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< Article title > *Let the Stalker Beware? Analysis of the Law of Stalking in Scotland*

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*Abstract* This article analyses the significance of changes to the law in Scotland dealing with stalking by outlining the previous legal position and examining the new legal rules and their impact. Stalking has been proven to be extremely harmful to the victims of the behaviour and their families, and proper legislative rules to deal with it in Scotland have been long overdue. The legislative protection required for stalking victims was introduced in 2010 and it now seems an opportune time to review the legal rules and their impact in protecting victims against stalkers in Scotland. In the process, consideration of statistical data concerning stalking prosecutions is also considered. The article also includes analysis of the legal position of stalking victims in England and Wales where new offences have recently been introduced.

*Keywords* Stalkers; Harassment; Scotland; Anti-social behaviour; Anti-stalking legislation

The history of the legal struggle to deal with the problem of stalking in Scotland is characterised by a judiciary (and courts) that have: underrated the impact of the behaviour on the victim;<sup>1</sup> utilised common law crimes (in the absence of statutory rules) which latterly were ill-suited to deal with the behaviour<sup>2</sup> and provided a general lack of a support for victims who brought the issue before the criminal courts. Although there is still room for reform,<sup>3</sup> the legal position of victims of stalkers in Scotland has undoubtedly improved.<sup>4</sup> One the major reasons for this is the new legislation on stalking which will be analysed below. To understand fully the issue at hand it is necessary to analyse recent research into stalking and provide an overview of the law that applied in Scotland before the enactment of s. 39 of the Criminal Justice and Licensing (Scotland) Act 2010.

< A head > **Research into stalking in Scotland**

There are various research studies that have been undertaken into stalking in Scotland. However, none of these have been conducted on a national scale or included victims

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<sup>1</sup> R. Mays, S. Middlemiss and J. Watson, 'Every Breath You Take, Every Move You Make ... Scots Law, the Protection from Harassment Act 1997, the Problem of Stalking in Scotland' (1997) 6 *Juridical Review* 331.

<sup>2</sup> At least since the common law offence of breach of the peace was redefined.

<sup>3</sup> Judges in Scotland are still often reluctant to pass appropriate sentences for stalkers.

<sup>4</sup> S. Middlemiss, 'The New Law of Scotland on Stalking: Too Little Too Late?' (2010) 4 *Juridical Review* 297.

at the heart of the research.<sup>5</sup> In 2005, research was conducted into stalking in Scotland as part of a larger study into stalking in different jurisdictions.<sup>6</sup> Several thousand victims of stalking from 47 countries across the world responded to the researchers' inquiries about stalking by completing a survey.<sup>7</sup> The lead researcher, Dr Lorraine Sheridan,<sup>8</sup> was surprised by the number of Scottish people that contacted her (around 700) when she advertised for stalking victims to help her with her research. She discovered that stalking behaviour was far more prevalent in Scotland than previously thought. What the researchers found was that fewer than half of the respondents had reported their experience to the police. This was despite the fact that more than 25 per cent of the stalking experienced by them had involved violence. In a high proportion of cases, the stalker also targeted the victim's children and friends.<sup>9</sup>

Dr Sheridan also discovered that stalking carries not only a physical and emotional cost to the victim, but also a financial one.<sup>10</sup> The two most prevalent stalking behaviours experienced by the respondents were unsolicited telephone calls affecting 72 per cent of the respondents and spying on the victim experienced by 67 per cent of them.<sup>11</sup> Around half of the victims had had a prior intimate relationship with the person that became their stalker and more than half were forced to give up social activities and lost family or friends as a consequence of stalking.<sup>12</sup> The research highlighted the broad impact that this behaviour has on the victims and others in Scotland and elsewhere. It also helped identify the nature of the behaviour perpetrated against victims. It showed clearly that being subjected to stalking can be devastating to a victim's life, affecting his or her ability to maintain and protect friends and family, have a permanent residence and job, and live a normal life.

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<sup>5</sup> S. Morris *et al.*, *Research into the Existing Criminal and Civil Law Procedures and Practices in relation to Stalking and Harassment*, 15 November 2002, Research Finding RF 67, Scottish Executive, available at <http://www.scotland.gov.uk/Publications/2002/11/15756/13113>, accessed 8 August 2014.

<sup>6</sup> L. Sheridan, Findings from [www.stalkingsurvey.com](http://www.stalkingsurvey.com) (2005). Paper presented at the 29th International Congress on Law and Mental Health, Paris, France.

<sup>7</sup> It included 2,000 victims from the USA, 1,200 from England and Wales and 700 from Scotland.

<sup>8</sup> A forensic psychologist and senior research fellow at the Heriot-Watt University in Edinburgh.

<sup>9</sup> She found that in each case an average of 19 people were adversely affected.

<sup>10</sup> The majority of victims lost more than £5,000 as a result of hours lost at work and legal expenses: 'Law on stalking is necessary and timely', *The Herald*, 9 March 2010, available at <http://www.heraldscotland.com/comment/herald-view/law-on-stalking-is-necessary-and-timely-1.1011988>, accessed 8 August 2014.

<sup>11</sup> Of the victims, 19 per cent had their homes broken into and 18 per cent suffered sexual assaults.

<sup>12</sup> D. Gunn, '700 Scots victims of stalkers add their voice to new research', *The Scotsman*, 9 March 2010, <http://www.scotsman.com/news/700-scots-victims-of-stalkers-add-their-voice-to-new-research-1-474570>, accessed 8 August 2014.

Prior to the Criminal Justice and Licensing (Scotland) Act 2010 the extent and seriousness of the stalking problem in Scotland in terms of legal cases taken against stalkers remained largely hidden. This was because stalking was prosecuted generally under common law crimes such as a breach of the peace which were not identified in the statistical data as stalking offences<sup>13</sup> and were not distinguished from other unrelated criminal behaviour which was prosecuted as these crimes. This makes it difficult to carry out any meaningful comparison between the previous legal position and what is happening at the time of writing . The following quote suggests that the situation is much better now as a result of the legislation:

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Since the law changed in Scotland the effect of tougher anti-stalking legislation is clear. Before the changes only 70 offenders were prosecuted over 10 years, but since 2010 the figure has soared to 443.<sup>14</sup>

< /Q >

How the reporters came up with the figures prior to 2010 is unclear, but it seems excessively low. Other reporters and commentators<sup>15</sup> have been less positive about the change in the law. It has been claimed that fewer than one-third of the 1,400 people reported for alleged stalking in Scotland have been convicted since the flagship legislation came into force. Recent figures show victims have achieved justice in 462 out of the 1,431 alleged stalking cases reported to the Crown Office and Procurator Fiscal Service (COPFS) between December 2010 and September 2013.<sup>16</sup> While these figures are disappointing and commentators are right to call for improvements even this conviction rate will deter some stalkers. There are possibly a number of factors which can account for the low level of successful prosecution. However, the underlying reason will derive from the fact that some members of the judiciary in Scotland are slow to apply the new law appropriately.

Before considering the current law and its impact on victims of stalking in Scotland it is necessary to provide some background to the previous law.

## < A head > Previous law in Scotland

The nature and the impact of the previous law on stalking has been dealt with in detail elsewhere, so there is no need to reiterate it here.<sup>17</sup> The common law crime that principally applied to the prosecution of stalkers was breach of the peace. There are undoubtedly other crimes that can apply to stalking in Scotland,<sup>18</sup> but as these are

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<sup>13</sup> Scottish Crime and Justice Survey, available at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/crime-and-justice-survey>, accessed 8 August 2014.

<sup>14</sup> J. Chilton, 'New Law to Tackle Stalkers Comes into Effect', Sky News, 26 November 2012, available at <http://news.sky.com/story/1016103/new-law-to-tackle-stalkers-comes-into-effect>, accessed 8 August 2014.

<sup>15</sup> Ann Moulds and Campaign Action against Stalking, available at <http://www.scotlandagainststalking.com/node/66>, accessed 8 August 2014.

<sup>16</sup> F. McKay, 'Just one-third of stalking cases end in conviction', *The Herald*, 21 October 2013, available at <http://www.heraldscotland.com/news/home-news/just-one-third-of-stalking-cases-end-in-conviction.22479991>, accessed 9 August 2014.

<sup>17</sup> S. Middlemiss and L. Sharp, 'A Critical Analysis of the Law of Stalking in Scotland' (2009) 73 JCL 89.

<sup>18</sup> Ibid.

seldom utilised by prosecutors, it is unnecessary to give them detailed consideration in this article. Prior to the 2010 Act there were important changes in the criminal law in Scotland that impacted on stalking. Most notable of these was the judiciary's reinterpretation of the common law rules that defined the offence of breach of the peace. The consequence of this was to cast doubt on the ability of the redefined crime to deal with the problem of stalking. There had been considerable debate in Scotland over a lengthy period concerning the suitability of the common law rules to deal with stalking.<sup>19</sup> However, some commentators believed that breach of the peace with its general application was a suitable criminal offence to charge stalkers with.<sup>20</sup> Other commentators disagreed with this view.<sup>21</sup>

However, a consensus was reached when as a result of two important decisions<sup>22</sup> the scope of the common law crime of breach of the peace was modified considerably so that it did not cover the majority of stalking cases. It was recognised that the danger of this new situation was without statutory intervention many victims of stalking would be left unprotected.

## < A head > **Breach of the peace**

### < B head > *Impact of Smith v Donnelly*

In the case of *Smith v Donnelly*<sup>23</sup> there was a challenge to the legality of the crime of breach of the peace under the Human Rights Act 1998.<sup>24</sup> This led to the court restating the law and ruling that a person accused of breach of the peace must be told the specific reason for any charge made against him. More importantly from the point of view of victims of stalking, the court also defined the *actus reus* of breach of the peace as conduct which presents as genuinely alarming and disturbing, in its context, to any reasonable person. This meant that after *Smith* the accused would need to be given advance notice of the reasons for their arrest for breach of the peace and the behaviour representing a breach of the peace would need to be considerably more serious than previously. The court set an objective test by looking at the behaviour from the context of the reasonable person. If such a person is not alarmed or disturbed to the degree required, then the conduct is not likely to represent a breach of the peace.<sup>25</sup> The conduct must be of sufficient seriousness that it would be likely to result in serious disturbance of the community. It follows that conduct which is merely embarrassing, annoying, irksome or inappropriate is not of sufficient importance to represent a breach of the peace. Where difficulty could arise in stalking cases is

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<sup>19</sup> Although the legal rules in England dealing with stalking were by no means perfect the utilisation of the two criminal offences under the Protection from Harassment Act 1997 to combat stalking behaviour did have some success.

<sup>20</sup> A. Bonnington, 'Stalking and the Scottish Courts' (1996) 146 (6761) *New Law Journal* 1394.

<sup>21</sup> Mays, Middlemiss and Watson, above n. 1.

<sup>22</sup> *Smith v Donnelly* 2001 SLT 1007 and *Harris v HMA* (2009) HCJAC 80.

<sup>23</sup> *Ibid.*

<sup>24</sup> Specifically Art. 7(1) of the European Convention on Human Rights which requires that offences are clearly defined in law and that applies to common law crimes.

<sup>25</sup> *Jones v Carnegie* 2004 SLT 609.

establishing that the effect of the behaviour extended beyond the immediate impact on the sensitivities of the victim, to threatening to disturb significantly the community at large. Most instances of stalking are carried out surreptitiously and/or on a one-to-one basis by letter, telephone or electronic means where the stalker and his victim are the only persons aware of what is occurring. This point is illustrated by the following quote:

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... some of the conduct in which stalkers engage may not, even when taken in context, be of the necessary quality to meet the test in *Smith v Donnelly*. Simply waiting on a public street outside a victim's home or workplace, telephoning or sending a text message in terms which are not in themselves offensive or threatening may appear innocuous to the reasonable person.<sup>26</sup>

< /Q >

### < B head > *Impact of Harris v HMA*

This general legal test for determining if a breach of the peace applies has been clarified in the case of *Harris v HMA*.<sup>27</sup> The appellant appeared on indictment at Dundee Sheriff Court on various charges including *inter alia* two charges of breach of the peace. The appellant raised preliminary pleas to the relevancy of the indictment, in particular to the two charges of breach of the peace contained within it and when the Sherriff repelled the preliminary pleas, he appealed on that basis. In the High Court of Justiciary a bench of five judges was constituted to consider the soundness of the decision in *Young v Heatly*<sup>28</sup> as an authority on breach of the peace. In particular, the relevance to the offence of breach of the peace of conduct that was not disorderly and was carried out in private. Here the court considered whether for the crime to be made out it was necessary for there to be a public element and for the conduct to cause or threaten disturbance to the public peace. The High Court overturned the decision in *Young v Heatly* and emphasised that to constitute a breach of the peace there must be a public element to the offence. It was noted in court that it would be difficult for a statement made in private by one person to another, without more, to constitute the crime. The court clarified by stating it was not maintaining that a breach of the peace could not take place in a private house or that such conduct had to be directly observable by third parties.<sup>29</sup> This case restricted the circumstances in which behaviour would be seen to constitute a breach of the peace. The following quote highlights the essence of the legal decision:

< Q >

It is unnecessary for the purposes of this opinion to seek to give definitive guidance as to what public element would be sufficient. Disturbance or potential disturbance of even a small group of individuals in a private house ... may suffice. The conduct need not be directly observable by the third parties but, if in private, there must be a realistic risk of it being discovered ...<sup>30</sup>

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<sup>26</sup> Middlemiss and Sharp, above n. 17 at 95.

<sup>27</sup> (2009) HCJAC 80.

<sup>28</sup> (1959) JC 66.

<sup>29</sup> <http://www.scotland-judiciary.org.uk/9/0/Summaries-of-Court-Opinions>

<sup>30</sup> *Harris v HMA* (2009) HCJAC 80 at [25]. ***Harris v HMA 2009 HCJAC APPEAL NO: XC143/09.***

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As a result of these decisions there was concern in some quarters that stalking would not always have the gravity of consequence or the ‘public element’ needed for the crime and therefore complaints would be difficult to prosecute. Particularly, instances of stalking that were carried out through social networking sites, for example Facebook, telephone calls, texting, e-mails or stalking which occurs in private or in an isolated place. It is for this reason that the Scottish Parliament agreed to legislate on stalking.<sup>31</sup>

### < A head > Statutory measures to control stalkers

There are various measures provided by statute to control the behaviour of stalkers in Scotland which need to be outlined here as they may still apply to stalking cases because they could be utilised along with the stalking offences to protect victims (see the case of Mark Armstrong described below). Fortunately they do not need detailed explanation.

First, common law interdicts ad interim are fairly readily obtained in the Scottish courts and the balance of convenience test applied by the judiciary ensures that writs are not too widely framed.<sup>32</sup> An advantage of the common law interdict is that there is no requirement to prove a course of conduct. An interim interdict or interdict can be granted on the basis of a single incident. While interdicts have been superseded in part by non-harassment orders they still have a place in protecting stalkers particularly, when a power of arrest (for breach) has been attached to the interdict under the Protection of Abuse (Scotland) Act 1998.

Secondly, restrictions of liberty orders were introduced by s. 245A of the Criminal Procedure (Scotland) Act 1995.<sup>33</sup> A restriction of liberty order requires an offender to be restricted to a specific place for a maximum period of 12 hours per day for up to a maximum of 12 months and/or restricted from a specified place or places for 24 hours a day for up to 12 months. Its possible application to stalking cases is clear. It has the effect of restricting the offender’s movements although the offender must consent to being placed under the order. The legislation also provides for the use of electronic monitoring (tagging) equipment to monitor offenders’ compliance with the terms of the order.

Thirdly, a victim of stalking could seek an anti-social behaviour order (ASBO) which is a civil order introduced under the Crime and Disorder Act 2001 and designed to protect the public from anti-social behaviour. The law on this is now contained in the Antisocial Behaviour etc. (Scotland) Act 2004. In terms of s. 143(1) of the 2004 Act, a person (‘A’) engages in antisocial behaviour if he or she acts in manner which causes alarm or distress or pursues a course of conduct that causes or is likely to cause alarm or distress to at least one other person who is not of the same household as A.

A course of conduct must involve conduct on at least two occasions and anti-social behaviour can include a wide range of activity such as abusive language, drunken behaviour in the streets, vandalism and joyriding, but it can also include stalking. All that is required is that the conduct causes or is likely to cause alarm or

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<sup>31</sup> See Middlemiss, above n. 4 for detailed background to the Act.

<sup>32</sup> *Murdoch v Murdoch* 1973 SLT (Notes) 13.

<sup>33</sup> Restriction of liberty orders have been available in Scotland since May 2002.

distress. Also there is no need to establish the cause of the behaviour or an intention to cause alarm or distress.<sup>34</sup>

Fourthly, under s. 8(1) of the Protection from Harassment Act 1997, 'every individual has a right to be free from harassment'. Where there is an actual or anticipated breach of s. 8(1), whereby the victim has experienced a course of conduct which amounts to harassment,<sup>35</sup> he or she may raise a civil action known as an action of harassment. The remedies available for harassment are damages (for anxiety caused by the harassment and any financial loss resulting from it), an interdict or interim interdict or a non-harassment order (NHO). The interdicts and orders will only be available when the court is satisfied that it is appropriate to protect the victim from further harassment. There are indications that the courts view the NHO as a stronger, more powerful remedy than an interdict or interim interdict, and that it is therefore appropriate only in more serious cases.<sup>36</sup> In *McGuire v Kidston*,<sup>37</sup> Sheriff Principal Nicholson held that a court should only consider granting such an order where it considered that an interdict would be insufficient to protect the pursuer. A civil NHO made under s. 8(5)(b)(ii) of the 1997 Act incurs criminal liability when its terms are breached.<sup>38</sup> An offender is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or both, and on summary conviction, to imprisonment for a period not exceeding 12 months or to a fine not exceeding the statutory maximum or both. Allegations of breaches of NHOs require an investigation by the police and have to be reported to the Procurator Fiscal, who will decide whether or not criminal proceedings will be pursued against the alleged stalker and, if so, whether the case will be dealt with under solemn or summary procedure.

Fifthly, the Protection from Abuse (Scotland) Act 2001 provides the police with the power of arrest where the subject of an interdict is likely to abuse his victim contrary to the terms of the order. The impact of this legislation is far-reaching, offering the prospect of arrest in a variety of situations for abusers, harassers or stalkers, thereby bringing about cessation of their unlawful activities, at least in the short term. In accordance with s. 1(1), 'a person applying for or who has obtained, an interdict for the purpose of protection against abuse may apply to the court for the power of arrest to be attached to the interdict under this Act'. 'Abuse' is widely defined in s. 7 as 'violence, harassment, threatening conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress'. So anyone that is a victim of abuse and entitled to an interdict under the civil or criminal law will be eligible to apply for a power of arrest to be attached to it' The person seeking protection will have to convince a judge that it is needed to protect him or her from a risk of abuse. Under s. 1(2) the court must satisfy itself that the interdicted person has had a chance to be heard by, or represented before, the court.

Having outlined the legal rules that apply to stalking other than the 2010 Act, it is now important to look at the new legal offence of stalking.

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<sup>34</sup> Breach of an ASBO is a criminal offence and is punishable by a fine and/or imprisonment of up to five years.

<sup>35</sup> It is intended to amount to harassment of that person or occurs in circumstances where it would appear to a reasonable person that the conduct would amount to harassment.

<sup>36</sup> *McCann v McGurran* 2002 SLT 592.

<sup>37</sup> 2002 SLT (Sh Ct) 66.

<sup>38</sup> Protection from Harassment Act 1997, s. 9(1)(a) and(b).



## < A head > Criminal Justice and Licensing (Scotland) Act 2010

For the first time anywhere in the UK an offence of stalking was brought in under s. 39 of the Criminal Justice and Licensing (Scotland) Act 2010.<sup>39</sup> Section 39 defines the nature of this offence as where:

< Q >

- (1) A person ('A') commits an offence, to be known as the offence of stalking, where A stalks another person ('B').
- (2) For the purposes of subsection (1), A stalks B where—
  - (a) A engages in a course of conduct,
  - (b) subsection (3) or (4) applies,<sup>40</sup> and
  - (c) A's course of conduct<sup>41</sup> causes B to suffer fear or alarm.

< /Q >

Under s. 39(6)(a)–(f) of the 2010 Act various types of activity are identified as being covered. In this section 'conduct' can include (but is not limited to):

< L [not word for word quote]>

- (a) following B or any other person,
- (b) contacting B or any other person by post, telephone, e-mail, text message or any other method,<sup>42</sup>
- (c) publishing any statement or other material—
  - (i) relating or purporting to relate to B or to any other person:
  - (ii) purporting to originate from B or from any other person,
- (d) monitoring the use by B or by any other person of the internet, e-mail or any other form of electronic communication,
- (e) entering any premises,
- (f) or loitering in the vicinity of—
  - (i) the place of residence of B or of any other person,
  - (ii) the place of work or business of B or of any other person,
  - (iii) any place frequented by B or of any other person.<sup>43</sup>

< /L >

In the interests of brevity the remainder of the examples of stalking behaviour covered by the offence of stalking have been placed in a footnote.<sup>44</sup> This list of areas where s.

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<sup>39</sup> The Bill received Royal Assent on 6 August 2010.

<sup>40</sup> Section 39(3) and (4) states:

'(3) This subsection applies where A engages in the course of conduct with the intention of causing such harm to B or of arousing such apprehension or fear in B.

(4) This subsection also applies where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause such harm or arouse such apprehension or fear.

<sup>41</sup> Course of conduct involves conduct on at least two occasions.

<sup>42</sup> There was a high incidence of this behaviour identified in the research: Morris *et al.*, above n. 5.

<sup>43</sup> This was the most common behaviour identified by the research: Morris *et al.*, above n. 5.

<sup>44</sup> Under s. 39(6)(g)–(j) 'conduct' means:

- (g) interfering with any property in the possession of B or of any other person,
- (h) giving anything to B or to any other person or leaving anything where it may be found by, given to or brought to the attention of B or any other person,
- (i) watching or spying on B or any other person,

39 of the 2010 Act applies is comprehensive covering the vast majority of the types of stalking that currently occur. However, it is not regarded as an exhaustive definition and it can be expanded upon to deal with new forms of stalking over time. Because the offence of stalking has been broadly defined it means that (unlike in the previous position) the vast majority of victims of stalking are protected.

Under s. 39(5) it is a defence for a person charged with an offence under s. 39 to show that the course of conduct ‘(a) was authorised by virtue of any enactment or rule of law, (b) was engaged in for the purpose of preventing or detecting crime, or (c) was, in the particular circumstances, reasonable’. It is difficult to imagine when stalking would be authorised by the law or engaged in the process of preventing or detecting crime. However, it is possible in circumstances where someone is legitimately under surveillance or being followed because of his suspected or actual criminal or terrorist activity. Since stalking is by its very nature unreasonable behaviour, it is difficult to imagine circumstances where the defence of reasonableness will be accepted by the courts.

A person convicted of the offence of stalking is liable on conviction on indictment, to imprisonment for a term not exceeding five years, or to a fine, or to both, and on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both (s.39(7)(a)–(b)).<sup>45</sup> This is undoubtedly the offence that is primarily being utilised in stalking cases as illustrated by the prosecution rates highlighted below. However, before considering the impact of the offence since its inception it is important to mention another offence that could have application to stalking cases.

### < B head > *Threatening or abusive behaviour*

Section 38 of the 2010 Act provides a second offence relevant to stalking which is called ‘threatening or abusive behaviour’.<sup>46</sup> However, it is primarily intended to protect victims of domestic violence.<sup>47</sup> It defines the offence as follows:

< Q >

A person (‘A’) commits an offence if—  
(a) A behaves in a threatening or abusive manner,

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(j) acting in any other way that a reasonable person would expect would cause B to suffer fear or alarm, and “course of conduct” involves conduct on at least two occasions’.

<sup>45</sup> Solemn offences are prosecuted on indictment in either the High Court of Justiciary or in the Sheriff Courts, while summary offences may be prosecuted either in Sheriff Courts or in Justice of the Peace Courts. The selection of the court will depend on a number of factors including, the nature and seriousness of the offence and any prior criminal record of the accused.

<sup>46</sup> This is similar to breach of the peace without the need for the gravity of offence or public element needed for the common law crime.

<sup>47</sup> The Domestic Abuse (Scotland) Act 2011 clarifies the law dealing with harassment in this context. It amends the Protection from Harassment Act 1997 by removing the requirement that there must be a course of conduct before a NHO may be obtained, meaning that the victim no longer need wait to be harassed a number of times before seeking protection. The 2011 Act amendments also make it a criminal offence to breach an interdict with a power of arrest. These provisions only apply to domestic abuse cases as defined in the 2011 Act.

- (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
- (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

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Under s. 38(3) of the 2010 Act this offence applies to:

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- (a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and
- (b) behaviour consisting of—
  - (i) a single act, or
  - (ii) a course of conduct or both.

< /Q >

This offence will apply to a broad range of behaviour provided it is capable of causing a reasonable person to suffer fear or alarm (for example, verbal or physical threats or assault). The applicability of this offence will depend to some extent on the particular sensitivities of the victim, but the court will have to decide the issue using the reasonable person test. However, the type of behaviour covered will only become clear after full interpretation by the judiciary. It is unlikely to include fairly innocuous or unimportant aspects of daily exchanges (for example, persistent professional e-mails).

Under s. 38(2) it is a defence for a person charged with an offence under s. 38(1) to show that the behaviour was, in the particular circumstances, reasonable. It is difficult to imagine when threatening or abusive behaviour would be reasonable, but possibly when used as form of self-defence or in response to extreme provocation. There are now two offences under the 2010 Act that can be used to deal with perpetrators of stalking. As can be readily seen, the two offences are very different in nature and possibly in coverage although, there will be a degree of overlap and both offences carry a maximum penalty of five years in prison.

## < A head > Incidents of prosecution

The Crown Office provided information about the number of prosecutions of perpetrators of stalking under s. 39 of the Criminal Justice and Licensing (Scotland) Act 2010 following a freedom of information request submitted by this writer in October 2012.<sup>48</sup>

The Crown Office's response also outlined the new procedures utilised by prosecutors and the police in dealing with stalking cases<sup>49</sup> and provided statistics detailing the prosecutions under s. 39 of the 2010 Act under both summary and solemn procedure.

With respect to prosecutions under summary procedure in the six months between April and October 2012 there had been 51 convictions, nine persons not convicted and 122 cases were ongoing. Although this is an impressive number of

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<sup>48</sup> Available at [www.crownoffice.gov.uk](http://www.crownoffice.gov.uk). <http://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/389-stalking-prosecutions-criminal-justice-and-licensing-scotland-act-2010>

<sup>49</sup> The Crown Office claims that the training programme for staff dealing with these types of cases and the prosecution policy ensures that prosecutors understand the dynamics behind stalking and make the optimum decisions in the public interest in respect of forum for proceedings and the conditions that should apply to the alleged perpetrator.

prosecutions, it is considerably less than in the previous year when a total of 266 cases were brought under summary procedure. Also only 54 cases were prosecuted in 2010/11 under summary procedure. This low figure in 2010/11 compared with subsequent years is partly explained by the fact that the 2010 Act only came into effect in December 2010 and the period being considered only ran until April 2011. In the first year over the same period there were only two people convicted and one not convicted under solemn procedure. However, there was a sizeable increase in 2011/12 with eight people convicted of the crime, five not convicted, 19 cases were ongoing and five cases required no further action. With respect to 2012/2013 over the six-month period to the point of reporting there had been 26 prosecutions. Of those one person had been convicted, one had not and 24 cases were still ongoing.

Without accurate figures to refer to prior to the introduction of the Act it makes any comparison with the previous situation impossible. However, the rate of prosecution for stalking is impressive, resulting from a well-defined offence and a robust prosecution policy adopted and developed by the Crown Office and the Procurator Fiscal Service.

An example of this policy was seen in May 2012 when a stalker named Mark Armstrong was sentenced by the Edinburgh Sheriff Court to 30 months in prison after being found guilty of stalking in contravention of s. 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010. He was also made the subject of a 12-month supervised release order and the Sheriff granted a NHO against him which prohibited him from following, approaching or contacting the complainer for a period of 20 years. Solicitor General, Lesley Thomson QC, commenting on the Armstrong case, stated that:

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Scotland's prosecutors are dedicated to bringing to justice all those who, like Mark Armstrong, pursue a campaign of stalking and harassment. Though many of his actions, if taken in isolation, could perhaps appear innocuous, it was his persistent course of conduct that caused fear and alarm to his victim and constituted the statutory offence of stalking.<sup>50</sup>

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### < A head > **English position**

It is difficult to know the precise reasons why legislators in England recently introduced specific measures to deal with stalking. The Home Office had undertaken a research survey back in 2000 on the use of the Protection from Harassment Act and found that:

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the Protection from Harassment Act is being used to deal with a variety of behaviour such as domestic and inter-neighbour disputes. It is rarely used for stalking as portrayed by the media since only a small minority of cases in the survey involved such behaviour.<sup>51</sup>

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The results of a recent parliamentary inquiry will also have played a part in changing the law. In 2012 the inquiry found that about 120,000 victims, mostly women, were stalked every year. However, only 53,000 incidents were recorded as crimes by police

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<sup>50</sup> [www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-18173956](http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-18173956)

<sup>51</sup> J. Harris, *The Protection from Harassment Act 1997—An Evaluation of its Use and Effectiveness*, Home Office Research, Development and Statistics Directorate, 2000.

and only one in 50 of these lead to an offender being jailed. However, it also seems likely the legislators were in part influenced by the success of the Scottish model.<sup>52</sup>

## < A head > Law prior to the Protection of Freedoms Act 2012

The main legislation against stalking in England and Wales prior to the Protection of Freedoms Act 2012 was (and still is) the Protection from Harassment Act 1997. The 1997 Act, which was often referred to as the ‘anti-stalking law’, does not refer specifically to stalking, but it does adequately define harassment in s. 1(1). It states that it is unlawful to ‘pursue a course of conduct which amounts to harassment of another and which the defendant knows or ought to know amounts to harassment of another’. Section 7 elaborates by explaining that harassment includes ‘alarming the person or causing the person distress’ and a ‘course of conduct’ must involve conduct on at least two occasions. The conduct deemed unlawful harassment under s. 7 includes verbal behaviour. Section 1(2) states that a person ought to know that a course of conduct amounts to harassment if a reasonable person in possession of the same information would think that it amounted to harassment. Ultimately it is down to the court to decide whether the conduct in a case amounts to harassment.

Sections 2 and 4 of the Protection from Harassment Act 1997 can also still be used to prosecute harassment. ‘Harassment’ is described in the Act as a course of conduct which ‘(a) amounts to harassment of another, and (b) which the perpetrator knows or ought to know amounts to harassment of another’. Section 2 sets out the offence of harassment so that a person who pursues conduct in breach of s. 1(1) and (1A) is guilty of an offence.<sup>53</sup> Under s. 4 it is an offence to put someone in fear of violence. The elements of the s. 4 offence are a course of conduct, which causes another to fear that violence will be used against him or her, and which the defendant knows or ought to know will cause another to fear that violence will be used against him or her and the defendant ought to know that his or her course of conduct will cause another to fear that violence will be used against him or her if a reasonable person in possession of the same information would think that the course of conduct would cause the other so to fear on that occasion.

In *R v Nagy*,<sup>54</sup> which was a domestic abuse case, the accused pleaded guilty to a s. 4 harassment offence. The accused had formerly been in a relationship with the victim for some years and there were two children from the relationship. He physically and verbally abused his wife.<sup>55</sup> A sentence of 12 months’ imprisonment was imposed which in the circumstances seems light.

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<sup>52</sup> Anne Moulds is a leading campaigner based in Scotland who was consulted by the UK Parliament prior to the stalking offences being introduced in England and Wales.

<sup>53</sup> Collins J in the case of *Director of Public Prosecutions v Moseley, Selvanayagam and Woodling* [1999] All ER (D) 587 stated that: ‘Whatever may have been the purpose behind the Act, its words are clear, and it can cover harassment of any sort’.

<sup>54</sup> [2010] 1 Cr App R (S) 74.

<sup>55</sup> When his wife and two children were asleep in her house, he banged on the front door, shouted abuse, was let in and soon left. He returned a few moments later, banged on the door, shouted abuse, and threatened to throw a brick through the window if she did not let him in. She telephoned the police. He entered and locked the door from the inside. Police officers arrived, but the victim said that she did not wish

With respect to defences available under the 1997 Act the defendant can, of course, claim that he did not do the acts which he is alleged to have committed. A defendant can also rely on the defences in s. 1(3) that his or her conduct was pursued for the purpose of preventing or detecting crime;<sup>56</sup> that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment; or that in the particular circumstances the pursuit of the course of conduct was reasonable.

The s. 2 offence (which can only be tried in a magistrates' court) is punishable by a maximum of six months' imprisonment or a fine not exceeding level 5 on the standard scale (currently £5,000) or both. The s. 4 offence (which can be tried in either the magistrates' court or the Crown Court) is punishable in the magistrates' court by a maximum of six months' imprisonment or a fine not exceeding level 5 on the standard scale (currently £5,000) or both. In the Crown Court, the offence is punishable by a maximum of five years' imprisonment or a fine or both.

The court sentencing the defendant can also impose a 'restraining order' which is the equivalent of the NHO in Scotland. This is an order of the court which prohibits the defendant from doing certain things for a certain period of time. For instance, the court may order the defendant never to contact or attempt to contact the victim of stalking again or it may order him or her not to enter a particular road or area for a period of months or years.<sup>57</sup> The question of how wide the order should be and for how long it should last is up to the sentencing court and no guidelines have, so far, been set by the appeal courts. If a defendant breaches an injunction, he or she can be prosecuted in a criminal court for that breach or he or she can be punished for contempt of court in the civil court, but not both. The maximum punishment which a civil court can impose for contempt of court is two years' imprisonment.

The Protection from Harassment Act 1997 can be utilised in the civil court as it provides a civil tort of harassment. The definition of harassment is the same as for the criminal offence (i.e. alarming the person or causing the person distress on at least two occasions). A civil case can be brought in the High Court or, more usually, in the county court. The procedure is the same as in other civil cases. The court can grant an injunction (i.e. an order requiring the defendant either to do or not to do particular acts) and/or damages. Section 3(2) of the 1997 Act states that damages may be awarded for (amongst other things) the anxiety caused by the harassment or stalking and any financial loss resulting from it.

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to pursue the matter. The police remained in the area and he entered the living room carrying a knife in one hand and a bottle in the other. He abused her, threw beer over her, spat in her face, pushed her down, slapped her, threatened her with the bottle, dragged her and stabbed the television. The police returned and arrested him.

<sup>56</sup> *Hayes v Willoughby* [2013] UKSC 17.

<sup>57</sup> Section 127 of the Serious Organised Crime and Police Act 2005 amended s. 42 of the Criminal Justice and Police Act 2001 to provide the police with an additional power to direct a person to leave the vicinity and not return within such period as a constable may specify which can be up to three months. If a person does return within the period specified in the direction, beginning with the date on which the direction is given, and does so for the purposes of representing to or persuading a person not to do something he or she is entitled to do or to do something he or she is not obliged to do, he or she commits an offence. The penalty for this offence is imprisonment for a term not exceeding six months or a fine not exceeding level 4 on the standard scale or both.

## < A head > **Protection of Freedoms Act 2012**

As of 25 November 2012 amendments to the Protection from Harassment Act 1997 made stalking a specific offence in England and Wales for the first time. The amendments were introduced by the Protection of Freedoms Act 2012. The amendments could only be used to deal with stalking incidents that occurred after 25 November 2012 and stalking prior to this date will be dealt with as harassment under ss 2 and 4 of the Protection from Harassment Act.

The Protection of Freedoms Act 2012 created two new offences of stalking and inserted them into the Protection from Harassment Act 1997 as ss 2A and 4A. They provide additional offences for prosecutors to consider when deciding if charges can be brought against stalkers.<sup>58</sup> Whilst there is no strict legal definition of stalking, new s. 2A(3) of the Protection of Harassment Act 1997 gives examples of acts or omissions which, in particular circumstances, are associated with stalking. These include: 'physical following; contacting, or attempting to contact a person by any means' (for example, this could be through information technology, his or her friends, work colleagues or family) or other intrusions into the victim's privacy such as loitering in a particular place or watching or spying on them. Section 2A is a summary offence and a person guilty of the offence of stalking is liable on summary conviction to imprisonment for a maximum term of six months or a fine.

The elements of the s. 4A offence are a course of conduct which amounts to stalking, and which causes another to fear, on at least two occasions, that violence will be used against him or her; or causes another serious alarm or distress which has a substantial adverse effect on his or her usual day-to-day activities.<sup>59</sup> On conviction of an offence on indictment under s. 4A, the stalker can be sentenced to imprisonment for a term not exceeding five years, or a fine, or both. This legislation is different from the Scottish legislation in a number of ways. For example to establish that the less serious offence has been committed under s. 2A, it is necessary to establish there has been harassment as defined in s. 1 of the 1997 Act. An interesting aspect of the s. 4A offence is that the court can take account of the impact of the behaviour on the day-to-day activities of the victim in deciding if an offence has been committed. It is too early to analyse the impact of the legislative changes although it seems likely that the introduction of the specific offences of stalking will lead to increased prosecutions.

## < A head > **Domestic abuse developments in Scotland**

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<sup>58</sup> See *Home Office Guidelines* at <http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2012/018-2012/>, accessed 9 August 2014.

<sup>59</sup> Behaviour that has an adverse effect on usual day-to-day activities is not defined, but is characterised in the guidelines as that which requires the victim to: '(a) change their route to work, work patterns, or employment; (b) arrange for friends or family to pick up children from school (to avoid contact with the stalker); (c) putting in place additional security measures in their home; (d) stopping /or changing the way they socialise; (e) moving home or leads to them suffering: (e) physical or mental ill-health; (f) a deterioration in their performance at work due to stress'.

There is a pilot scheme being proposed in Scotland<sup>60</sup> which would allow people to find out whether their partner has a history of domestic violence.<sup>61</sup> This will clearly have an impact on stalking victims in that they might find out about previous relationship behaviour of their partners. The Scottish Government is also considering introducing a new domestic abuse offence following a call from the Solicitor General<sup>62</sup> for a specific offence of domestic abuse to be created. This offence if introduced will potentially overlap with the stalking offences particularly threatening and abusive behaviour. Given a considerable number of stalking cases arise out of domestic relationships going wrong, this might provide another offence that stalkers could be prosecuted for.

## < A head > Conclusion

The stalking offence introduced into the law of Scotland has been seen by many as a welcome development and has led to dramatic improvements in the lives of stalking victims. There are those that have their reservations about the effectiveness of the law.<sup>63</sup> What can be established from the prosecution record of the stalking offence introduced by s. 39 of the Criminal Justice and Licensing (Scotland) Act 2010 is that it is sufficiently robust and broadly defined to cover the full range of behaviour that occurs in the context of stalking. Therefore, at one level at least, the introduction of this offence has been highly successful. While there can always be improvements in the level of successful prosecutions, it is generally accepted (although difficult to prove) that many more stalkers are being dealt with by the law than was the case prior to the 2010 Act. The Crown Office in Scotland has also introduced new important measures, which include increased training of staff, adopting an appropriate policy (governing judicial treatment of these cases) to deal with stalking and providing help to victims of stalking. The utilisation of the stalking offence along with the various statutory measures available to control stalkers (highlighted above) has meant the law in this respect has been and will continue to be effective. The changes highlighted have improved the treatment of most victims and their friends and/or families by the courts.<sup>64</sup>

It is gratifying that the example set by Scotland by legislating on stalking has been followed in the rest of the UK. However, the legal rules dealing with stalking south of the border are different in a number of ways. First, there are two offences of

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<sup>60</sup> The police disclosure scheme. A similar scheme has already been carried out across England and Wales.

<sup>61</sup> This is known as Clare's Law after Clare Wood who was murdered by her ex-boyfriend in Salford, Greater Manchester in 2009.

<sup>62</sup> Lesley Thomson QC.

<sup>63</sup> Ann Moulds and Campaign Action against Stalking, above n. 15.

<sup>64</sup> All victims of stalking are referred to a dedicated Victim Information and Advice service (VIA), which is available to ensure that they are offered the support and information they need throughout the court process and to assist in signposting to victims of stalking offences other agencies that provide specialist support or necessary practical assistance.



stalking introduced into the law.<sup>65</sup> Secondly, as pointed out above, there has to be evidence of harassment before an offence of stalking under s. 2A of the Protection of Harassment Act 1997 can be made out, which may not prove too significant. Thirdly, the nature of the stalking offence is different in England. In particular, s. 4A of the 1997 Act directly considers the effect of the behaviour on the day-to-day activities of the victim. This is a positive feature which should mean that in dealing with a case the impact of the stalking on the daily life of the victim will be paramount. This could include the impact of stalking on the victim's enjoyment of his or her work and/or home life and the impact on his or her family or friends. Nevertheless, there is still a lot to do as evidenced by the ongoing work of the Scottish National Stalking Group and Action Scotland against Stalking (ASAS),<sup>66</sup> the Network for Surviving Stalking<sup>67</sup> and other similar agencies.

Finally, in this writer's view, legal rules have been introduced in Scotland that are well defined and effective; there is a criminal justice system in place which is committed to combatting stalking; victim support in the courts has improved dramatically; the police force has been trained to deal with stalking complaints and strong support agencies are now in place. All of this means (as the title of the article suggests) that stalkers may now have to think twice or think again about pursuing this type of activity.

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<sup>65</sup> In Scotland, of course, s. 38 of the Criminal Justice and Licensing (Scotland) Act 2010 provides a second offence relevant to stalking which is called threatening or abusive behaviour.

<sup>66</sup> Ann Moulds and Campaign Action against Stalking, above n. 15.

<sup>67</sup> Available at <http://www.nss.org.uk/>, accessed 9 August 2014.