage all stalkers from stopping their behaviour. In some cases a restraining order might even be seen as an incentive by perpetrators to intensify their behaviour. Criminal law as well cannot cover the complex behaviour of stalking because it merely focuses on single acts and does not recognise stalking as an offence on its own. Moreover, single acts in context of stalking conduct will mostly be just below the constituting legal requirements of an offence.

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<sup>105</sup> Police Bremen <<http://www.polizei.bremen.de>> (last accessed 30 September 2005).

In this context, the question arises whether criminalising stalking behaviour is an option to better protect victims from the most serious forms of harassment. This paper argues in favour of criminalising stalking behaviour in Germany. Picture yourself being send flowers every day, finding love letters at all different places and being watched while shopping for groceries or sitting in a pub. One can illustrate a stalking scenario in a more drastic way, so how about being send a swimsuit stained in the crotch area with seminal fluid or a letter full of bullets?<sup>106</sup> Should behaviour like this violate criminal law? As stated above, this paper believes that inserting a provision into the German Penal Code, similar to New Zealand's section 8 of the Harassment Act 1997, is of vital importance. As in New Zealand, only the most serious types of harassment should be covered by a new provision.

### 3 *Acknowledging a gap in the legal protection of stalking victims*

The German *Bundesrat* first acknowledged the law was not able to cope with stalking behaviour and persistent harassment in March 2004. Almost all politicians recognised that adopting a criminal provision is vital to provide adequate legal protection for all victims of harassment and stalking.<sup>107</sup> The Minister of Justice, Brigitte Zypries, stated that existing protection under the Violence and Harassment Act has to be improved.<sup>108</sup> After extensive debates a new Bill was introduced to the *Bundestag*.<sup>109</sup> The aim of this bill is to introduce a new section into the Penal Code that makes persistent harassment an offence.

### 4 *Objections against the anti-stalking Bill*

Constitutional principles are most important when drafting a criminal statute. Adhering to those principles is vital for democracy and a constitutional state. Furthermore, it is essential for criminal statutes to be certain and define a scope of application so that every citizen can tell right

<sup>106</sup> Example taken from R A Swanwick „Stalkees Strike Back – the Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland“(1996) 19 QUTLJ 34.

<sup>107</sup> Bundesrat, Plenarprotokoll of 18 March 2005, Sitzung 809, Tagesordnungspunkt 16, Dokumentations- und Informationssystem für Parlamentarische Vorgänge <<http://dip.bundestag.de>> (last accessed 30 September 2005).

<sup>108</sup> Federal Ministry of Justice <<http://www.bmj.de>> (last accessed 24 September 2005).

<sup>109</sup> Bundesrats-Drucksache 551/04 of 5 July 2004, “Bill on the Amendment of the Penal Code regarding persistent Harassment“ Dokumentations- und Informationssystem für Parlamentarische Vorgänge <<http://dip.bundestag.de>> (last accessed 30 September 2005).

from wrong. The drafting of stalking statutes can challenge these principles, leaving it with the legislature to formulate a coherent statute.

The new Bill seeks to criminalise stalking behaviour. This aim is to be achieved by inserting the new clause 241b into the German Penal Code. The proposed clause seeks to outlaw every person's persistent and unwarranted harassment against another person's when the first person engages in the following specified acts:

- (1) following, stopping or accosting a person; and
- (2) making contact with that person (whether by telephone or any other means of communication); and
- (3) threaten the person or any other third person with whom the person is in a close relationship; and
- (4) acting in any other way.

Those specified acts shall be punishable if they cause the person to fear for his or her life, bodily integrity, freedom, or any other object of legal protection.

The main objection concerning the new Bill is the phrase under (4) criminalising 'acting in any other way' in contrast to the previously defined and specified behaviour.<sup>110</sup> In the explanatory statement it is stated that this phrase was introduced to include all possible behaviour towards a victim because the perpetrator's terror is only limited by his or her imagination.<sup>111</sup> The section does not define the term of 'acting in any other way' and in the absence of such definition, the issue of uncertainty of criminal law arises. A fundamental principle of German criminal law is the requirement that all aspects of punishment, including preconditions for imposition as well as type and severity, must be defined by statute.<sup>112</sup> This is the so-called principle of legality which invariably includes a requirement of statutory definiteness.<sup>113</sup>

<sup>110</sup> Bundesrats-Drucksache 551/04 of 5 July 2004, § 241a (1)4, Dokumentations- und Informationssystem für Parlamentarische Vorgänge <<http://dip.bundestag.de>> (last accessed 30 September 2005).

<sup>111</sup> Bundesrats-Drucksache 551/04 of 5 July 2004, 8, Dokumentations- und Informationssystem für Parlamentarische Vorgänge <<http://dip.bundestag.de>> (last accessed 30 September 2005).

<sup>112</sup> Joseph J Darby and Hans-Heinrich Jescheck *The Penal Code of the Federal Republic of Germany* (Sweet and Maxwell, London 1987) 8.

<sup>113</sup> Joseph J Darby and Hans-Heinrich Jescheck *The Penal Code of the Federal Republic of Germany* (Sweet and Maxwell, London 1987) 9.

Article 103(2) German Basic Law explicitly stipulates the principle of statutory definiteness saying that "an act may be punished only if it was defined by a law as a criminal offence before the act was committed." This provision shall ensure that everybody can tell right from wrong and that the principle of *nulla poene sine lege*, meaning 'no punishment without an underlying provision outlawing this behaviour', is strictly observed.

As mentioned before, the Federal Constitutional Court has the power to abrogate a statute deemed to be unconstitutional and can also examine this power if it considers a statute to be uncertain. It held that the principle of statutory definiteness imposes a special prohibition of arbitrariness onto the legislature and constitutes an obligation to formulate the scope of a criminal statute in such a precise manner that every citizen will know whether a conduct is legal or illegal.<sup>114</sup> Of course, this does not produce an absolute obligation to specify and/or precisely describe every single word and fact of criminal behaviour, as this would not be possible.<sup>115</sup> Because statutes have to address all different kinds of facts, they cannot be drafted exactly to fit the one individual case.

Bearing the principle of statutory definiteness in mind, this paper believes that the new anti-stalking Bill suffers significant shortcomings in relation to constitutional law. Is it really necessary to cover all possible behaviour and include subclause (4)? It is submitted that this 'broadbrush' definition of stalking behaviour will violate constitutional principles set out under the Basic Law as well as the principle that criminal law should always be used as a last resort.

(a) Criminal law as the last resort – The principle of *ultima ratio*

When general principals of law are at stake, the legislature's attempts to create a penalty for stalking behaviour have to be well considered. Attempts to find a legal definition of stalking will inevitably encounter obstacles as a great deal of commonly occurring stalking behaviour is also commonplace in the course of legitimate social interaction between citizens.<sup>116</sup> This

<sup>114</sup> Bundesverfassungsgericht (*Federal Constitutional Court*), Beschluss of 12 December 2000 - 2 BvR 1290/99 <<http://www.bundesverfassungsgericht.de>> (last accessed 21 September 2005).

<sup>115</sup> Hans D Jarass and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland* (7ed, C H Beck, München 2004) Article 103, 48.

<sup>116</sup> Emily Finch "Stalking the perfect Stalking Law: An Evaluation of the Efficiency of the Protection from Harassment Act 1997" (2002) Sep CRIMLR 705.

difficulty has to be taken into account when drafting a new law and the question is to be raised where the line that divides the acceptable pursuit of reconciliation with, for example, an ex-partner and stalking, is to be drawn. The same has to apply to a suitor: can it be legal to call an acquaintance twice a day but illegal to do so ten times a day? This paper believes that the major problem in combating stalking and drafting criminal anti-stalking provisions is to find a balance between conduct considered to be criminal and unwanted, and behaviour that is still 'normal' and legally adequate. The legislature should always bear in mind that criminal law is only *ultima ratio* in combating socially unwanted conduct. This paper contends that this leads to the presumption that the concept of criminal law must always be a fragmentary one. If the German legislature, however, decides to criminalise stalking behaviour it has to be made sure that this will only be for the most serious forms of stalking and harassment.

(b) Violation of general criminal law principles – The principle of definiteness

As stated above, the principle of definiteness is of vital importance in criminal law. Statutes always have to fulfil the requirements of definiteness in order to allow the perpetrator to know whether his or her behaviour is illegal.

Due to difficulties in proving intent, several US American jurisdictions, for example, have adopted a minimum level of intent.<sup>117</sup> Under these jurisdictions it is only necessary to prove that the perpetrator committed the act that caused the victim to fear while no proof is required that the perpetrator actually intended to cause fear or alarm. A statute like this is a victim-defined crime.<sup>118</sup> This paper argues that this legislative concept disregards the principle of predictability of criminal behaviour as well as the principle of definiteness.

To constitute a valid statute under criminal law, it is necessary that a person knows exactly which conduct is deemed to be legal and which, in contrast, is considered to be illegal and will be punished. People might otherwise not be on notice that their behaviour constitutes a crime. It will hardly be possible to assess a person's prosecution and criminal responsibility when

<sup>117</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 258.

<sup>118</sup> Paul E Mullen, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000) 259.

it is depending on the mental and physical power of resistance of a victim. The principle of certainty is a fundamental maxim of criminal law and can be violated by applying a victim-defined view of an offence. This paper argues that it is necessary to protect citizens against ambiguous criminal laws and provide certainty when drafting a new law. This requires legislatures to define criminal behaviour sufficiently to put a potential offender on notice that a certain conduct is prohibited.<sup>119</sup>

How do these principles affect the new anti-stalking Bill? This paper is of the opinion that subclause (4) of the new Bill violates the principles of definiteness. Of course, it is not possible for the legislature to think of all potential cases that might arise and draft a statute to cover all this conduct. While this paper is strongly in favour of a criminal anti-stalking legislation, it suggests that the imprecise wording referring to 'acting in any other way' should be omitted in order to comply with constitutional principles. As in the United States, no state includes all of the provisions necessary to comprehensively address stalking behaviour and their effects.<sup>120</sup> This might be sometimes seen as insufficient but this paper holds the opinion that constitutional principles shall prevail over a general criminal coverage of stalking behaviour.

## VI CONCLUSION

Stalking behaviour has moved into the focus of law just recently and legislatures in all different countries make an effort to combat this behaviour by civil and criminal law means. Given the immense impact stalking behaviour can have on the victims the improvement of legal protection is of vital importance. Although improving legal protection against stalking behaviour is highly favourable, the legislature has to accurately assess the affected rights of both victim and perpetrator and balance them sufficiently.

The question to ask in context of criminalising stalking behaviour must always be whether certain behaviour justifies the restriction of rights or not. Balancing rights is of course the underlying principle of every law, especially criminal law. Here, Governmental policy decisions play a major role. The questions arising are what should be protected and to what

<sup>119</sup> M Katherine Boychuk „Are Stalking Laws Unconstitutionally Vague or Overbroad?“ (1994) *NwULRev* 773.

<sup>120</sup> Kathleen G Mc Ananey and C Elizabeth Abeyta-Price “From Imprudence to Crime: Anti-Stalking Law” (1993) 68 *NTDLR* 906.

extent? Is there any behaviour that can be decriminalised and what behaviour has to be criminalised? Not every kind of behaviour in the context of stalking can be seen as so serious that it might infringe the rights of the victim to that extent that it is justified to restrict the perpetrator's constitutionally guaranteed rights and freedoms. The principle of proportionality has to be strictly observed by the legislature. Legislation has to reconcile competing rights with each other. It is of vital importance to understand that the state cannot legislate for every single act of human life and interaction. A society certainly has to keep up with the downsides of the human nature. Some behaviour might be annoying or disturbing but this does not mean that Government should intervene by enacting new laws.

This paper believes that the Harassment Act 1997 finds a good balance between competing rights of victim and perpetrator. Nevertheless, this paper is in favour of reviewing the provision on criminal harassment as it regards the constituents of section 8(1)(b) of the Harassment Act 1997 problematic and not well defined. Problems arising from the lack of a clear definition have been vividly demonstrated in the case of *R v D* where innocent behaviour led to a criminal conviction.

Protection for stalking victims under German law has to be extended as the current legislation under civil and criminal law is not sufficiently catering for the needs of the victims. Introducing the new Bill on criminalising stalking behaviour is a step in the right direction although this Bill has to be revised in order to comply with the Basic Law. Then, adequate legal protection will be available for stalking victims similar as it already exists in New Zealand.

#### a. Germany

Bundesverfassungsgericht (Federal Constitutional Court) Decisions of 13 December 2000, 2 BvR 1290/99

Bundesverfassungsgericht (Federal Constitutional Court) Judgment of 14 July 1999, 1 BvR 2226/99

#### b. New Zealand

*B v Reardon* [2000] DCR 573 (Judge Robinson)

*Bullock v The District Court of Te Awamutu* (4 August 1999) HC CP 3559 (Tomkins J)



## VIII BIBLIOGRAPHY

### A Primary Sources

#### 1 Statutes

##### a Canada

Criminal Code RS 1985 c C-46

##### b Germany

Basic Law (*Grundgesetz* – GG)

Civil Code (*Bürgerliches Gesetzbuch* – BGB)

Violence and Harassment Act (*Gewaltschutzgesetz* – GewSchG)

Penal Code (*Strafgesetzbuch* – StGB)

##### c New Zealand

Domestic Violence Act 1995

Harassment Act 1997

#### 2 Case Law

##### a Germany

Bundesverfassungsgericht (*Federal Constitutional Court*) Beschluss of 12 December 2000, 2 BvR 1290/99

Bundesverfassungsgericht (*Federal Constitutional Court*) Judgment of 14 July 1999, 1 BvR 2226/94

##### b New Zealand

*B v Reardon* [2000] DCR 575 Judge Robinson

*Bakker v The District Court of Te Awamutu* (4 August 1999) HC CP 35/99 Tompkins J

*Beadle v Allen* [2000] NZFLR 639 (HC) Potter J

*C v G* [1998] DCR 805 Judge Shaw

*Durkin v Police* (8 September 1999) HC A 106/99 Williams J

*E v O* [2004] DCR 281 Judge Hole

*Irvine v Edwards* [1999] DCR 171 Judge Kerr

*Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) Richardson J

*R v D* [2000] 2 NZLR 641 (CA) Elias CJ

*Woodman v Brooks* [1999] NZFLR 64 (HC) Giles J

*c United Kingdom*

*R v Dunn* (1840) 113 ER 939

*R v R (A Husband)* [1992] 1 A C 599

### 3 Government Publications

#### a Germany

Bundestags-Drucksache 14/5429 of 5 March 2001

Bundesrats-Drucksache 551/04 of 5 July 2004

Bundesrat, Sitzung 809, Plenarprotokoll of 18 March 2005

Law Gazette of the German Reich 1896, 195 –Bürgerliches Gesetzbuch of 18 August 1896

Federal Law Gazette I 2001, 3513 – Gesetz zur Verbesserung des zivilgerichtlichen Schutzes bei Gewalttaten und Nachstellungen sowie zur Erleichterung der Überlassung der Ehewohnung bei Trennung of 11 December 2001

Federal Law Gazette I 164 – Sechstes Strafrechtsänderungsgesetz of 1 April 1998

Federal Law Gazette I 1190 – Opferschutzgesetz of 1 September 2004

“Aktionsplan der Bundesregierung zur Bekämpfung von Gewalt gegen Frauen“ Federal Ministry of Family, Senior Citizen, Women and Youth <<http://www.bmfsfj.de>> (last accessed 30 September 2005)

Marina Rupp "Rechtsstaatliche Untersuchungen zum Gewaltschutzgesetz", Federal Ministry of Justice <<http://www.bmj.bund.de>> (last accessed 16 September 2005).

*b United Kingdom*

Brown, Hamish "Stalking and other forms of Harassment – An investigators guide" Metropolitan Police Service 2000 United Kingdom

Walby, Sylvia and Jonathan Allen "Domestic violence, sexual assault and stalking: Findings from the British Crime Survey" Home Office Research Study 276

*c United States of America*

Tjaden, Patricia "The Crime of Stalking: How Big Is the Problem?" (1997) US Department of Justice – National Institute of Justice – Research Preview

Tjaden, Patricia and Nancy Thoennes "Stalking in America: Findings From the National Violence Against Women Survey" (1998) U S Department of Justice – National Institute of Justice – Centers for Disease Control and Prevention – Research in Brief

Rennison, Callie Marie "Intimate Partner Violence 1993-2001" (2003) U S Department of Justice Crime Data Brief

**B Secondary Sources**

*1 Texts*

Darby, Joseph J and Hans-Heinrich Jescheck *The Penal Code of the Federal Republic of Germany* (Sweet and Maxwell, London 1987)

Jarass, Hans D and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland* (7ed, C H Beck, München 2004)

Mullen, Paul E, Michele Pathé and Rosemary Purcell *Stalkers and their victims* (Cambridge University Press, Cambridge, 2000)

Palandt, Otto and Dieter Bassenge *Bürgerliches Gesetzbuch* (64ed, C H Beck, München, 2005)

*2 Articles*

Boychuk, Katherine M "Are Stalking Laws Unconstitutionally Vague or Overbroad?" (1994) NwULRev 769 – 802

Faulkner, Robert P and Douglas H Hsiao "And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation" (1994) 31 HVJL 1 - 62

Finch, Emily "Stalking the perfect Stalking Law: An Evaluation of the Efficiency of the Protection from Harassment Act 1997" (2002) Sep Criminal Law Review 703 - 719

Goode, Matthew "Stalking: Crime of the '90s?" (1995) 19 CLJ 21 - 31

Guy, Robert A "The Nature and Constitutionality of Stalking Laws" (1993) 46 Vand L Rev 991 - 1027

Kerbein, Björn and Philipp Pröbsting "Stalking" (2002) 2 ZRP 76 - 78

Kift, Sally "Stalking in Queensland: From the Nineties to Y2K" (1999) 11 Bond L R 145 - 156

Mc Ananey, Kathleen G, Laura A Curliss and C Elizabeth Abeyta-Price "From Imprudence to Crime: Anti-Stalking Law" (1993) 68 Notre Dame Law Review 819 - 909

Royakkers, Lambèr "The Dutch Approach to Stalking Laws" (2000) 3 Cal Crim L Rev 1 - 14

Schwab, Dieter "2002 - Ein Jahr für Juristen" (2002) 1 FamRZ 1 - 6

Swanwick, R A "Stalkers Strike Back - the Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland" (1996) 19 QUTLJ 27 - 44

J M Walker "Anti-stalking legislation: Does it Protect the Victim Without Violating the Rights of the Accused?" (1993) 71 Denver University Law Review 277 - 302

### *C Electronic Sources*

Bundesverfassungsgericht (*Federal Constitutional Court*)

<<http://www.bundesverfassungsgericht.de>> (last accessed 30 September 2005)

Fordham University <<http://www.fordham.edu>> (last accessed 14 August 2005)

Online Dictionary <<http://www.dictionary.com>> (last accessed 29 September 2005)

Police Bremen <<http://www.polizei.bremen.de>> (last accessed 30 September 2005)

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