

## THE CASE FOR LEGISLATING HARASSMENT IN SINGAPORE

It will be argued in this article that the time has come to legislate against harassment in Singapore. While there is undoubtedly both common law and statutory protection against harassment, these solutions suffer from either uncertainty or incomplete remedies. A general blanket legislation addresses this problem and should be considered together with the various specific issues relating to such a statute that have been raised in this article.

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### I. Introduction

1 Harassment has been in the national spotlight of late. The Minister for Law has said that his Ministry is actively looking at harassment laws, in particular, online harassment.<sup>1</sup> There was a conference held to discuss the problems surrounding harassment in Singapore.<sup>2</sup> A commentary on the *Singapore Law Watch Commentary*<sup>3</sup> prompted a report in *The Straits Times*<sup>4</sup> highlighting that modern technology has made harassing innocent victims easier. Further, a High Court decision, *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan*<sup>5</sup> (“*AXA Insurance*”) – the subject of the commentary just mentioned – has ruled that there is no tort of harassment in Singapore, throwing into uncertainty the status of a tort that was established locally 12 years ago but has otherwise seen little use. These developments show,

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1 Kimberly Spykerman, “Law Ministry Actively Looking at Harassment Laws in S’pore”, *Channel News Asia*, (11 November 2013) <<http://www.channelnewsasia.com/news/singapore/law-ministry-actively/882954.html>> (accessed 12 November 2013).

2 Institute of Policy Studies Conference on Harassment in Singapore: Realities, Conundrums and Approaches Moving Ahead (18 November 2013).

3 Joshua Lim Yong En & Seow Tzi Yang, “The End of the Tort of Harassment in Singapore” *Singapore Law Watch Commentary* (September 2013).

4 K C Vijayan, “Technology makes harassing victims easier: Legal paper” *The Straits Times* (14 September 2013).

5 [2013] 4 SLR 545.

simultaneously, the increased legislative concern that victims of harassment be afforded protection, and the reduced certainty in judicial protection forged through the common law. The key question that this article addresses is whether, in light of these developments, legislation should be introduced to govern harassment and, if so, in what form. After examining current common law and statutory protection against harassment, it will be suggested below that a new general legislation should indeed be enacted against harassment.

2 The enactment of any legislation against harassment needs to address several issues. For a start, harassment can, of course, take place in different forms. For example, it can take place either in the physical sphere or virtually, that is, online or through telecommunicative means. The subject of harassment is also varied: there can be sexual harassment, stalking, school bullying, cyber-harassment and so on.<sup>6</sup> However, these different forms of harassment share certain similar traits that the common law was, until recently, ill-equipped to deal with: they all involve a series of unwanted conduct that causes disturbance or annoyance to the victim (short of a recognised psychiatric illness or physical harm) and often take place outside of the victim's property. This article does not propose separate legislation to deal with each and every type of harassment. There are simply too many different forms of harassment present and to come for such an approach. Rather, this article proceeds on the basis that a general legislation governing harassment is superior to separate pieces of legislation and evaluates the desirability of legislating harassment as such.

3 In connection with such a general legislation, any new legislation must also consider related issues, such as the definition of harassment, defences and enforcement issues. While the scope of this article largely focuses on the preliminary question of whether there is need for legislation against harassment, it will also consider briefly the details of such legislation. After examining the experiences of other jurisdictions, it will be suggested that any definition of harassment should be sufficiently broad to allow for judicial exposition to cater for specific facts in individual cases, yet not so sparse as to be without legislative guidance. It will also be suggested, among other things, that enforcement of such legislation will be key to its success. To enable its success, perhaps some assistance can be provided to lay litigants who will probably be the main users of such legislation against harassment.

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6 *Clerk and Lindell on Torts* (Margaret Brazier gen ed) (UK: Sweet & Maxwell, 17th Ed, 1995) at p 889.

## II. Existing protection from harassment

4 In order to consider the desirability of legislating harassment, we must first consider the existing protection from harassment. There is at present protection from harassment both at the common law and statute law. The problem, as we shall see, is that both of these protections are either uncertain or incomplete.

### A. Common law protection

#### (1) Previous limitations

5 The common law did not always afford protection against harassment. This is because, as mentioned above, harassment involves disturbance short of actual psychiatric or physical damage outside of the victim's property. The law of torts protects against such disturbance, including excessive noise, by way of actions in *property-related* torts such as nuisance. Specifically, the tort of private nuisance protects the right of a person who has possession of land to enjoy his premises undisturbed. The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land.<sup>7</sup> In *Epolar System Enterprise Pte Ltd v Lee Hock Chuan*,<sup>8</sup> the Court of Appeal recognised these principles and held further that generally, only a person with a proprietary interest, whether by virtue of his freehold or leasehold interest, can sue in the tort of private nuisance. Mere occupation is not enough. Thus, a person who is a mere occupier, even if the wife of the husband-owner, cannot sue. This is further illustrated by the English case of *Malone v Laskey*,<sup>9</sup> where the wife of the manager of a company entitled to live in the affected premises by virtue of her husband's employment was held not to have standing to sue in private nuisance.

6 However, the protection of privacy cannot stop there, especially where there is no property interest which precludes an action in these torts. This covers a wide range of situations like the one illustrated in *Malone v Laskey*. Many times, the occupier of the premises came into occupation by virtue of a relationship with the owner, such as wife, child or friend. Yet, in these cases, the English cases have held that there is no recourse for disturbance caused to them while on the premises. For example, in *Khorasandjian v Bush*,<sup>10</sup> the daughter of the mother-owner was disturbed by excessive phone calls at the premises. The English Court of Appeal, by a majority, held that she had the right to sue in

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7 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545.

8 [2003] 2 SLR(R) 198.

9 [1907] 2 KB 141.

10 [1993] QB 727.

private nuisance. He thought that it was “ridiculous” that in the light of changed social conditions:<sup>11</sup>

... the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or leasehold proprietary interest in the premises in which he or she has received the calls.

7 Ridiculous as the case may be, this decision was overturned by the House of Lords in *Hunter v Canary Wharf*.<sup>12</sup> In that case, Lord Goff of Chieveley held that an action in private nuisance will only lie at the suit of a person who has a right to the land affected.<sup>13</sup> Thus ended the English courts’ attempt to extend the tort of private nuisance to afford some protection to victims of harassment. However, it must be said that the English position towards such victims is not so dire: there exists English legislation, which we will examine below,<sup>14</sup> that affords statutory protection for victims of harassment. This account of the law does, however, shed light on limitations of the tort of private nuisance in protecting against harassment.

8 The other non property-related torts fare no better. It is of course trite law that a person who suffers physical harm or the threat of imminent physical harm can sue in battery and assault respectively. Thus in *Amutha Valli d/o Krishnan v Titular Superior of the Redemptorist Fathers in Singapore*,<sup>15</sup> the High Court defined battery as the actual affliction of unlawful force on a person, and assault as an act which causes another person to apprehend the infliction of immediate, unlawful force on his person.<sup>16</sup> A person who is harassed does not generally fall within these definitions. There is normally no unlawful force on victims of harassment, since harassment usually takes the form of unwanted stalking or contact through an intangible medium. There is also normally no apprehension of battery (thus constituting assault) because the unwanted contact is usually through an intangible medium, thereby negating the immediacy that is required for assault to be established.

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11 *Khorasandjian v Bush* [1993] QB 727 at 734.

12 [1997] AC 655.

13 *Hunter v Canary Wharf* [1997] AC 655 at 692.

14 See paras 55–60 below.

15 [2009] 2 SLR(R) 1091.

16 *Amutha Valli d/o Krishnan v Titular Superior of the Redemptorist Fathers in Singapore* [2009] 2 SLR(R) 1091 at [71].

9 There is a further tort to consider. The case of *Wilkinson v Downton*<sup>17</sup> established that false words or verbal threats calculated to cause, and uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable. The requirement of physical injury was later expanded to include recovery for mental shock caused by intentional acts. However, whether couched in terms of physical injury or mental shock (or even a recognised psychiatric illness), it is unlikely that victims of harassment will find recourse in the case of *Wilkinson v Downton* for the simple reason that there is normally no such injury in harassment cases. While the pain of disturbance is a real one and should not be downplayed, the law requires that there be more than mere disturbance or annoyance. Thus, it is clear that even the non property-related torts, which do not require a proprietary interest, are not able to assist a victim of harassment.

(2) *Establishment of a tort of harassment*

10 These shortcomings in the law of torts led courts to develop a tort of harassment. The English attempt, started in *Khorasandjian v Bush*, was halted in *Hunter v Canary Wharf*, even if Lord Hoffmann in the latter case acknowledged the shortcomings of the present law, and that there is no reason why an intentional tort cannot compensate for mere distress, inconvenience or discomfort, rather than insisting on proof of a physical or psychiatric injury.<sup>18</sup>

11 The Singapore attempt resulted in the establishment of a tort of harassment in 2001. In *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta*<sup>19</sup> (“*Malcomson*”), the defendant was the former employee of the second plaintiff company and had resigned from his employment. The first plaintiff was the chief executive officer of the second plaintiff. The defendant desired to regain his employment, and when that was not forthcoming he engaged in a series of acts designed to harass both plaintiffs. For a year afterwards, the defendant persistently made telephone calls, sent facsimiles and flowers, and trespassed at the second plaintiff’s premises on various occasions. The defendant also procured a third party to make calls to the first plaintiff’s residence early in the morning, trespass against his house, and also send him a vicious greeting card which displayed a baby’s rattle near the anniversary of the death of the first plaintiff’s infant son. The defendant also sent various electronic mails and telephone text messages to the first plaintiff, as well as to various staff members of the second plaintiff. In granting the plaintiffs’ application for damages and injunction after the second

17 [1897] 2 QB 57.

18 *Hunter v Canary Wharf* [1997] AC 655 at 707.

19 [2001] 3 SLR(R) 379.

plaintiff failed to enter a defence, Lee Seiu Kin JC (as he then was) in the High Court had to overcome various legal hurdles and effectively come up with a new tort of intentional harassment, which had hitherto not been recognised elsewhere.

12 As should be evident by now, the problem essentially was that the plaintiffs had no recognisable tort under which to sue the defendant. First, they “could not sue under the traditional tort of trespass to the person in assault or battery”.<sup>20</sup> This is because:<sup>21</sup>

... the defendant had not, by his harassment, come into any unwanted physical contact with the plaintiff, as required under battery, nor did he cause the plaintiff to reasonably apprehend any such contact, as required under assault.

There was also no possible action under the rule in *Wilkinson v Downton*: in *Malcomson*, the plaintiffs did not suffer any bodily harm or recognisable psychiatric illness to sue under this tort. Finally, while some of the harassment took place in the first plaintiff’s home and the second plaintiff’s premises, much of the harassing acts took place outside these premises. Accordingly, the tort of private nuisance, which protected one’s right to the enjoyment of one’s own property, did not help for the most part in *Malcomson*.

13 Faced with these constraints, Lee JC in *Malcomson* had to go beyond the established torts to provide the plaintiffs with a remedy against the defendant’s harassment.<sup>22</sup> While he could have simply followed the English position and held that the plaintiffs had no cause of action, Lee JC went further and considered whether the Singapore courts should, in fact, recognise a new tort of intentional harassment. Lee JC’s reasoning would be of some interest. After referring to the dictionary meanings of “harassment”, he defined it to mean:<sup>23</sup>

... a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person.

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20 Tan Keng Feng, “Harassment and Intentional Tort of Negligence” (2002) Sing JLS 642. See also Mark Lim, Gene Kwok & Eric Tan, “After *Malcomson v Mehta*: Charting New Waters in the Law of Harassment in Singapore – Civil and Criminal Perspectives” (2002) 14 SAclJ 302.

21 Tan Keng Feng, “Harassment and Intentional Tort of Negligence” (2002) Sing JLS 642.

22 Tan Keng Feng, “Harassment and Intentional Tort of Negligence” (2002) Sing JLS 642 at 643.

23 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [31].

He also said that this definition was one that “sufficiently encompasses the facts of the present case in order to proceed with a consideration of the law”<sup>24</sup>.

14 Lee JC considered that the English authorities did not hinder the development of a tort of intentional harassment.<sup>25</sup> Commenting on the case of *Hunter v Canary Wharf*, in which Lord Goff quite clearly stated that there was no tort of harassment in English law, Lee JC instead emphasised the approach of Lord Hoffmann in the same case, who noted that there was an absence of a tort of intentional harassment causing distress without actual bodily or psychiatric harm and that there was:<sup>26</sup>

... no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence.

Taking these comments together with apparent support in England for a tort of intentional harassment in *Khorasandjian* and *Burris v Azadani*,<sup>27</sup> Lee JC concluded that there was no English authority which stood in the way of the development of a tort of intentional harassment in Singapore.

15 Lee JC’s analysis of the English position could only take him so far. He still had to confront the question of whether there *should* be a tort of intentional harassment in Singapore. Although he was at pains to point out that there was nothing in England that prevented the development of the tort of intentional harassment, the corollary of that was equally true: there was nothing to *support* the development of the tort. As such, it fell on Lee JC to make an essentially policy-oriented reasoning on why the tort of intentional harassment should be recognised and created in Singapore, when the other jurisdictions in the Commonwealth had not done so. He pointed out that the last 200 years of improvements in technology have brought about three great changes

24 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [31].

25 Although:

... there is no clear authority, at least in the British and Australian law of torts (nor for that matter in Canada and New Zealand), that an action on the case for damages is available for the intentional infliction of purely mental distress or, as it is sometimes described, mental distress *simpliciter*.

See Tan Keng Feng, “Harassment and Intentional Tort of Negligence” (2002) Sing JLS 642 at 643–644, fn 7 (citing F A Trindade, “The Intentional Infliction of Purely Mental Distress” (1986) 6 OJLS 219 at 222).

26 *Hunter v Canary Wharf* [1997] AC 655 at 707.

27 *Burris v Azadani* [1995] 1 WLR 1372 at 1380–1381; cf *Patel v Patel* (1988) 2 FLR 179 at 180 (refusing to uphold a provision in an injunction that was based on the harassment of the plaintiff due to a family dispute).

in lifestyle, *viz*, urbanisation, widespread availability of leisure time and improved communication.<sup>28</sup> According to Lee JC, these three changes have combined to create the problem in the present case which did not and could not exist before. He considered that life could be unbearable for the person who finds himself the object of attention of one who is determined to make use of these modern devices to harass and that the result can range from displeasure to distress to debilitation.<sup>29</sup> For all these reasons, therefore, Lee JC thought that the time had come to recognise a tort of intentional harassment in Singapore and granted the relief asked for by the plaintiffs in *Malcomson*, but not before specifically highlighting the fact that Singapore was one of most densely populated countries in the world.<sup>30</sup>

*In Singapore we live in one of the most densely populated countries in the world. And the policy of the government is to further increase the population. It will make for an intensely uncomfortable living environment if there is no recourse against a person who intentionally makes use of modern communication devices in a manner that causes offence, fear, distress and annoyance to another. [emphasis added]*

16 Thus was created, in the Singapore context, the tort of harassment for the protection of victims of harassment in Singapore. However, the status of the tort of harassment is now in some doubt in Singapore following *AXA Insurance*, which we will consider below.<sup>31</sup>

## **B. Statutory protection**

17 There is some statutory protection against harassment in Singapore. It is, however, spread over several statutes and none is targeted specifically at harassment. The protection arises because of the criminalisation of certain acts deemed to be against the public order, or as part of the general criminal law. More specifically, protection may be accorded in the form of a protection order, but that is premised on there being a familial relationship between the parties concerned. This section will not attempt to discuss each and every legislation because there are too many. Instead, attention will be drawn to some of the more prominent ones. The primary legislation is the Miscellaneous Offences (Public Order and Nuisance) Act<sup>32</sup> (“MOA”), which protects against harassment by ss 13A and 13B. These sections provide as follows:

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28 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [51].

29 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [52].

30 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [55].

31 See paras 29–35 below.

32 Cap 184, 1997 Rev Ed.

**Intentional harassment, alarm or distress**

13A.—(1) Any person who in a public place or in a private place, with intent to cause harassment, alarm or distress to another person —

- (a) uses threatening, abusive or insulting words or behaviour; or
- (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

thereby causing that person or any other person harassment, alarm or distress, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000.

(2) It is a defence for the accused to prove —

- (a) that he was inside a dwelling-house and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, by him would be heard or seen by a person outside that dwelling-house or any other dwelling-house; or
- (b) that his conduct was reasonable.

**Harassment, alarm or distress**

13B.—(1) Any person who in a public place or in a private place —

- (a) uses threatening, abusive or insulting words or behaviour; or
- (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

within the hearing or sight of any person likely to be caused harassment, alarm or distress thereby shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$2,000.

(2) It is a defence for the accused to prove —

- (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress;
- (b) that he was inside a dwelling-house and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that dwelling-house or any other dwelling-house; or
- (c) that his conduct was reasonable.

18 As can be seen, these sections prescribe criminal sanctions against harassment. While one might think at first that these sections are only actionable at the instance of the Public Prosecutor, it is clear that a private individual can commence proceedings under these sections.

The power to do so is prescribed by s 11(10) of the Criminal Procedure Code<sup>33</sup> (“CPC”), which provides as follows:

A private person may appear in person or by an advocate to prosecute in summary cases before a Magistrate’s Court for any offence for which the maximum term of imprisonment provided by law does not exceed 3 years or which is punishable with a fine only.

Thus, according to this section, a person who has been harassed can commence an action against the alleged offender under ss 13A and 13B of the MOA because the offence prescribed under those sections is punishable by a fine only.<sup>34</sup> Indeed, in *Yap Beng Hin v Tan Bee Tin*,<sup>35</sup> the complainant commenced a private prosecution under s 13A(1)(a) of the MOA for harassment. The harassment had taken place when the offender walked over to the complainant’s house, pressed the bell repeatedly and then, when the complainant subsequently emerged, started scolding him in Hokkien and walked alongside his moving car. The District Judge found that an offence under s 13A(1)(a) had been made out and sentenced the offender to a fine of \$1,500. There is therefore some statutory protection against harassment that can be instituted not only by the Public Prosecutor, but by an individual who is the victim of such harassment.

19 Similarly, ss 503, 504 and 507 of the Penal Code<sup>36</sup> provide for criminal offences that would cover behaviour amounting to harassment. More specifically, s 509 may cover sexual harassment. Section 503 covers criminal intimidation, which is defined as:

**Criminal intimidation**

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Since s 506 provides that the punishment for criminal intimidation is imprisonment for a term of up to two years, or with fine, or both, this is covered by s 11(10) of the CPC and private prosecution is possible.

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33 Cap 68, 2012 Rev Ed.

34 For completeness, it should be noted that under s 13 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), the Public Prosecutor has the power, among others, to take over conduct of private prosecutions at any stage of the proceedings and continue or discontinue the prosecution.

35 [2011] SGDC 127.

36 Cap 224, 2008 Rev Ed.

For example, in *Lwee Kwi Ling Mary v Quek Chin Huat*,<sup>37</sup> there was a private prosecution by the respondent against the appellant for criminal intimidation caused by the appellant wielding a chopper while threatening to kill the respondent. Similarly, in *Cheng William v Loo Ngee Long Edmund*,<sup>38</sup> the respondent had been convicted under s 506 of the Penal Code for hurling vulgarities at the appellant and threatening to beat and kill him. The facts of these cases may conceivably constitute harassment, although the facts of the case just mentioned may be more appropriately covered by the tort of assault.

20 Section 504 likewise covers an offence that may amount to harassment. It provides that:

**Intentional insult with intent to provoke a breach of the peace**

504. Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

Again, because the offence is punishable by imprisonment not more than two years, private prosecutions are possible. Thus, in *Koh Young Lyndon v Masao Lim Zheng Xiong*,<sup>39</sup> the accused was charged under private prosecution for, *inter alia*, an offence under s 504 of the Penal Code for shouting insults at the complainant directed at his mother and also challenging him to a fight. The accused was convicted under s 504 of the Penal Code. Again, the facts of this case could cover harassment, but may not on a more general level. This is because s 504 requires there to be provocation, whereas in harassment cases, the reaction of the victim is more likely to be one of annoyance or disturbance, rather than provocation.

21 Section 507 provides for criminal intimidation by an anonymous communication. It provides that:

**Criminal intimidation by an anonymous communication**

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or by having taken precautions to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment for a term which may extend to 2 years, in addition to the punishment provided for the offence by section 506.

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37 [2003] 2 SLR(R) 145.

38 [2001] 2 SLR(R) 626.

39 [2010] SGDC 309.

As with the previous two sections, it is possible for a victim of such criminal intimidation to commence a private prosecution against the offender. However, in harassment cases, it is normally the case that the offender wants to be known and will not take actions to conceal his identity. The whole purpose of the harassment is established partly through making the identity of the offender known to the victim.

22 The final section under the Penal Code, s 509, may cover sexual harassment. It provides that:

**Word or gesture intended to insult the modesty of a woman**

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

An example of a private prosecution under this section is *Tay Poh Cheok v Yeo Koon Beng*.<sup>40</sup> This is a case between neighbours whose ill-feelings eventually gave rise to a private prosecution under s 509. The words uttered by the accused were all in Hokkien and were indeed insulting of a woman's modesty. The accused was convicted of all charges filed against him. The facts of this case could conceivably constitute harassment, specifically sexual harassment.

23 The Women's Charter<sup>41</sup> is another statute that affords some protection against harassment. It does so via a protection order that may be granted under s 65 where "family violence" has been committed or is likely to be committed against a family member and it is necessary for the protection of the family member. Section 66 provides for the provision of an expedited order where there is "imminent danger" of family violence. "Family violence" is in turn defined under s 64 to mean:

... the commission of any of the following acts:

- (a) wilfully or knowingly placing, or attempting to place, a family member in fear of hurt;
- (b) causing hurt to a family member by such act which is known or ought to have been known would result in hurt;
- (c) wrongfully confining or restraining a family member against his will; or
- (d) causing continual harassment with intent to cause or knowing that it is likely to cause anguish to a family member,

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40 [2005] SGMC 29.

41 Cap 353, 2009 Rev Ed.

but does not include any force lawfully used in self-defence, or by way of correction towards a child below 21 years of age ...

Thus, as presently defined, ss 64 and 65 of the Women's Charter do provide protection against harassment. However, this is limited to persons with a familial relationship as defined by the Women's Charter. Thus, its scope of protection is limited.

24 Finally, particular sections of the Computer Misuse and Cybersecurity Act<sup>42</sup> probably cover acts of cyber-harassment. These sections include s 3, which governs unauthorised access to computer material, and s 5, which governs unauthorised modification of computer material. It is important to note that under s 3(2), if any damage is caused, the maximum term of imprisonment increases to seven years, which brings this outside of the right of private prosecution. Likewise, s 5(1) prescribes a maximum term of imprisonment of five years in the case of a second or subsequent conviction. This likewise brings this outside of the private prosecution provisions.

25 The above is thus an overall summary of the legislation that provides some kind of protection against harassment in Singapore. As can be seen, there is no overarching statute that is targeted against harassment generally. Also, in terms of remedies, most of the statutes are criminal in nature and afford the victim indirect "compensation" in the form of punishing the offender. This is of course not compensation in the civil sense wherein the victim is compensated monetarily for harm emanating from the harassing conduct. Instead, what is meant here is perhaps the sense of vindication that the victim gets when he or she sees the harasser punished for the harassing conduct. Herein is perhaps the problem with such compensation: there is, unlike civil remedies, no *direct* compensation due to the victim. However, on this point, one may note that s 359 of the CPC empowers the court to make compensation orders to the victims of crimes:

**Order for payment of compensation**

359.—(1) The court before which a person is convicted of any offence shall, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative, in respect of his person, character or property by —

- (a) the offence or offences for which the sentence is passed; and
- (b) any offence that has been taken into consideration for the purposes of sentencing only.

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42 Cap 50A, 2007 Rev Ed.

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26 Elaborating on its predecessor provision, Chan Sek Keong CJ in *Public Prosecutor v AOB*<sup>43</sup> said that such orders are particularly suitable and appropriate for victims who may have no financial means or have other difficulties in commencing civil proceedings for damages against the offender.<sup>44</sup> However, his Honour also noted that in *R v Dalvy*<sup>45</sup> it was held that such orders are designed for cases where the amount of compensation can be readily and easily ascertained. It is unclear if and how compensation orders can be made with respect to statutory offences that amount to harassing conduct. In particular, it is unclear if judges will regard damages in such cases to be so uncertain as to fall outside of the scope of compensation orders.

27 Relatedly, there may be a deterrent effect that may stop the offender from committing further acts of harassment, but this is not usually in the form of a court order. The only instance of a court order statutorily provided for is under ss 64 and 65 (and s 66 in expedited form) of the Women's Charter, but that is premised on the presence of a familial relationship.

### III. Limitations of existing protection

28 So far we have seen that both the common law and statute afford some kind of protection against harassment in Singapore. Both can be instituted at the instance of the victim, and is not dependent on the Public Prosecutor commencing an action in prosecution of the offender.<sup>46</sup> Thus, there already exists real protection for harassment in Singapore. Yet, the existing protection is also subject to some limitations, which we will now consider.

#### A. Limitations of common law protection

##### (1) Uncertain ambit after *AXA Insurance*

29 The first and most pressing limitation of the common law protection is that its scope is now unclear following *AXA Insurance*. In that case, the plaintiff was an insurance company. It alleged that the defendant persistently sent e-mails and made phone calls to its employees and lawyers using vulgar and threatening language. It was in

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43 [2011] 2 SLR 793.

44 *Public Prosecutor v AOB* [2011] 2 SLR 793 at [23].

45 (1973) 58 Cr App R 333.

46 Although, as mentioned earlier, s 13 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that the Public Prosecutor may take over such proceedings and continue or discontinue the prosecution.

those circumstances that the plaintiff sued the defendant under the tort of harassment.

30 The High Court rejected the plaintiff's contention on three grounds. The first was that the tort of harassment was not pleaded by the plaintiff. Secondly, the court doubted whether the plaintiff could sue on behalf of its employees. Thirdly, and more substantively, the court was not convinced that there was a tort of harassment in Singapore. It held that since Parliament had criminalised harassment under ss 13A and 13B of the MOA, it should be up to Parliament to determine whether the law should govern annoyance caused by means of letters, e-mails and telephone messages, and whether the present public order law ought to be expanded to allow a claim for civil remedies.<sup>47</sup> The court was fundamentally concerned that the court, which is not subject to the process of accountability, should be restrained in the law-making process.<sup>48</sup> Since the tort of harassment was essentially a new tort, the court felt that its creation should be by Parliament and its process of deliberation and debate by members accountable to the public. The court was also concerned that it would be impossible to formulate a definition for the tort of harassment that is sufficiently certain.<sup>49</sup> If the courts were to proceed with a vague definition of harassment, the court was concerned that it would result in the creation of a "blockbuster tort", which might then be used by all manners of persons for apparently minor acts of nuisance.<sup>50</sup>

31 The result after *AXA Insurance* is that the status of the tort of harassment remains unclear in Singapore and awaits a final pronouncement by the Court of Appeal. However, on balance, at least from a legal perspective, there are sufficient grounds to regard there to be still a tort of harassment in Singapore.

32 First, the High Court cannot overrule itself. Thus, unless and until the Court of Appeal rules specifically on whether there is a tort of harassment, the present position is that there are two conflicting High Court decisions: *Malcomson*, which established the tort of harassment, and *AXA Insurance*, which doubted the correctness of *Malcomson*. However, as things stand, there is still a tort of harassment in Singapore because *AXA Insurance* cannot overrule *Malcomson*.

33 Secondly, it may well be that the Court of Appeal has already acknowledged indirectly that there is a tort of harassment in Singapore.

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47 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [8].

48 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [9].

49 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [10].

50 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [10].

In *Tee Yok Kiat v Pang Min Seng*<sup>51</sup> (“*Tee Yok Kiat*”), the plaintiff alleged that the defendant had extracted a sum of money from her through either intimidation or harassment. The Court of Appeal found for the plaintiff in the tort of intimidation, but went on to consider the plaintiff’s alternative claim in the tort of harassment. In doing so, the court noted that the “existence of the tort of harassment was extensively explored by the High Court in *Malcomson*”.<sup>52</sup> It further noted that “none of the parties questioned the existence of this tort in our law”.<sup>53</sup> It then went on to very comprehensively apply the definition of this tort in *Malcomson* to the current case, even to the extent of examining the differences between the tort of intimidation and the tort of harassment.<sup>54</sup> Although the High Court in *AXA Insurance* appeared to have treated the Court of Appeal’s treatment of the tort of harassment as *obiter* and hence not binding on it,<sup>55</sup> the truth is that the Court of Appeal in *Tee Yok Kiat* may have gone further. The Court of Appeal not only assumed the existence of the tort, but also went on to consider its differences with the tort of intimidation. It seems that the Court of Appeal had indirectly held that the tort of harassment is good law in Singapore. Were it not the case, it would not have assumed it to be good law, *and then* gone on to compare it with the tort of intimidation and then apply it to the facts.

34 Thirdly, even if Court of Appeal in *Tee Yok Kiat* did not indirectly acknowledge the existence of the tort of harassment in Singapore, it is respectfully submitted that the High Court in *AXA Insurance* adopted a far too restrictive view of the judicial law-making process. First of all, as acknowledged by the Court of Appeal, it is now widely accepted that the common law courts do make law.<sup>56</sup> Law-making is not the exclusive domain of Parliament. In fact, even Parliament has acknowledged the existence of the tort of harassment made at common law, thereby acknowledging the law-making powers possessed by courts. In his response speech at the Committee of Supply Debate on the Ministry of Home Affairs in 2004, Assoc Prof Ho Peng Kee acknowledged that the tort of harassment exists in Singapore. He had said this in the context of addressing protection against harassment in Singapore.<sup>57</sup> He regarded the tort of harassment as part of the

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51 [2013] SGCA 9.

52 *Tee Yok Kiat v Pang Min Seng* [2013] SGCA 9 at [39].

53 *Tee Yok Kiat v Pang Min Seng* [2013] SGCA 9 at [39].

54 *Tee Yok Kiat v Pang Min Seng* [2013] SGCA 9 at [39].

55 *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545 at [8] (although the High Court does not actually make this very clear).

56 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [241], rejecting the declaratory theory of the common law and acknowledging that judges do make law.

57 Ministry of Home Affairs, “Response Given by the Senior Minister of State for Home Affairs and Law, Associate Professor Ho Peng Kee at the Committee of Supply Debate on the Ministry of Home Affairs” (12 March 2004) at para 52.

protection against harassment, and which gave the victim civil remedies by way of an injunction or damages. Therefore, had Parliament thought that civil remedies for harassment were within its exclusive domain, it is conceivable that it would have acted to legislatively overrule *Malcomson*, especially since it had this knowledge since at least 2004. Yet, on the contrary, it regarded *Malcomson* as forming one of the many levels of protection against harassment in 2004.

35 More broadly, if one were to take the High Court's reasoning in *AXA Insurance* to its logical conclusion, then it would render the courts powerless in the face of changed social conditions. As mentioned, the court's primary concern was that it did not infringe on Parliament's domain since Parliament had considered harassment in the criminal sphere. This concern is borne out by the court's holding that, since Parliament had criminalised harassment under ss 13A and 13B of the MOA, it should be up to Parliament to determine whether the law should govern harassment in the civil sphere. This means that whenever Parliament has considered an issue, the courts will be powerless to rule on that issue. Parliament has obviously considered almost every conceivable issue in its legislative capacity; if the reasoning in *AXA Insurance* is correct, then it means that the courts cannot consider any issue because everything has been considered by Parliament. More specifically, Parliament has considered many issues in the criminal or civil sphere. However, the mere fact that it has done so does not automatically render common law principles inapplicable. For example, under ss 3(1) and 3(2) of the Residential Property Act<sup>58</sup> ("RPA"), except as provided for under the Act, any transfer of any residential property to a foreign person shall be null and void. Yet, the statute is silent on the status of the purchase money. In such a case, there is no doubt that common law principles should intervene to decide how the money is to be dealt with. It would certainly be unworkable if the courts were to say that the common law has no role to play in such circumstances.<sup>59</sup>

36 For all these reasons, it is respectfully submitted that *AXA Insurance* is wrong in so far as it purported that there is no more tort of harassment in Singapore. There is still a tort of harassment, but there is also no doubt that *AXA Insurance* has introduced some degree

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58 Cap 274, 2009 Rev Ed.

59 It is correct to say that the Residential Property Act (Cap 274, 2009 Rev Ed) ("RPA") example is slightly different from the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("MOA") example in so far as the latter statute concerns the relationship between criminal sanctions and tortious remedies. However, the broader point is that in both statutes Parliament has dealt with an aspect of the subject matter in question – does this mean that the courts are barred from dealing with other aspects concerning the same subject matter (status of various components of a contract to purchase residential property in the RPA; civil and criminal sanctions relating to harassment in the MOA).

of uncertainty into its status. Until the Court of Appeal rules on the correctness of *AXA Insurance*, it is an open question whether there is still a tort of harassment in Singapore, although there are strong reasons why there still is.

(2) *Limited scope in definition and damages*

37 Assuming that there is still a tort of harassment in Singapore, it is submitted that it suffers from two important shortcomings. The first is that it is limited in its scope. In *Malcomson*, Lee JC adopted a meaning of harassment that he regarded as “sufficiently encompass[ing] the facts of the present case in order to proceed with a consideration of the law”.<sup>60</sup> The problem with this qualification is that the definition may not be exhaustive. There is an obvious question as to whether there can be an exhaustive definition of “harassment”, but it may be possible to have a more precise definition. Twelve years on from *Malcomson*, the courts are still considering the precise meaning of “harassment”.

38 In *Yue Tock Him @ Yee Chok Him v Yee Ee Lim*<sup>61</sup> (“*Yue Tock Him*”), the District Court had to consider the meaning of “harassment” in the context of an application for a protection order under s 65(1) of the Women’s Charter. In considering the meaning of harassment, the District Judge undertook a comprehensive survey of the relevant case law. He referred to *Chee Siok Chin v Minister for Home Affairs*<sup>62</sup> (“*Chee Siok Chin*”), where V K Rajah J (as he then was) held that “harassment” in the context of ss 13A and 13B of the MOA was to be given a “common-sense meaning”.<sup>63</sup> In that case, Rajah J held as follows:

The fact that Parliament did not define the word ‘harassment’ in ss 13A and 13B of the MOA is a strong indication that this word, like the words ‘insult’ and ‘abusive’, is intended to be accorded a common-sense meaning. Harassment describes determined conduct which is directed at persons and is calculated to produce discomfort and/or unease and/or distress: see *Malcomson Nicholas Hugh Bertram v Mehta Naresh Kumar* [2001] 3 SLR(R) 379. Persistent or prolonged conduct that is directed at causing distress in those responsible for discharging their duties would amount to harassment for the purposes of the subject provisions. *The essence of harassment is not just repetitive conduct but includes prolonged or persistent or sustained conduct.* A persistent course of conduct for a sustained period of time can constitute harassment. [emphasis in original]

60 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [31].

61 [2011] SGDC 99.

62 [2006] 1 SLR(R) 582.

63 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [124].

Thus, as can be seen, Rajah J in *Chee Siok Chin* was satisfied to take Lee JC's definition of harassment in *Malcomson*. Even then, the learned judge was keen to point out that a "common-sense" meaning should be given to the word "harassment". This presumes that the law should develop in an incremental fashion. Indeed the lack of a precise definition is certainly not the fault of Lee JC in *Malcomson*; this is simply the product of a common law development: The common law, developing as it does through an incremental approach.

39 The problem with this, however, is that courts are not afforded a consistent approach in determining what amounts to harassment. That this is the case can be seen in the case law surveyed in *Yue Tock Him* (most of which concerned the application for a protection order). In *ZU v ZV*,<sup>64</sup> the District Judge found that three visits to the complainant's home did not constitute harassment, especially since the alleged offender was there to pick up some documents. In *Chua Li Choo v Teo Swee Theng*,<sup>65</sup> there was no harassment when the husband simply returned to the matrimonial home, and called the police at the request of the wife. Finally, in *AGX v AGW*,<sup>66</sup> the District Court found that the alleged harassment was in fact not harassment since it had taken place in the context of the matrimonial home and occurred through a strained relationship between the parties. All of these cases were decided without a legal definition of what amounts to "harassment". While there is something to be said about harassment being highly dependent on the context, it might help conduce towards consistency and certainty if the definition of "harassment" can be legislatively provided for. Of course, as we shall see below,<sup>67</sup> having a blanket definition of "harassment" can and will affect the use of this word in related statutes, such as the Women's Charter. Care must therefore be taken to craft a definition that takes these specific contexts into account, or to exclude such other statutes from the blanket definition.

40 The second shortcoming concerns the remedies available to a victim of harassment under the tort of harassment. The most obvious remedy is that of an injunction, which was indeed granted in *Malcomson*. However, it is unclear what damages may be awarded under the tort and, if so, how they are to be assessed. The plaintiff in *Malcomson* had asked for damages,<sup>68</sup> but the court did not seem to grant

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64 [2009] SGDC 99.

65 [2005] SGDC 241.

66 [2010] SGDC 27.

67 See paras 55–58 below.

68 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [3].

damages, although it left open the possibility of awarding such damages.<sup>69</sup>

(3) *Lack of signalling effect*

41 It may also not be as obvious to a victim of harassment that there is a tort of harassment in Singapore, and how to go about suing under that tort. The common law is not as visible as a statute that has as its title something that signals its protection from harassment. The layperson, as most victims of harassment are, may not be aware that there is a tort of harassment with which protection can be sought. Also, even if the layperson is aware of such a tort, he or she may not be aware of how to go about suing under it. Admittedly, this is a problem that also exists for private prosecutions or protection orders under the various statutes, but at least in those cases, there are additional statutes of procedure that prescribe the manner in which cases or applications should be commenced in a clear manner. This is all the more true for family cases, where there exists a lot of online assistance in the application process. The same is not true for a common law tort of harassment: the Rules of Court<sup>70</sup> – which prescribes the proper procedure for such cases – is probably too complicated for the layperson to understand. This, in addition to the general lack of awareness of the existence of a tort of harassment in the first place, is likely to be an impediment against its use for protection.

42 The lack of a signalling effect also reduces the deterrent effect such a law might otherwise have. The benefit of a law lies not only in a victim being able to make use of it after an incident, but also in preventing the incident in the first place by way of deterrence. Without widespread knowledge that there is even a tort of harassment, its deterrent effects, potential or otherwise, are lost. Thus, there is a lost chance that potential offenders may be deterred from committing harassment. The presence of statutory offences in a myriad of statutes does not help, especially where the relevant offences are embedded in general statutes that may lessen their deterrent effect.

(4) *Encourages false sense of coverage?*

43 Ultimately, the presence of a tort of harassment may give a false sense of coverage and discourage legislative action when it may be needed. Thus, as mentioned above, in his response speech at the Committee of Supply Debate on the Ministry of Home Affairs in 2004, Assoc Prof Ho acknowledged that the tort of harassment exists in

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69 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [55].

70 Cap 322, R 5, 2006 Rev Ed.

Singapore. He had said this in the context of addressing protection against harassment in Singapore.<sup>71</sup> Because of the perceived completeness of the protection against harassment, Assoc Prof Ho noted that there was perhaps no need for specific legislation against harassment. Indeed, even though the Law Reform Committee of the Singapore Academy of Law drafted a report on proposed legislation to curb stalking<sup>72</sup> (which is an instance of harassment), nothing was done in furtherance of this, perhaps in light of the prevailing view that the law was adequate to deal with this. This has continued to the present time in 2013, some ten years after the speech was made, and there is still no legislation against harassment generally in Singapore. Perhaps the time has indeed come for Parliament to consider the utility of a legislative solution.

## **B. Limitations of statutory protection**

### *(1) Statutory gaps*

44 When we consider the existing statutory protection against harassment, it is not difficult to conclude that while it exists, it is not the most effective for a few reasons. The first is the piecemeal nature of the statutory protection. This fact alone is not necessarily a weakness, but it does show that protection against harassment may be tied to an overarching criterion in the parent statute. For example, while it is possible to apply for a protection order under the Women's Charter, that can only take place in a family context, as is evident from the parent statute. Likewise, while the Computer Misuse and Cybersecurity Act may cover cyber-harassment, that protection is limited to the overarching subject matter of the parent statute, *viz*, that it must concern computers. Thus, where the harassment in question does not fall within this specific legislation, there is no statutory protection.

45 More prominently, where the harassment is not in a familial context, hence bringing it outside the Women's Charter (and the ability to apply for a protection order), the problem is that there is no injunctive relief. As Lee JC said in *Malcomson*, what victims of harassment really want is injunctive relief, not damages, so as to prevent the offender from continuing the harassing conduct.<sup>73</sup> The statutory provisions that protect against harassment mainly do so by criminalising

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71 Ministry of Home Affairs, "Response Given by the Senior Minister of State for Home Affairs and Law, Associate Professor at the Committee of Supply Debate on the Ministry of Home Affairs" (12 March 2004) at para 52.

72 Law Reform Committee, Singapore Academy of Law, *Report on Proposed Legislation to Curb Stalking* (2002). For a similar report, see The Law Reform Commission of Hong Kong, *Report on Stalking* (30 October 2000).

73 *Malcomson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 3 SLR(R) 379 at [55].

acts amounting to harassment. Thus, the only “remedy” to the victim is the successful prosecution of the offender. There are no damages and certainly no injunctive relief (unless the situation falls within the Women’s Charter). To some extent, being able to prosecute the offender (and successfully securing a conviction) may have a deterrent effect on future harassing conduct. However, without an injunction, the effect is not guaranteed. Indeed, having to privately prosecute an offender again may be a deterrent itself to the victim seeking relief.

(2) *Lack of signalling effect*

46 Further, there is also a lack of signalling effect. When the statutory protection is piecemeal protection as it is now, it is not so clear to the general public that there is, in fact, a protection they may seek against harassment. Indeed, the disparate nature of the statutory protection, spread across a host of statutes, may itself dull any signal that there is protection against harassment.

**C. *Limitations of normal court system***

47 Moreover, the common law and statutory protection suffer from an overarching problem: the limitations of the formal court system. Protection without an easy way of enforcement is not good protection. To that extent, both these types of protection require a victim to go through the formal court process before relief can be gotten. The common law tort of harassment requires the victim to file a claim against the offender, a process that may be daunting. Likewise, the ability to privately prosecute under the statutory protections is no relief if the procedure it takes to do so is too onerous for victims. Quite apart from looking at whether a legislative solution is desirable, a concomitant area to be looked at must be the instrument which such protection is given effect to. The formal court system may not be the best system to implement protection against harassment.

**IV. *Evaluating other Commonwealth solutions***

48 With the weaknesses of the various common law and statutory protection examined, let us now look at the experiences of other Commonwealth jurisdictions to ascertain if there is a better approach and, if so, what issues may be worthy of attention in going ahead with any solution.

**A. *Common law protection***

49 Expressly following *Malcomson*, Hong Kong very recently adopted common law protection against harassment by recognising a

tort of harassment. In *Lau Tat Wai v Yip Lai Kuen Joey*<sup>74</sup> (“*Lau Tat Wai*”), the defendant was upset at the plaintiff for wanting to end a relationship with her. As such, since August 2007, she pursued a course of action intended to cause annoyance to the plaintiff. Specifically, she sent malicious e-mails to the plaintiff, his friends and colleagues. She had hacked into the plaintiff’s e-mail account and retrieved his contact list. She also made numerous calls and sent messages to the plaintiff, as well as his friends and colleagues. In September 2008, the defendant hired a private investigator to keep track of the plaintiff’s movements, effectively stalking him and appearing at events uninvited. In January 2009, she made a false advertisement for employees on behalf of the plaintiff’s new employer, causing nuisance to the employer. She continued this course of conduct till 2012, including moving to the same block as the plaintiff and splashing paint on the plaintiff’s grandmother’s home.

50 Anthony Chan J had no difficulty finding for the plaintiff in the tort of intimidation. However, he did not find for the plaintiff in private nuisance and trespass to goods because the plaintiff did not have sufficient proprietary interest in the properties the harassing acts affected. This led him to consider whether it was time to recognise a tort of harassment in Hong Kong. He said:<sup>75</sup>

I am unable to see any reason why there should not be a tort of harassment to protect the people of Hong Kong who live in a small place and in a world where technological advances occur in leaps and bounds. It means that, eg, intrusion on privacy is difficult to prevent and it is hard for the victim to escape the harassment.

In Singapore, where the social conditions are not very different to those of Hong Kong, the tort of harassment has been recognised since 2001 (see *Malcomson Bertram & Anr v Naresh Mehta* [2001] 4 SLR 454 at 470H to 474A).

This case serves to demonstrate that the time must have come for Hong Kong to recognise this tort.

51 Accordingly, Chan J adopted the definition of “harassment” laid down in *Malcomson*.<sup>76</sup> However, he acknowledged the weaknesses of a protection against grounded in the common law when he said that:<sup>77</sup>

Second, it should be remembered that the development of common law is incremental, responding to the facts of the cases brought before the court. *Hopefully, a codified body of law to provide for a remedy against harassment will soon come into place, and that will avoid a*

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74 [2013] HKCFI 639.

75 *Lau Tat Wai v Yip Lai Kuen Joey* [2013] HKCFI 639 at [59]–[61].

76 *Lau Tat Wai v Yip Lai Kuen Joey* [2013] HKCFI 639 at [62].

77 *Lau Tat Wai v Yip Lai Kuen Joey* [2013] HKCFI 639 at [63].

*piecemeal development of the law which is inherent in the common law system.* [emphasis added]

52 This rightly acknowledges the weaknesses of such common law protection as explained above. Nonetheless, this case is also guidance for courts in deciding how much damages to award, an issue that was not dealt with in *Malcomson*. In agreeing with plaintiff's counsel that HK\$600,000 was the appropriate sum to award in terms of aggravated damages (to compensate the plaintiff for suffering in his feelings, dignity and pride, *etc*), Chan J compared the facts of the present case to another case, where the acts of humiliation lasted three days, and for which HK\$300,000 was awarded. Chan J also awarded exemplary damages in the sum of HK\$200,000 for the misery that she caused to the plaintiff and the fact that she broke a court undertaking previously entered into not to harass the plaintiff. Above all, the learned judge also ordered a wide-ranging injunction against the defendant.

53 The Hong Kong experience shows us that, where there is no blanket legislative protection, the courts may (rightly) recognise a tort of harassment to afford a civil remedy to victims of harassment. However, *Lau Tat Wai* also shows a proper recognition of the inherent limitations of the common law process. It may therefore be better to go with statutory protection of the wide-ranging kind.

### **B. Statutory protection**

54 Statutory protection against harassment exists in many Commonwealth jurisdictions. In formulating a legislative solution for protection against harassment, the different ways in which statutory protection is effected should be considered.

#### *(1) Piecemeal or blanket legislation?*

55 The first difference in statutory approaches across other Commonwealth jurisdictions is whether a piecemeal or blanket legislation should be used. "Piecemeal" legislation refers to statutory protection like the Singapore experience, where statutory protection is effected through different statutes, without a unifying statute against harassment generally. In contrast, there is a dedicated Protection from Harassment Act 1997<sup>78</sup> ("PHA (UK)") in the UK, whose aim is to make provisions to protect persons from harassment and similar conduct. While there may be other statutes that govern harassing behaviour in the UK (an important example being s111 of the Protection of Freedoms Act 2012,<sup>79</sup> which creates an offence of stalking as distinct

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78 c 40.

79 c 9 (UK).

from harassment), the existence of the PHA is a clear blanket statute that covers harassment generally.

56 Another example is the South African Protection from Harassment Act 2011<sup>80</sup> (“PHA (SA)”), which was enacted to (a) afford victims of harassment an effective remedy against such behaviour; and (b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act.

57 Assuming that the weaknesses of the common law protection render statutory protection a better solution, then the first issue to consider is whether to persist with the piecemeal approach that is currently at play, or to enact a new statute that is targeted at harassment specifically. Here, one of the weaknesses of a piecemeal legislative solution identified above is the lack of a signalling effect. Where statutory protection against harassment is scattered across a range of statutes, the signalling effect against harassment is lost or weakened. For this reason alone, it might be worthwhile considering a dedicated statute against harassment.

58 Having a general statute will mean having to determine a definition of “harassment” that will cover instances where that word now appears in the disparate legislation. The definition has to be sufficiently broad so that these other statutes will not be disturbed.

(2) *Range of coverage*

59 The next issue is to consider how a statute, if it is a dedicated one, is to cover harassment. There are two models. The first is exemplified by the PHA (UK), which does not define what harassment means. Rather, all that the statute says about harassment is via ss 1(1) and 1(2), which provide as follows:

**1 Prohibition of harassment.**

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

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80 Act 17 of 2011.

As can be seen, there is no explicit definition of what harassment means. The closest the PHA (UK) comes to defining harassment is via s 1(2), which lays down a reasonable person test, and s 7(2), which provides that “references to harassing a person include alarming the person or causing the person distress”.

60 In the UK Supreme Court case of *Hayes v Willoughby*,<sup>81</sup> the court acknowledged that the term “harassment” is not otherwise defined in the PHA (UK). However, Lord Sumption held that it is an “ordinary English word with a well understood meaning”, and that it is “a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated and does cause that person alarm, fear or distress”, citing *Thomas v News Group Newspaper Ltd*.<sup>82</sup> Similarly, in the English Court of Appeal case of *R v Curtis*,<sup>83</sup> Pill LJ held that:

[t]o harass as defined in the *Concise Oxford Dictionary*, is to ‘torment by subjecting to constant interference or intimidation’. The conduct must be unacceptable to a degree which would sustain criminal liability and also must be oppressive.

This general definition allows the PHA (UK) to be applied to many different forms of harassment, including repeated offensive publications in the newspaper,<sup>84</sup> victimisation in the workplace<sup>85</sup> and campaigns against the employees of an arms manufacturer by political protesters.<sup>86</sup>

61 In contrast, the second model is to have a very detailed definition of “harassment”. In the PHA (SA), harassment is the subject of a lengthy definition in s 1(1), as follows:

‘harassment’ means directly or indirectly engaging in conduct that the respondent knows or ought to know—

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

81 [2013] 1 WLR 935 at [1].

82 [2002] EMLR 78 at [30].

83 [2010] 1 WLR 2770 at 2777.

84 *Thomas v News Group Newspaper Ltd* [2002] EMLR 78.

85 *Majrowski v Guy’s and St Thomas’s NHS Trust* [2007] 1 AC 224.

86 *EDO Technology Ltd v Campaign to Smash EDO* [2005] EWHC 2490.

- (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
  - (ii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or
- (b) amounts to sexual harassment of the complainant or a related person.

Sexual harassment is in turn defined under the same section to mean:

‘sexual harassment’ means any—

- (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;
- (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;
- (c) implied or expressed promise of reward for complying with a sexually-oriented request; or
- (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.

62 One problem with such a detailed definition is that it is implied to be exhaustive. If so, it may not cover forms of harassment that may come in the future. It is, in other words, not future-proof. For example, the section that provides examples of “objects” that may be sent to the complainant does not include objects that may in the future arise or have, in fact, arisen, such as SMSes. However, there may be something to be said about having some kind of definition. Indeed, if the UK courts are correct that “harassment” is an ordinary English word capable of easy comprehension, then why not just say it in the statute? There can be little harm in formulating a broad definition in the statute that provides a common point of reference for the courts in application to specific cases. This overcomes one problem in the common law protection, where there is not a common starting point in defining harassment, *Malcomson* being ignored in family law cases. Also, having a definition of harassment also strengthens the signalling effect a general statute may have: if the public knows what harassment is, even in very general terms, then the statute may have greater effect in signalling Parliament’s intention to stamp out harassment.

63 Whatever the definition of harassment is, one important aspect of a general statute is the remedy provided. Here, the weakness of the piecemeal legislative solution – the lack of a civil remedy – can and should be remedied. For example, s 5 of the PHA (UK) provides for restraining orders against an offender. This can be easily provided for in a similar statute.

(3) *Requisite mental state or knowledge of offender*

64 Closely related to the definition of harassment is the requisite mental state or knowledge of the harasser. This clearly needs to be dealt with in any legislation as well. Both the PHA (UK) and PHA (SA) prescribe an objective standard, that is, harassment is established so long as the offender knows or ought to know that his or her conduct amounts to harassment.

65 It is submitted that this ought to be the appropriate standard to apply. Were it not, it would be too easy for the offender to argue that it was, in his own view, in the “best interests” of the victim to pursue the harassing conduct. In many of such cases, the offender may indeed come under the false impression that the harassing conduct is for the “benefit” of the victim. For example, in *Lau Tat Wai*, the offender, who was the ex-girlfriend of the victim, may have harassed the victim in the hope of reconciliation; in such a case, the offender may well argue that it was not actually clear to him or her that the allegedly harassing conduct amounted to harassment. An objective standard would resolve this problem.

(4) *Defences*

66 To avoid the overreach of legislation against harassment, there must be defences built into the legislation. In a sense, a definition of harassment that is founded on an objective standard is itself a “defence”, in so far as it gives the court the power to find that the conduct complained of was not reasonably harassment. Indeed, one of the “defences” recognised in s 1(3)(c) of the PHA (UK) is that the allegedly harassing conduct was, in the circumstances, “reasonable”:

(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—

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

67 The other defences in the PHA (UK) are safe harbour provisions that protect against harassing conduct pursued for the purpose of preventing or detecting crime, or pursued under any enactment or rule of law.

68 Some of the defences may need to be written into any legislation against harassment in Singapore. However, adopting an objective definition of harassment would provide the strongest “defence” of all. Other provisions would probably be “catch-all” safe harbour provisions designed to ensure compliance with other legislation.

(5) *Enforcement*

69 A perhaps more practically important consideration is the enforcement of such a statute. It is no use having a statute that cannot be easily used by the layperson. In this regard, the PHA (UK) does not prescribe a special procedure and the normal court system is used. However, as mentioned earlier, this runs the risk of denying to the layperson a remedy through a complicated implementation system. A better example may be the PHA (SA), which while still relying on the normal court system, provides via s 2(2) that the clerk of the court must inform the lay-complainant of his relief available under the Act. This eases the burden on the layperson who may not otherwise be familiar with his rights. This approach, however, may be met with the reasonable objection that it privileges harassment victims over other victims. Perhaps it will have to be a conscious policy decision why such victims are given this kind of advantage over other victims, inasmuch as claims for matrimonial matters are also provided non-legal assistance by the sidelines. This can be justified by the fact that there may be more harassment victims than victims of other offences. Indeed, even if such help is provided, it should not amount to legal advice but only assistance by the sidelines to enable the complainant to advance his or her case readily in the otherwise intimidating court system.

70 Perhaps this can go further with the establishment of a special tribunal to hear harassment matters. However, the threshold for application should be kept high so as not to encourage too many frivolous complaints.

## V. Conclusion

71 It has been argued in this article that the time has come to legislate against harassment in Singapore. While there is undoubtedly both common law and statutory protection against harassment, these solutions suffer from either uncertainty or incomplete remedies. A general blanket legislation addresses this problem and should be considered together with the various specific issues relating to such a statute that have been raised in this article.

## VI. Postscript

72 Prior to the printing of this article, the Minister for Law, K Shanmugam, introduced the Protection from Harassment Bill 2014 for First Reading in Parliament on 3 March 2014. It is hoped that this article will provide food for thought as the Bill is being debated, refined and eventually passed into law.

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