Additional chapter: Protection from harassment or stalking

Overview

This chapter deals with the offences contained within the Protection from Harassment Act 1997. This Act penalises those who pursue a course of conduct which amounts to harassment or stalking. It also provides aggravated offences where such conduct causes the victim to fear violence or (in the case of stalking) serious alarm or distress.

1 The Protection from Harassment Act 1997 (PHA 1997) was passed to remedy the inadequacy of the law in protecting against harassment. That inadequacy had been demonstrated by a number of high profile cases involving stalkers, but the legislation is widely drawn and a range of other activities can be covered by it, as shown in para 8 below.

As well as an offence of harassment, which centres on breach of one or other of two prohibitions of harassment contained in the PHA 1997, s 1, the Act also provides a more serious offence of putting people in fear of violence. It also now contains two offences specifically dealing with stalking.

Prohibitions of harassment

2 Two prohibitions of harassment are set out in the PHA 1997, s 1.

The first prohibition is concerned with the harassment of another person, no ulterior intent being specified. It is framed as follows by the PHA 1997, s 1(1):

> 'A person must not pursue a course of conduct –
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other.'

The second prohibition of harassment is concerned with the harassment of two or more persons and the ulterior intent to prevent lawful conduct. It is contained in PHA 1997, s 1(1A):

> 'A person must not pursue a course of conduct –
> (a) which involves harassment of two or more persons, and
> (b) which he knows or ought to know involves harassment of those persons, and
> (c) by which he intends to persuade any person (whether or not one of those mentioned above) –
> (i) not to do something that he is entitled or required to do, or
> (ii) to do something that he is not under any obligation to do.'

References in the PHA 1997 to a person, in the context of the harassment of a person, are references to a person who is an individual.[1] Thus, the complainant cannot be a corporation (such as a company) or an unincorporated association (such as a partnership). The defendant in a criminal case under the PHA 1997 can be a corporation,[2]

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1 PHA 1997, s 7(5).

2 *Kosar v Bank of Scotland plc* [2011] EWHC 1050 (Admin), Silber J.

but it remains to be decided whether an unincorporated association can.[3]

Conduct includes speech.[4]

Course of conduct

3 By PHA 1997, s 7(3), for the purposes of the PHA 1997, a 'course of conduct' must involve:

> '(a) in the case of conduct in relation to a single person (see s 1(1)), conduct on at least two occasions in relation to that person, or
>
> (b) in the case of conduct in relation to two or more persons (see s 1(1A)), conduct on at least one occasion in relation to each of those persons.'

This is true of 'course of conduct' whenever it appears in the following provisions. It is not simply a matter of counting the number of incidents. There must be a sufficient connection between the acts in type and context as to justify the conclusion that they amount to a *course* of conduct,[5] taking into account all the circumstances. The fewer the incidents and the wider apart they were spread the less likely it is that a finding of harassment can reasonably be made.[6] Nevertheless, it has been stated, obiter, that incidents as far apart as a year could constitute a course of conduct, eg a threat made once a year on a person's birthday.[7] At the other extreme, it was held in one case that a finding by magistrates that three separate and distinct phone calls to a former partner within the space of five minutes constituted a course of conduct was not irrational; the time interval between the calls was only one factor to be taken into account.[8] Likewise, where D followed V and tried to stop her entering a shop, and then confronted her when she left the shop shortly afterwards, the Divisional Court held that this was capable of amounting to conduct on two separate occasions and to a course of conduct.[9] The incidents do not have to be similar in nature but it may be more difficult to prove a course of conduct if they are different. It will be particularly difficult to establish a course of conduct if the parties have been reconciled during a part of the period.[10]

If an individual is continually abusive to someone who makes telephone calls to him or comes within his vicinity, that will amount to a course of conduct, even if the victim has chosen to make the telephone calls or come within his vicinity.[11]

Harassment

4 The PHA 1997, s 1(1) requires D's course of conduct to amount to harassment of

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3 The point was left open in *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123 (where it was held that an unincorporated body could be liable under the PHA 1997 in a civil case). Unincorporated associations are not normally criminally liable, particularly for an offence such as those under the PHA 1997: see paras 18.50–18.53 of the text.

4 PHA 1997, s 7(4).

5 *Lau v DPP* [2000] 1 FLR 799, DC; *Patel* [2004] EWCA Crim 3284.

6 *Lau v DPP* [2000] 1 FLR 799, DC; *Patel* [2004] EWCA Crim 3284.

7 *Lau v DPP* [2000] 1 FLR 799, DC.

8 *Kelly v DPP* [2002] EWHC 1428 (Admin), Burton J.

9 *Wass v DPP* (2000) unreported, DC. See also *Buckley v DPP* [2008] EWHC 136 (Admin), DC.

10 *H (Gavin)* [2001] 1 FLR 580, CA.

11 *James v CPS* [2009] EWHC 2925 (Admin) DC.

another, and s 1(1A) requires it to involve harassment of two or more persons. The Court of Appeal has stated that, when considering whether conduct amounts to or involves harassment, it is right to have regard to what the ordinary person would understand by harassment.[12]

The element of harassment is concerned with the effect of the course of conduct rather than with the types of conduct that produce that effect.[13] It is the course of conduct which must amount to or involve harassment, rather than individual instances forming part of the course of conduct. This was held by the Court of Appeal in *Iqbal v Dean Manson Solicitors*,[14] where Rix LJ stated:

> 'Take the typical case of stalking, or of malicious phone calls. When a defendant, D, walks past a claimant C's door, or calls C's telephone but puts the phone down without speaking, the single act by itself is neutral, or may be. But if that act is repeated on a number of occasions, the course of conduct may well amount to harassment. That conclusion can only be arrived at by looking at the individual acts complained of as a whole. The course of conduct cannot be reduced to or deconstructed into the individual acts, taken solely one by one.'[15]

Thus, conduct which begins innocuously may become harassment by reason of the manner and frequency with which it is repeated.[16]

It is not necessary that the victim suffered harassment on more than one occasion. This was held in *Kelly v DPP*,[17] where D left three abusive telephone calls on V's voicemail. Later, V listened to them without pause and suffered harassment. Burton J dismissed D's appeal against conviction for breach of the prohibition, stating that:

> 'it is . . . not necessary for there to be alarm caused in relation to each of the incidents relied upon as forming part of the course of conduct. It is sufficient, if by virtue of the course of conduct, the victim is alarmed or distressed'.[18]

The victim need not have direct knowledge of a course of conduct. It suffices that the victim acquires such knowledge indirectly via a third party and is caused harassment by such knowledge.[19]

5 Section 7(2) provides that **the reference to harassment of a person here, and elsewhere in the Act, includes alarming that person or causing that person distress.** This has been held to be a non-exhaustive definition.[20] It does not change the essential nature of

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12 *Smith* [2012] EWCA Crim 2566.

13 *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; *Curtis* [2011] EWCA Crim 123.

14 [2011] EWCA Civ 123.

15 Ibid at [45].

16 *DPP v Hardy* [2008] EWHC 2874 (Admin), DC. In this case, D made a telephone call to find out why his partner had not got a job. When D did not receive an explanation, he made a further 95 telephone calls in 90 minutes, setting the telephone to automatic redial, during the course of which he stated that he was 'set for the night'. The Divisional Court held that this conduct was capable of constituting harassment for the purposes of the PHA 1997.

17 [2002] EWHC 1428 (Admin).

18 Ibid at [24].

19 *Kellett v DPP* [2001] EWHC Admin 107, DC. Unless it is foreseeable that the third party would reveal the course of conduct, proof of the *mens rea* element (para 7 above) will be impossible.

20 *DPP v Ramsdale* [2001] EWHC Admin 106, DC; *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; *Curtis* [2011] EWCA Crim 123.

harassment.[21] Indeed, in *Smith*,[22] the Court of Appeal held that it does not necessarily follow from PHA 1997, s 7(2) that any course of conduct which causes alarm or distress therefore amounts to harassment. The Court gave the example of someone who habitually drives too fast in a built up area. It said that, although such conduct may cause alarm to other road-users, it would be illogical and would produce perverse results to categorise conduct such as that as amounting to harassment. Thus, as the Court of Appeal confirmed in *O'Neill*,[23], s 7(2) does not equate harassment with simply causing alarm or distress. The Court of Appeal stated that, given the breadth of the prohibition contained in s 1(1) and the criminal offence which flows from a breach of s 1(1), there is a 'need to distinguish between conduct which, however despicable, does not justify invoking the criminal law and conduct which crosses the line and results in criminal liability. This distinction is effected by a requirement that the conduct should be oppressive, as shown by the following definitions of 'harassment'.

The Court of Appeal has adopted three definitions of 'harassment' for the purposes of the PHA 1997. In *Thomas v News Group Newspapers Ltd*,[24] the Court of Appeal defined 'harassment' as conduct targeted at an individual which is calculated to produce alarm or distress[25] and which is oppressive and unreasonable.[26] In the most recent case on the meaning of 'harassment', *O'Neill*, the Court of Appeal, having reviewed some of the case law on 'harassment', defined the term in essentially the same terms, save that it also required the conduct to be improper. In *Curtis*,[27] the Court of Appeal defined harassment as conduct which must be unacceptable to a degree that would sustain criminal liability and also must be oppressive.[28] The reference to 'conduct unacceptable to a degree that would sustain criminal liability' introduces an element of circularity, because it states that a course of conduct amounts to a crime of harassment if it is so unacceptable as to be criminal.[29] More recently, the Court of Appeal in *Smith* defined 'harassment' as follows:

'Essentially it involves persistent conduct of a seriously oppressive nature, either

21 *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; *Curtis* [2011] EWCA Crim 123.

22 [2012] EWCA Crim 2566.

23 [2016] EWCA Crim 92

24 [2001] EWCA Civ 1233.

25 In *Haque* [2011] EWCA Crim 1871, the Court of Appeal stated that conduct will be calculated to cause harassment if D intends his conduct to cause harassment (or, perhaps, is reckless as to such a consequence). Contrast *Dowson v Northumbria Police* [2010] EWHC 2612 (QB), where Simon J held that 'calculated' bore its normal objective meaning, ie 'likely'. The latter view is clearly preferable. To require intention or recklessness as to causing harassment would conflict with the rule (see para 7 below) that it is enough that D ought to know that his conduct amounts to harassment.

26 In *Thomas v News Group Newspapers Ltd*, the Court of Appeal stated that the conduct must be unreasonable. If they meant that the prosecution must prove this, this cannot be correct in the light of the PHA 1997, s 1(3) (see para 9 below), the prohibitions of harassment do not apply if D shows that his conduct was reasonable. In *Haque [2011] EWCA Crim* 1871, the Court of Appeal pointed out that for present purposes the prosecution does not have to prove that D's conduct was unreasonable because s 1(3) provides that it is for D to show that his conduct was reasonable. See also *O'Neill* [2016] EWCA Crim 92..

27 [2011] EWCA Crim 123. The Court of Appeal referred to similar statements in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 1233 at [30] and[65], per Lord Nicholls and Baroness Hale.

28 Whether conduct is unacceptable and oppressive is to be judged objectively; what is unacceptable and oppressive may depend on the social or other context in which it occurs: *Dowson v Northumbria Police* [2010] EWHC 2612 (QB).

29 Ormerod [2010] Crim LR 638.

physically or mentally, targeted at an individual and resulting in fear or distress.'[30]

In *Curtis* and *Smith*, respectively, the Court of Appeal agreed with and relied on the definition in *Thomas v News Group* but, as has been pointed out by Storey,[31] the three definitions are not identical because there are not insignificant differences between 'oppressive and unreasonable', 'unacceptable to a degree which would sustain criminal liability and also must be oppressive' and 'seriously oppressive'. Clarification by the Supreme Court would be welcome.

6 Before the PHA 1997, s 7(3A) was added in 2001, proving a course of conduct was difficult where the defendant used other people to take part in the harassment. This problem has been dealt with by s 7(3A), which provides that, for the purposes of the PHA 1997, a person's (X's) conduct on any occasion which is aided, abetted, counselled or procured by another (Y) is taken:

(a) also to be on that occasion the conduct of Y; and

(b) to be conduct in relation to which Y's knowledge and purpose (and what Y ought to have known) are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting etc.

This means in relation to the wording of s 1(1) or s 1(1A) that there can be a breach of the prohibition on harassment thereunder by Y if, for example, on one occasion the harassing conduct is by X aided and abetted by Y and on the second occasion it is by Y himself provided that the two pieces of conduct can be regarded as a 'course' and that (b) is satisfied.

Know or ought to know

7 Because it is enough that D ought to know that his conduct amounts to or involves harassment, it is no defence that D did not know that his conduct would amount to or involve harassment, if a reasonable person would know that it does. 'Knowledge' bears its ordinary meaning.[32] The objective nature of 'ought to know' in the PHA 1997, s 1(1)(b) and s 1(1A)(b) is given a subjective aspect by s 1(2), which provides that **the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.** It was held in *Colohan*[33] that the 'reasonable person' in this context is, however, a hypothetical reasonable person; he is not endowed with D's standards or characteristics. Thus, D's schizophrenia could not be taken into account in deciding whether a reasonable person would think that D's conduct amounted to harassment.

Conduct covered

8 The breadth of the prohibitions of harassment means that they apply to a wide range of activities. Conduct involved in disputes between neighbours, industrial disputes, racial harassment, bullying in the workplace,[34] protests of various kinds, the activities of the 'paparazzi', the sending of a series of threatening letters demanding payment of a debt[35]

30 [2012] EWCA Crim 2566 at [24].

31 'When is it "Necessary" to Protect a Person from Harassment?' (2013) 77 JCL 105.

32 Para 4.43 of the text.

33 [2001] EWCA Crim 1251.

34 *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34.

35 *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46.

and the publication of press articles calculated to incite hatred or contempt of the victim[36] are all liable to amount to a breach of the prohibition of harassment in the PHA 1997, s 1(1). In *Howlett v Holding*,[37] Eady J held that the instigation at various times of secret surveillance of a woman of which she was aware (although she did not know exactly when it was taking place) constituted a course of conduct amounting to a breach of the prohibition of harassment under the PHA 1997, s 1(1), because she was caused distress by her awareness that the secret surveillance was taking place, or was likely to take place at any moment. Although the PHA 1997, s 1(1A) was introduced to deal with the particular problem of the harassment by animal rights protesters of people connected with organisations engaged in the use of animals for scientific research with intent to cause the cessation of such use, it is not limited to such conduct.

Exceptions

9 By the PHA 1997, s 1(3), the prohibitions of harassment s 1(1) and s 1(1A) do not apply to a course of conduct if the person who pursued it shows:[38]

> **'**(a) that it was pursued for the purpose of preventing or detecting crime;
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment [eg by a court bailiff]; or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable'.

Section 1(3)(a) applies not only to law enforcement agencies but also to private persons, and whether or not it is shown that the course of conduct was reasonable. This was held by the Supreme Court in *Hayes v Willoughby*,[39] where the majority (4–1) of the Supreme Court held that, in order to show that a course of conduct was pursued for the purpose of preventing or detecting crime, the person who pursued it would have to show that he had acted 'rationally'. The requirement of rationality, said the majority of the Supreme Court, imported a requirement of good faith, a requirement that there should be some logical connection between the evidence (of criminality actual or potential) and the ostensible reasons for the decision (to pursue the course of conduct), and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse. Before an alleged harasser could be said to have had the purpose of preventing or detecting crime, he had to have sufficiently applied his mind to the matter. He must have thought rationally about the material suggesting the possibility of criminality and formed the view that the conduct said to constitute harassment was appropriate for the purpose of preventing or detecting it. If, on the other hand, he had not engaged in these things, but proceeded anyway on the footing that he was acting to prevent or detect crime, then he would have acted irrationally. In that case, it would follow that in law he would not be regarded as having had the purpose to prevent or detect crime, and would not have pursued his course of conduct for that purpose. The Court added that the purpose of crime prevention or

36 In *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233 it was held that the publication of articles and letters in *The Sun* newspaper calculated to incite racial hatred of an individual was a course of conduct capable of amounting to harassment.

37 [2006] EWHC 41 (QB).

38 In *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, the Court of Appeal stated that the persuasive burden of proof was on the defendant.

39 [2013] UKSC 17.

detection must be D's dominant purpose; it need not be his sole purpose.[40]

Lord Reed SCJ (dissenting) rejected the majority's requirement that the pursuit of the course of conduct should be rational. He did so for three reasons:[41]

'First, Parliament did not say so. On its face, a test of purpose usually refers to the object or aim which the defendant had in mind. . .. The purpose for which a course of conduct is pursued is therefore ordinarily ascertained by reference to the intention of the person who pursues it. To introduce a requirement of objective rationality requires the court to read in words which Parliament did not use. Furthermore, . . . in enacting the Act Parliament was significantly extending the reach of the criminal and civil law in controversial circumstances. In doing so, care was taken to identify expressly occasions when conduct was to be judged by an objective standard [eg the objective terms of s 1(1)(b) ("knows or ought to know"), s 1(2) ("if a reasonable person . . . would think") and s 1(3)(c) above]. The language employed in [these examples] demonstrates that Parliament made it clear when it intended to impose an objective requirement. The implication is that it did not intend to impose such a requirement in s 1(3)(a), or in the similarly worded ss 4(3)(a), 4A(4)(a) . . .

Secondly, s 1(3)(a) and the similarly worded provisions elsewhere in the Act provide defences to criminal as well as civil liability. It is trite that a statute is not normally to be construed as extending criminal liability beyond the limits which Parliament itself made clear in its enactment.

Thirdly, bearing in mind again that s 1(3)(a) and the other provisions to like effect limit the scope of criminal offences, some of which are triable on indictment, I would be slow to infer that criminal liability was intended to turn upon the subtle distinction between what is unreasonable and what is irrational.'

Section 1(3)(c) involves an objective test, and therefore D's characteristics must be ignored in determining whether his course of conduct was reasonable.[42] It is an important, albeit vague, curb on the width of the prohibition of harassment. Eady J stated in *Huntingdon Life Sciences Ltd v Curtin*[43] that the PHA 1997 was not intended by Parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of public protest and public demonstration which was so much part of our democratic tradition, and that he had little doubt that the courts would resist any wide interpretation of the Act.

In *DPP v Moseley*,[44] Collins J stated that in determining whether conduct was reasonable a court had to balance V's interests against the purpose and nature of the course of conduct pursued, including the right to peaceful protest. However, the Divisional Court agreed in that case that, if the course of conduct in question involved breach of an injunction, it could not be reasonable conduct, at least unless the circumstances were very special.

In determining whether the exception of reasonable conduct applies, a court must also have regard to the ECHR, Articles 10(2) and 11(2), which set out the grounds on which the freedom of expression and freedom of peaceful assembly and association, respectively, may be interfered with.

In *Trimingham v Associated Newspapers Ltd*,[45] Tugendhat J, referring to a statement by Lord Phillips MR (as he then was) in *Thomas v News Group Newspapers*

40 If crime prevention is not D's dominant purpose, D may be able to rely on the exception under s 1(3)(c).

41 *Hayes v Willoughby* [2013] UKSC 17 at [26]–[28].

42 *Colohan* [2001] EWCA Crim 1251.

43 (1997) *Times*, 11 December.

44 (1999) *Times*, 23 June, DC.

45 [2012] EWHC 1296 (QB).

Ltd,[46] held that a course of conduct in the form of journalistic speech is reasonable unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in the ECHR, Article 10(2), including, in particular, the protection of the rights of others under Article 8 (right to respect for private or family life).

Offence of harassment

10 The PHA 1997, s 2(1) makes it an offence to pursue a course of conduct in breach of the prohibition of harassment in s 1 or s 1(1A). The offence is summary only, and punishable with six months' imprisonment[47] or a fine not exceeding level 5 on the standard scale or both.[48] This penalty may be inadequate where V suffers serious psychiatric injury.[49] In such a case it may be possible to secure a conviction for an offence under s 4 or 4A (see later) or for one of the offences under the Offences Against the Person Act 1861 discussed in Chapter 6 of the text.

Because the offence is summary only, it is not an offence to attempt to commit it.[50] Thus, no case of an apprehended breach of the prohibition of harassment can result in a conviction for attempting to commit a s 2 offence.

Breach of the prohibition of harassment is also a tort.[51]

Offence of putting people in fear of violence

11 The Protection from Harassment Act 1997, s 4(1) provides a more serious offence:

> **'**A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.'

The course of conduct referred to in s 4(1) is a course of conduct which amounts to the harassment of another within the meaning of the PHA 1997, s 1.[52] It will be noted that the fear of violence need not be of 'immediate' violence, even in the watered-down sense accorded to that term elsewhere in the criminal law.[53] V, however, must fear that violence *will* be used against *him*; a fear that violence may be used will not suffice, nor will a fear of violence against a third party.[54] This may make it difficult, eg, to get a conviction against a silent telephone caller who on at least two occasions causes V to fear violence, because V may only be caused to fear the potential, as opposed to definite, use of violence.[55]

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46 [2001] EWCA Civ 1233.

47 The maximum term of imprisonment will be increased to 51 weeks if, and when, the Criminal Justice Act 2003, s 281(4) and (5) comes into force.

48 PHA 1997, s 2(2).

49 As Lord Steyn observed in *Ireland; Burstow* [1998] AC 147 at 153.

50 Criminal Attempts Act 1981, s 1(1) and (4).

51 PHA 1997, s 3.

52 *Curtis* [2010] EWCA Crim 123; *Widdows* [2011] EWCA Crim 1500; *Haque* [2011] EWCA Crim 1871.

53 Paras 6.39–6.41 of the text.

54 *Henley* [2000] Crim LR 582, CA.

55 This point was made by Lord Steyn in *Ireland; Burstow* [1998] AC 147 at 153.

12 The provisions relating to the s 4 offence are markedly similar to the provisions relating to the prohibition of harassment, in that:

- there must be a 'course of conduct'; 'conduct' includes 'speech'.[56] However, for the purposes of s 4, the course of conduct must cause another person to fear, on each of at least two occasions, that violence will be used against him;[57]
- the objective nature of 'ought to know' is given a subjective aspect by s 4(2), which provides that the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion;
- it is a defence for D to show that:
  - his course of conduct was pursued for the purpose of preventing or detecting crime,
  - his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  - the pursuit of his course of conduct was reasonable for the *protection of himself or another or for the protection of his or another's property*;[58] and
- the PHA 1997, s 7(3A)[59] applies.

13 The distinguishing feature between the offence under s 4 and that under s 2 is, of course, that the course of conduct must cause another to fear that *violence* will be used *against him*. It is not enough that on one occasion V1 fears violence against himself (but V2 does not) and that on another occasion V2 fears such violence (but V1 does not).[60] Direct evidence from V that he was caused to fear such violence is not essential, because a court may infer such fear if there is other evidence entitling it to do so, but without direct evidence from V proof may be difficult.[61]

14 Fear of violence only against property is not enough. On the other hand, the fact that D's words or conduct were directed ostensibly against property or a third party does not prevent proof of an offence under s 4; if they cause V to fear, on at least two occasions, that violence will be used against him and D knows or ought to know that his conduct will cause V so to fear on each of those occasions, D is guilty of that offence.[62]

15 The prosecution does not have to prove that the violence feared was unlawful

56 PHA 1997, s 7(4).

57 Confirmed in *Kelly v DPP* [2002] EWHC 1428 (Admin), Burton J.

58 PHA 1997, s 4(3). The first two of these defences correspond to the first two of the exceptions from the prohibition of harassment (para 9 above). The third defence is narrower than the third exception (conduct reasonable). It remains to be seen whether the requirement for a s 4 offence that the conduct must amount to harassment contrary to s 1 has the effect of importing the 'conduct reasonable exception' into s 4. The Court of Appeal in *Haque* [2011] EWCA Crim 1871 at [73] seems to have assumed that it does, but if this is so why did Parliament enact the narrower third defence referred to above?

59 Para 6 above.

60 *Caurti v DPP* [2001] EWHC Admin 867, DC.

61 *R (a child) v DPP* [2001] EWHC Admin 17, DC.

62 Ibid.

violence, but under the third defence referred to above it will be a defence, in effect, for D to show that the violence feared was not unlawful violence.

16 The offence under s 4 is an either-way offence.[63] A person guilty of it is liable on conviction on indictment to imprisonment for a term not exceeding five years**.**[64] Given that the prohibited conduct is not required to result in psychiatric injury, and that D is not required to have intended that V would fear violence, this is a surprisingly high maximum.

Stalking

17 Although the Protection from Harassment Act 1997 was initially passed to deal with the problem of stalkers, the report of a Parliamentary Independent Inquiry into Stalking Law Reform, published in February 2012, concluded that the law on stalking was not fit for purpose. Among its recommendations for improvement, the report recommended the creation of a specific offence of stalking in place of the offence under the PHA 1997, s 4 and that the offence under s 2 should be made an either-way offence. Within three months, Parliament enacted the Protection of Freedoms Act 2012 (PFA 2012), s 111, which added two sections to the PHA 1997 to remedy the defects of the existing offences under that Act. As will be seen, the solution adopted in the PFA 2012 in respect of stalking, ie new offences of stalking (PHA 1997, s 2A) and of stalking involving violence or serious alarm or distress (PHA 1997, s 4A), which operate in addition to the offences under PHA 1997, ss 2 and 4, is different from the recommendations in the Independent Inquiry's report. It would not excuse a defendant on a charge under PHA 1997, s 2 (or s 4) that the evidence indicated that he had committed an offence under s 2A (or, as the case may be, s 4A).[65]

Offence of stalking

18 The PHA 1997, s 2A(1) provides that:

> **'**A person is guilty of an offence if –
>
> (a) the person pursues a course of conduct[66] in breach of [PHA 1997,] s 1(1) [ie in breach of the first prohibition of harassment mentioned in para 2 above], and
>
> (b) the course of conduct amounts to stalking.'

For the purposes of s 2A(1)(b), a person's course of conduct amounts to stalking of another person if:

> '(a) it amounts to harassment[67] of that person,
>
> (b) the acts or omissions involved are ones associated with stalking, and
>
> (c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.'[68]

It will be noted that the distinguishing feature between an offence under PHA 1997, s 2

63 PHA 1997, s 4(4).

64 Ibid.

65 PHA 1997, ss 2A(6) and 4A(9).

66 Paras 3 and 6.

67 Para 4.

68 PHA 1997, s 2A(2). Section 2A(2) also applies for the purposes of s 4A(1)(a): s 2A(2).

and one under s 2A is the addition of s 2A(1)(b).

The PHA 1997, s 2A(3) gives the following examples of acts or omissions which, in particular circumstances, are ones associated with stalking:

> **'**(a) following a person,
> (b) contacting, or attempting to contact, a person by any means,
> (c) publishing any statement or other material:
> (i) relating or purporting to relate to a person, or
> (ii) purporting to originate from a person,
> (d) monitoring the use by a person of the internet, e-mail or any other form of electronic communication,
> (e) loitering in any place (whether public or private),
> (f) interfering with any property in the possession of a person,
> (g) watching or spying on a person.'

This list is not exhaustive; it is open to a court to say that other acts or omissions are associated with stalking. By providing a non-exhaustive list of acts or omissions associated with stalking, s 2A(3) goes some way to achieving what was said to be impossible in 1997.

The PHA 1997, s 1(2)[69] applies to 'knows or ought to know that the course of conduct amounts to or involves harassment of the other person'.[70] Because the offence of stalking under the PHA 1997, s 2A requires a breach of the prohibition of harassment in s 1(1) the exceptions to the prohibition referred to in para 9 above also apply to the offence under s 2A. The offence of stalking under the PHA 1997, s 2A is a summary offence, punishable in the same way as an offence under s 2 (ie with six months' imprisonment or a fine not exceeding level 5 on the standard scale or both).[71] The offence under s 2A does not add any further protection from that offered by s 2; an offence under s 2A is by its definition necessarily an offence under s 2 since an offence under s 2A can only be established where an offence under s 2 has occurred. Nevertheless, organisations representing the victims of stalkers have welcomed the creation of a separate offence of stalking in the expectation that this will lead to an increase in the number of cases where action is taken against stalkers by the police and the CPS.

Offence of stalking involving fear of violence or serious alarm or distress

19 The PHA 1997, s 4A(1) provides that:

> **'**A person ("A") whose course of conduct –
> (a) amounts to stalking,[72] and
> (b) either:
> (i) causes another ("B") to fear, on at least two occasions, that violence will be used against B, or
> (ii) causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities,
>
> is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.'

For the purposes of the PHA 1997, s 4A, A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person

69 Para 7 above.

70 PHA 1997, s 1(2).

71 Ibid, s 2A(4) and (5). The maximum term of imprisonment will be increased to 51 weeks if, and when, the Criminal Justice Act 2003, s 281 comes into force.

72 See para 18 above.

in possession of the same information would think the course of conduct would cause B so to fear on that occasion;[73] and A ought to know that A's course of conduct will cause B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities if a reasonable person in possession of the same information would think the course of conduct would cause B such alarm or distress.[74]

As in the case of an offence under PHA 1997, s 4, it is a defence for A to show that:

- his course of conduct was pursued for the purpose of preventing or detecting crime;
- his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or
- the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.[75]

Like the offence under the PHA 1997, s 4, the offence under s 4A is triable either way and punishable on conviction on indictment with a maximum of five years' imprisonment.[76]

The offence under the PHA 1997, s 4A is identical to that under s 4 except that:

- it requires proof that the defendant's conduct amounts to stalking (in which respect the non-exhaustive list in s 2A(3) above is relevant); and
- the alternative condition for liability in s 4A(1)(b)(ii) (causing B *serious* alarm or distress which has a *substantial* adverse effect on B's usual day-to-day activities) significantly widens the protection offered by the law, since there is no equivalent in s 4. Section 4A(1)(b)(ii) is the only part of the provisions introduced by the PFA 2012 which adds any additional protection to that under s 2 or 4.

In a Home Office circular,[77] the Home Office has set out a non-exhaustive list of what may amount to evidence of substantial adverse effect on B's day-to-day activities:

- changing routes to work, work patterns, or employment;
- arranging for children to be picked up from school (to avoid contact with the stalker);
- putting in additional home security measures or moving home;
- damage to physical or mental health;
- deterioration in performance at work due to stress; and
- changing socialisation patterns.

Racially or religiously aggravated harassment

20 The Crime and Disorder Act 1998 (CDA 1998), s 32(1) provides that:

> **'**A person is guilty of an offence under this section if he commits –
>
> (a) an offence under s 2 or 2A of the Protection from Harassment Act 1997 (offences of harassment and stalking); or
>
> (b) an offence under s 4 or 4A of that Act (offences of putting people in fear of violence and stalking involving fear or serious alarm or distress),
>
> which is racially or religiously aggravated for the purposes of this section.'

The CDA 1998, s 32(1) does not create one offence which can be committed in more than one way; it creates separate racially or religiously aggravated offences based on the

73 PHA 1997, s 4A(2).

74 Ibid, s 4A(3).

75 Ibid, s 4A(4).

76 Ibid, s 4A(5) and (6).

77 Home Office Circular 018/2012. Home Office Circulars do not have legal force.

offences under the PHA 1997, ss 2, 2A, 4 and 4A.[78]

21 On a charge of one of these aggravated offences the prosecution must prove that D has committed the relevant specified basic offence (set out earlier) and that it was racially or religiously aggravated (as defined in para 6.97 of the text).

22 The aggravated offences within the CDA 1998 have higher maximum sentences than the basic offence to which they refer. An aggravated offence within the CDA 1998, s 32(1)(a) is triable either way[79] and on conviction on indictment is punishable with a maximum term of imprisonment of two years. The maximum imprisonment on conviction on indictment for the aggravated offence within the CDA 1998, s 32(1)(b), which is also triable either way, is seven years.[80]

FURTHER READING

Addison and Lawson-Cruttenden *Harassment Law and Practice* (1998)
Finch *The Criminalisation of Stalking* (2001)
Finch 'Stalking the Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997' [2002] Crim LR 703
Gowland 'Protection from Harassment Act 1997: The "New" Stalking Offences' (2013) 77 JCL 387
MacEwan 'The New Stalking Offences in English Law: Will They Provide Effective Protection from Cyberstalking?' [2012] Crim LR 767;
Gillespie 'Cyberstalking and the Law: A Response to Neil MacEwan' [2013] Crim LR 38;
MacEwan – Letter [2013] Crim LR 54
Wells 'Stalking: the Criminal Law Response' [1997] Crim LR 463

78 See para 6.95, n 295 of the text.

79 This can be contrasted with the basic offence under the PHA 1997, s 2 or s 2A, which is only triable summarily.

80 CDA 1998, s 32(3) and (4).