



LAW REFORM COMMISSION

Discussion Paper

“Incorporation of Offence of Moral Harassment in the Criminal Code”

[LRC_R&P 130, December 2018]

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- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) the Director of Public Prosecutions or his representative;
- (e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
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LAW REFORM COMMISSION

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Executive Summary

Discussion Paper “*Incorporation of Offence of Moral Harassment in the Criminal Code*”

[LRC_R&P 130, December 2018]

The Commission has reviewed, from a comparative perspective, laws in different jurisdictions pertaining to Moral Harassment and has explored reform proposals.

Moral harassment is not incriminated in our Criminal Code. It is only when the moral harassment is committed within work relations that it constitutes an offence, as per the Employment Rights Act.

The Law Reform Commission is thus of the view, so as to remedy this lacuna of the law, that it would be wise to insert, in our Criminal Code, a new Section 255 which would make it an offence to morally harass another person.

This new Section would contain three limbs. The first subsection would target repeated conduct which is designed to lead to or which leads to a deterioration of another person’s work conditions likely to violate his rights and his dignity, to damage his physical or mental health or compromise his career prospects. The second subsection would make it an offence to harass a person by repeated words or conduct which have as object or as effect the degradation of the living conditions resulting in impaired physical or mental health. The third and last subsection would incriminate harassment of one’s spouse or partner, present or past, by repeated words or conduct which are destined to lead to or have as effect the degradation of living conditions resulting in impaired physical or mental health.

INTRODUCTION

1. Moral harassment is undignified conduct by someone towards another person, going beyond the normal type of relationships between the two persons, whether at work or between relatives or otherwise, which is designed to lead or which leads to a deterioration of work or living conditions and is likely to result in impaired physical or mental health of that other person.
2. This type of harassment is not currently incriminated by our Criminal Code, only sexual harassment is.¹ Nevertheless, the Employment Rights Act criminalises harassing a person “sexually or otherwise”, which implies that in the area of labour relations, moral harassment is incriminated.
3. However, in the field other than work relations, the only remedy seems to be civil law, in particular under Article 1382 of the Civil Code, which would allow the person who is harassed morally to sue his harasser for civil fault.²
4. The Law Reform Commission has recommended, in its Interim Report on the Reform of the Criminal Code dated May 2016, to insert a new Section 255 to deal specifically with the issue of Moral harassment.

¹ According to Section 254 (1): Any person who, by abuse of the authority conferred upon him by his functions, harasses another person by means of orders, threats or constraints in order to obtain favours of a sexual nature, shall commit an offence and shall, on conviction, be liable to imprisonment for a term not exceeding 10 years and to a fine not exceeding 200,000 rupees.

² Cass. Soc. 21 juin 2006.

5. We shall first examine how moral harassment is dealt with under Mauritian law (A), before considering the approach adopted in other jurisdictions (B). Finally, we shall analyse reform proposals (C).

(A) MORAL HARASSMENT IN MAURITIAN LAW

6. According to the **Protection from Domestic Violence Act**, harassment is one form of violence which fall within the ambit of the said Act when it is committed by a person against his spouse, a child of his spouse or another person living under the same roof. The same Act provides that a Protection Order can be issued to prohibit the respondent spouse from “contacting, **harassing**, threatening or intimidating the aggrieved spouse” (S. 3 (5) (d)) or another person living under the same roof (S. 3A (5) (a) (i)).
7. According to **Section 46 (ga)** of the **Information and Communication Technologies Act [ICTA]**, any person who uses telecommunication equipment to send, deliver or show a message which is obscene, indecent, abusive, threatening, false or misleading, or is likely to cause distress or anxiety commits an offence. Moreover, **Section 46 (h)** of **ICTA** provides that any person who uses an information and communication service, including telecommunication service, - (i) for the transmission or reception of a message which is grossly offensive, or of an indecent, obscene or menacing character; or (ii) for the purpose of causing annoyance, inconvenience or needless anxiety to any person; (iii) for the transmission of a message which is of a nature

likely to endanger or compromise State defence, public safety or public order” commits an offence.³

8. In the Definition Section of the **Employment Rights Act**, harassment is defined as follows: “any unwanted conduct, verbal, non-verbal, visual, psychological or physical, based on age, disability, HIV status, domestic circumstances, sex, sexual orientation, race, colour, language, religion, political, trade union or other opinion or belief, national or social origin, association with a minority, birth or other status, that a reasonable person would have foreseen that a worker would be affected negatively in his dignity”.

According to **Section 54 (1) (a)** of the Act, no person shall harass, sexually or otherwise a worker, in the course of or as a result of his work.

By using the words “sexually or otherwise”, the Act clearly ambitions to target moral harassment.

9. The **Prevention of Corruption Act** makes it an offence for someone to harass a person who has made a disclosure under the Act that a person, public official, body corporate or public body is or has been involved in an act of corruption (S. 49 (7)).

10. Under the **Protection of Elderly Persons Act**, it is an offence to subject an elderly person to prolonged mental or emotional harassment (S. 11 (1) (b)).

³ The Judicial and Legal Provisions (No. 2) Act 2018 has brought several amendments to the ICTA. Thus, Section 5 (b) of the former provides that “in section 46 –

(i) in paragraph (ga), by deleting the words “or is likely to cause distress or anxiety” and replacing them by the words “which is likely to cause or causes annoyance, humiliation, inconvenience, distress or anxiety to any person”;

(ii) in paragraph (h), by repealing subparagraph (ii) and replacing it by the following subparagraph –

(ii) which is likely to cause or causes annoyance, humiliation, inconvenience, distress or anxiety to that person;

(iii) by inserting, after paragraph (h), the following new paragraph –

(ha) uses an information and communication service, including telecommunication service, to impersonate, or by any other means impersonates, another person which is likely to cause or causes annoyance, humiliation, inconvenience, distress or anxiety to that person”

(B) MORAL HARASSMENT IN OTHER COUNTRIES

(1) FRANCE

11. Introduced into the French Penal Code by the law n° 2002-73 of social modernisation of January 17, 2002, the offence of moral harassment aims at combating both unacceptable methods of managing human resources and the insidious means used by some employers to separate themselves from employees by avoiding the burdens of a dismissal procedure. The offence guarantees the right of workers to a decent working environment, both moral and material. It encapsulates the notion of "dignity" in labour law and echoes an evolution which has taken shape in recent decades "*dans le sens d'un recul constant de la perception du travail comme facteur d'indignité et d'un renforcement constant de son appréhension comme l'un des moyens pour l'homme de préserver et d'assurer cette dignité*".⁴ More profoundly, we can see in the offence the confirmation of a growing attention of the right to the health of workers, both physical and mental.⁵
12. The text was referred to the Constitutional Council at the time of its adoption on the grounds of lack of clarity of the criminal law and ignorance of the principle of legality, the authors of the referral limiting their criticism to only certain components of the offence. The Constitutional Council had, however, issued a decision confirming the legality of the provisions.⁶

⁴ P. Adam, La « dignité du salarié » et le droit du travail : Rev. dr. trav. mars 2014 et Rev. dr. trav. avr. 2014. – Th. Revet, La dignité de la personne humaine en droit du travail : in M.-L. Pavia et Th. Revet (dir.), La dignité de la personne humaine : Économica Études juridiques, 1999, p. 137.

⁵ N. Maggi-Germain, Travail et santé : le point de vue d'une juriste : Dr. soc. 2002, p. 485.

⁶ Cons. const., 12 janv. 2002, n° 2001-455 DC : Journal Officiel du 18 Janvier 2002.

➤ MATERIAL ELEMENT OF THE OFFENCE

- *Art. 222-33-2*

13. Article 222-33-2 of the Penal Code refers to the harassment of others by repeated conduct which is designed to or which leads to a deterioration of their work conditions likely to violate their rights and dignity, to damage their physical or mental health or compromise their career prospects.

14. Moral harassment is thus constituted by repeated words or behaviour leading to or simply likely to lead to a deterioration of the working conditions of the victim, this deterioration must itself be liable to harm him.

1° Relationship between perpetrator and victim

15. Even if the text does not specify it and does not make it, in particular, a prerequisite for the crime, moral harassment is primarily concerned with the professional environment. Anyone engaged in an employment relationship can be both author and victim of moral harassment.⁷

16. It is not necessary for the perpetrator and victim of the offence to be bound by a hierarchical or authoritative relationship.⁸ As a result, both an employer and an employee may be the perpetrators of moral harassment, and conversely, both may be victims of moral harassment. In addition to the moral harassment of an employer or a director with

⁷ JO Sénat CR, 25 avr. 2001, p. 1433 ; JO Sénat CR, 3 mai 2001, p. 1653.

⁸ CES, avis, 10-11 avr. 2001.

respect to one of his subordinates, which can be described as “downward”, there is thus “upward” moral harassment or horizontal moral harassment, that is to say between colleagues.⁹

2° Typology of prohibited conduct

17. The text does not indicate which “words or conduct” may constitute harassment, the only clarification provided by the legislator in this regard being that such actions must be “repeated”.

18. According to French doctrine, “*différents comportements sont considérés par la jurisprudence comme constitutifs de harcèlement moral. Il est rare qu’un seul d’entre eux soit retenu à l’appui de cette qualification : la plupart du temps, ils se combinent en un ensemble, au sein duquel il est possible de dégager six grandes catégories de comportements prohibés : sanctions ou menaces de sanctions injustifiées ou non suivies d’effet, refus d’aménager les horaires du salarié d’une façon qui lui convienne, ingérences dans la vie personnelle du salarié, surveillance tatillonne, affectation du salarié à des tâches ne correspondant pas à ses qualifications, insultes, menaces ou critiques adressées à son endroit, voire brimade.*”¹⁰

(a) Threats of unjustified sanctions

19. A defendant, an administrative assistant who became a quality manager, has been accused of having harassed several employees, in particular by daily repeated insults,

⁹ CA Douai, 6e ch. corr., 24 janv. 2006, n° 05/00648-A, D. : JurisData n° 2006-301649 ; JCP E 2007, note C. Duvert.

¹⁰ C. Duvert, *JCP Art. 222-33-2 à 222-33-2-2, Fasc. 20, HARCÈLEMENT MORAL*, 5 sept. 2018, n° 16.

cries, orders and remarks uttered while screaming, contradictory orders, threats, false accusations, to punish them for faults they did not commit, by intruding into their private lives, by creating a climate of perpetual tension and guilt, and by manipulations aimed at causing them to lose their professional balance, the court adding that all these elements were an **excessive authoritarianism** or even pathological on the part of the defendant, **outside the exercise of the normal power** of a management assistant, even though she was responsible for organising the work of the staff and to check the quality of the work.¹¹

(b) Refusal to adjust the employee’s working hours in a manner that suits him

20. An accused who, breaking free from the rules governing employment contracts and the organisation of working time, **created a context of permanent insecurity** for employees and exerted **unwarranted pressure** on them was held guilty of the offence of harassment. The objectives allocated to heads of services were disproportionate and could not be achieved for lack of means. Employees were regularly forced to work unpaid overtime. The staff was subjected to various pressures on the part of the accused, including the installation of a video-surveillance camera, aggression towards the staff representatives and vexatious acts towards certain employees in order to obtain their resignation. The court held that the difficult context in which the defendant was hired because of his managerial skills in the hotel industry, in order to redress a deficit financial situation and restructure the services, could not justify the actions of the latter.¹²

¹¹ CA Paris, 12 févr. 2013, n° 1, 12/01565 : JurisData n° 2013-009874.

¹² CA Pau, 23 mai 2013, n° 12/00121, 392/2013 : JurisData n° 2013-012381

(c) Interferences with the employee’s personal life

21. It was also considered moral harassment the fact of “**prohibiting an employee from being sick**” and “advising her to stop childbearing”,¹³ or that of “imposing an intolerable working conditions on an employee” by observing her at all times, by criticising her in an unfounded manner, both because of her professional behaviour and because of her private life.¹⁴

(d) Petty supervision

22. **Whistling employees** to call them, forbid them to leave their office to go to the toilet, change their work schedules by cutting the day into several niches to force them to make commutes between home and the workplace in order to force them to resign, and to forbid them to communicate with each other during working hours constitutes moral harassment.¹⁵

(e) Assignment to the employee of tasks which do not correspond to his qualifications

23. The fact of entrusting to an employee only “poorly defined subordinate tasks”, or to entrust only difficult tasks, the fact of confining in a prolonged and systematic way an

¹³ CA Grenoble, 3 mai 1999, ch. soc., SA Adecco c/ Savelli

¹⁴ CA Nancy, 13 nov. 2000, ch. soc., n° 99/02834, Christophe c/ SA Vilroc : JurisData n° 2000-129428 ; RJS 2/2001, n° 163

¹⁵ CA Montpellier, ch. correc. 3, 16 oct. 2008 : JurisData n° 2008-374694.

employee hired as an ambulance attendant, whereas this function was only an accessory to the main function, may constitute moral harassment.¹⁶

(f) Insults, threats or criticisms

24. Constitutes moral harassment the conduct of an employer who only speaks to his employees to make **insulting or foul remarks** in the presence of customers, who throws objects in their direction to punish them and who does communicate his instructions only through a sign inside the store, designed to be visible to customers, which also contained reproaches and foul words.¹⁷

3° Behaviour not constitutive of moral harassment

25. The only real limit to the qualification of repeated acts constituting moral harassment is the **exercise by the employer of his power of direction and control**. Indeed, the relationship of subordination that characterises the very existence of a working relationship implies that the employee agrees to receiving orders. **The employer can, as a consequence, control the activity of the employees and take disciplinary measures if necessary**. Therefore, so long as the acts remain **within the limits of the employer’s power**, moral harassment cannot be characterised. Many decisions of acquittal thus refer more or less explicitly to the legitimacy of the power of direction and control by the employer.¹⁸

¹⁶ CA Nancy, 30 janv. 2002, ch. soc., n° 01/02517, Lecossois c/ SA Mathieu Zitvogel : JurisData n° 2002-177085.

¹⁷ CA Angers, 20 sept. 2005 : Bull. inf. C. cass. n° 655, 15 janv. 2007, n° 127.

¹⁸ Crim. 14 févr. 2012, n° 11-84.697.

26. Courts, when deciding a charge of moral harassment, emphasise the fact that the behaviour of the accused “*a dépassé l’usage de l’autorité que lui conféraient ses fonctions*”¹⁹ or “*dépasse le pouvoir reconnu au chef d’entreprise dans l’exercice de ses fonctions*”.²⁰

- *Art. 222-33-2-1*

27. Article 222-33-2-1 of the French Penal Code makes it an offence to harass one’s spouse or partner by repeated words or conduct which are destined to lead to or have as effect the degradation of living conditions resulting in impaired physical or mental health. The offence is also constituted when committed by a former spouse or former partner of the victim.

28. The offence provided for in Article 222-33-2-1 of the Penal Code is only constituted if the words or conduct to which it refers are repeated.²¹

- *Art. 222-33-2-2*

29. Article 222-33-2-2 provides that to harass a person by repeated words or conduct which have as object or as effect the degradation of the living conditions resulting in impaired physical or mental health shall be punished by imprisonment for a term not exceeding one year and a fine not exceeding 15 000 € when these acts have caused a total incapacity for work below or equal to eight days or resulted in no disability.

¹⁹ Crim. 19 juin 2012, n° 11-87.963

²⁰ Crim. 14 mai 2013, n° 12-81.743

²¹ Crim. 9 mai 2018, n° 17-83.623

30. This provision allows for moral harassment to be constituted as an offence notwithstanding the fact that the words or conduct are not expressed within work relations.

➤ MORAL ELEMENT OF THE OFFENCE OF ARTICLES 222-33-2 TO 222-33-2-2

31. Concerning the moral element of this offence, there is no need to establish that the perpetrator intended the damage which occurred to the victim as a result of his actions.²² In a first hypothesis, **the harasser has effectively degraded the conditions of work or life of his victim**. The intent is then reduced to its simplest component, and it **suffices to establish that the agent had the conscience and the will to violate the criminal law**, that is to say the knowledge of the likelihood that his conduct could undermine the physical or psychic integrity of his victim. In practice, **the evidence is derived from the facts of the case**. In the majority of cases the victims only initiate criminal proceedings when they have suffered a deterioration of working conditions. The demonstration of the reality of the acts of moral harassment and their **negative effect on working or living conditions is enough to establish the guilty mind required by law**.

32. There is another hypothesis, certainly less frequent but just as conceivable, **where the harasser has simply adopted a behaviour** whose object is, and not the effect of, the degrading of the working or living conditions of the employee. Then, it must be **demonstrated that the repeated acts were animated by an intention strived towards a particular goal, that to degrade the conditions of work or of life**. Some decisions of

²² P. Conte, *Élément moral*, Droit pénal n° 4, Avril 2017, comm. 52.

acquittal are based on the fact that it has not been shown that the actions of the defendant were carried out “*dans l’intention de nuire aux deux plaignantes ou de dégrader leurs conditions de travail*”.²³

33. Attempted harassment is not incriminated.²⁴

²³ Crim. 12 mars 2013, no 12-82.161.

²⁴ C. Duvert, *op. cit.*, n° 41.

(2) AUSTRALIA

34. State and territory laws criminalise stalking. These offences often target behaviour amounting to harassment.²⁵ For example, under the **Crimes Act 1958 (Vic)** s 21A, a person (the offender) stalks another person (the victim) if the offender **engages in a course of conduct (which includes any of a wide range of types of conduct) with the intention of causing physical or mental harm to the victim**, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person.
35. There are also state and territory offences that incriminate **harassment at work, in family or domestic contexts, and in schools and other educational institutions**. For example, the **Crimes Act 1900 (NSW)** s 60E provides that it is an offence to “assault, stalk, harass or intimidate any school student or member of staff of a school, while the student or member of staff is attending a school”.
36. Section 8(1) of the **Crime (Domestic and Personal Violence) Act 2007 (NSW)** defines stalking as “the following of a person about or the watching or frequenting of the vicinity of, or an approach to a person’s place of residence, business or work or any place that a person frequents for the purposes of any activity”. This Act is confined to persons experiencing domestic or family violence.

²⁵ Criminal Code (Cth) s 189; Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13; Criminal Code Act 1899 (Qld) s 395B; Criminal Law Consolidation Act 1935 (SA) s 19AA; Criminal Code Act 1924 (Tas) s 192; Crimes Act 1958 (Vic) s 21A; Criminal Code Act Compilation Act 1913 (WA) s 338D; Crimes Act 1900 (ACT) s 35.

(3) UK

37. According to Section 1 of the **Protection from Harassment Act 1997**,²⁶ 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. A person is taken to know that conduct is harassment if “a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other”.
38. The **Protection of Freedoms Act 2012** inserted the offence of stalking in relation to this section and is defined to include things like monitoring a person online, contacting a person, loitering in a public or private place, interfering with property or spying/watching a person.
39. Section 7(3) of the Act provides that a course of conduct must **involve conduct on at least two occasions**. In *Wainwright v. Home Office* (2003),²⁷ Lord Hoffmann said “The requirement of a course of conduct shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident.”
40. Section 32 of the **Crime and Disorder Act 1998** provides that where a person commits an offence under section 2 or 4 of the Protection from Harassment Act which is “racially or religiously aggravated” within the meaning of section 28 of the Crime and Disorder Act 1998 (as amended by the Anti-terrorism, Crime and Security Act 2001) he is guilty of an offence triable either way.

²⁶ <https://www.legislation.gov.uk/ukpga/1997/40/contents>

²⁷ <https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/wain-1.htm>

41. **Employers have vicarious liability for harassment by their employees** under section 3 of the Protection from Harassment Act 1997. In *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34,²⁸ Lord Nicholls said: “Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors. They are summarized in Professor Fleming's *Law of Torts*, 9th ed, (1998) pages 409-410. Stated shortly, these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment.”

²⁸ <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060712/majro-1.htm>

(4) SINGAPORE

42. The **Protection from Harassment Act 2014**²⁹ is a statute of the Parliament of Singapore that criminalises harassment, stalking, and other anti-social behaviour. The law is designed specifically to make acts of cyberbullying and online harassment a criminal offence.
43. The Act abolished the common law tort of harassment, replaced by its statutory provisions. It also replaced sections 13A to 13D of the Miscellaneous Offences (Public Order and Nuisance) Act, and expanded the scope to cover acts conducted online and increased the penalties to include imprisonment sentences. The Act is intended to cover both intentional and unintentional harassment, and has extra-territorial jurisdiction for certain offences which include online acts by the defendant if the complainant was in Singapore at the time of the offence and the defendant knew or should have known of that fact. The new law is also designed to be more accessible for the public than previous laws: for instance, provisions are now made for victims to apply a protection order against an offender, and in more extreme cases a separate expedited protection order can be applied for and issued immediately.
44. A new offence of “unlawful stalking” was introduced under this Act. Furthermore, anyone who abuses any public servant and public service worker, including staff from the public transport industry, can be prosecuted under this Act and sentenced to imprisonment for up to a year and a fine.

²⁹ <https://sso.agc.gov.sg/Act-Rev/PHA2014/>

45. Within two months of the commencement of the Act, 79 reports were filed for harassment and 13 protection orders applied for. The first expedited protection order was reportedly issued in January 2015 to delete captions from two videos uploaded by the defendant.³⁰

³⁰ Abu Baker, Jalelah (15 January 2015). "Protection from Harassment Act: 5 things you need to know about the landmark legislation". Straits Times. Retrieved 7 April 2015.

(5) NEW ZEALAND

46. According to Section 8 of the **Harassment Act**,³¹

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

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

(i) that other person’s safety; or

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

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

(i) that other person’s safety; or

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

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

47. Section 3 of the Harassment Act provides that:

“(1) For the purposes of this Act, a person harasses another person if he or she engages **in a pattern of behaviour that is directed against that other person**, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

(2) To avoid any doubt,—

(a) the specified acts required for the purposes of subsection (1) may be the same type of specified act on each separate occasion, or different types of specified acts:

(b) the specified acts need not be done to the same person on each separate occasion, as long as the pattern of behaviour is directed against the same person.

³¹ <http://www.legislation.govt.nz/act/public/1997/0092/latest/DLM417078.html>

(3) For the purposes of this Act, a person also harasses another person if—

(a) he or she engages in a pattern of behaviour that is directed against that other person;
and

(b) that pattern of behaviour includes doing any specified act to the other person that is one continuing act carried out over any period.

(4) For the purposes of subsection (3), continuing act includes a specified act done on any one occasion that continues to have effect over a protracted period (for example, where offensive material about a person is placed in any electronic media and remains there for a protracted period)."

48. Section 4 of the Harassment Act gives the following definition of "Specified Acts":

"(1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:

(a) watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:

(b) following, stopping, or accosting that person:

(c) entering, or interfering with, property in that person's possession:

(d) making contact with that person (whether by telephone, correspondence, electronic communication, or in any other way):

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

(ea) giving offensive material to a person by placing the material in any electronic media where it is likely that it will be seen by, or brought to the attention of, that person:

(f) acting in any other way—

(i) that causes that person (person A) to fear for his or her safety; and

(ii) that would cause a reasonable person in person A’s particular circumstances to fear for his or her safety.

(2) To avoid any doubt, subsection (1)(f) includes the situation where—

(a) a person acts in a particular way; and

(b) the act is done in relation to a person (person B) in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person (person A); and

(c) acting in that way—

(i) causes person A to fear for his or her safety; and

(ii) would cause a reasonable person in person A’s particular circumstances to fear for his or her safety,—

whether or not acting in that way causes or is likely to cause person B to fear for person B’s safety.

(3) Subsection (2) does not limit the generality of subsection (1)(f).”

(6) SOUTH AFRICA

49. Under the **Protection from Harassment Act**,³² harassment includes **both direct and indirect conduct that either causes harm or that inspires the person complaining of harassment ("the complainant") to reasonably believe that harm may be caused.** Such conduct includes following, watching, pursuing or accosting of the complainant or someone in a close relationship with the complainant such as a spouse or family member.
50. Harassment also includes contact through verbal communication aimed at the complainant. The Act also recognises electronic communication that causes harm or makes the complainant feel in danger of being harmed as harassment.
51. The Act mentions several forms of written communication as capable of being contact for the purposes of harassment, such as letters, packages and e-mails. It also includes sexual harassment, which means "any unwelcome sexual attention from a person who knows or who reasonably knows that such attention is unwelcome". Such sexual attention includes unwelcome behaviour, suggestions, messages or remarks of a sexual nature that have the effect of "offending, intimidating or humiliating" the complainant or a person who has a close relationship with the complainant.
52. The Protection from Harassment Act (Act 17 of 2011) came into effect on 27th April 2013 to address harassment and stalking behaviours which violate Constitutional provisions of right to privacy and dignity of individual persons.

³² <http://www.justice.gov.za/legislation/acts/2011-017.pdf>

53. The Act provides for inexpensive civil remedy to protect a person from behaviour which may not constitute a crime but may impact negatively on various rights of an individual.
54. The Act was promoted because the existing civil law framework and criminal law framework do not provide adequate recourse to victims of harassment who are not in a domestic relationship (the Domestic Violence Act, 1998 (Act 116 of 1998).
55. The Act aims to provide a remedy in the form of a protection which would prohibit a person from harassing another person. If the harasser breaches a protection order he or she commits an offence which is punishable with a fine or a period of imprisonment. It aims to address harassing behaviour by means of a court order, in terms of which the harasser is prohibited from continuing with the act of harassment.
56. Any person who contravenes such an order is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years. The Act provides recourse for victims of harassment and stalking in both domestic non-domestic relationships. It also broadens the categories of harassment to include bullying at schools and cyber-stalking.

(7) CANADA

57. The criminal harassment provisions of the Criminal Code of Canada came into force on August 1, 1993. The main intention of the new **section 264** was to help protect women in Canada from physical attacks and harassment. The hope was that perpetrators would either be deterred by the threat of criminal prosecution, or be incarcerated or otherwise prevented from harassing or attacking their victims. The legislation is also available as a potential tool against harassment such as the stalking of children, harassment practised by some members of politically motivated groups, or harassment related to business or personal matters not linked to violence against women.
58. Canadian law makes criminal harassment an offence punishable by summary conviction or by indictment. This offence currently carries a maximum penalty of ten years in prison. Section 264. (1)³³ of the Criminal Code specifies:
- “(1) Criminal harassment - No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonable, in all circumstances, to fear for their safety or the safety of anyone known to them.”
59. Section 264 (2) provides that:
- “(2) The conduct mentioned in subsection (1) consists of
- (a) repeatedly **following from place to place** the other person or anyone known to them;
 - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

³³ <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-61.html#h-83>

(c) **besetting or watching the dwelling-house**, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or

(d) **engaging in threatening conduct** directed at the other person or any member of their family.”

60. There is **no requirement to prove the *mens rea* of the offence where it can be inferred from the facts.**³⁴ Safety extends beyond simply fear of physical harm but also includes psychological and emotional security.³⁵

61. In *R. v. Sillipp* (1995), 99 C.C.C. (3d) 394 (Alta. Q.B.), the accused argued that section 264 was of no force and effect, in that it was unconstitutional for vagueness, contrary to section 7 of the Charter, and that it infringed the right to freedom of expression under section 2(b) of the Charter. In dealing with the section 7 argument, Mr. Justice Murray outlined what the Crown must prove:

“It must prove that the accused person intended to do a s-s (2) act, that he did it, that he did so without lawful authority, that another person was harassed by those acts, that he knew that the person was harassed by such conduct on his part or he was reckless as to whether that person was so harassed, that such behaviour caused that other person to fear for his or her safety, and that in all of the circumstances that person's fear was reasonable. I agree with the decisions of the Ontario Provincial Court in R. v. Lafreniere (1994) 22 W.C.B. (2d) 519 . . . and R. v. Baszczyński (1994), 24 W.C.B. (2d) 153 . . . It is not necessary that the Crown prove that he knew that the "other person" feared for his or her safety which would be difficult to do (at 403).”

³⁴ *R. v. Holmes* [2008] O.J. No. 3415 (C.A.)

³⁵ *R. v. Gowing*, [1994] O.J. No. 2743 (Gen.Div.) at para 5 (aff'd on appeal *Gowing*, [1998] O.J. No. 90).

62. The Crown must establish the complainant's fear was, in all the circumstances, reasonable.³⁶

³⁶ R. v. Kosikar, 1999 CanLII 3775 (ON CA), 138 C.C.C. (3d) 217 (Ont. C.A.) at para. 19.

(8) BELGIUM

63. The first form of harassment being incriminated was telephone harassment in 1991. It was not until 1998 that the legislator introduced in the Penal Code a new **Article 442bis** which punishes moral harassment in the broad sense. Specific provision was inserted in the Act of 4 August 1996 on the welfare of workers in order to combat moral or sexual harassment at work.
64. According to article 442bis of the Belgium Penal Code, anyone who has harassed a person who knew or ought to have known that by so doing he would seriously **affect the peace of the person concerned by such behaviour** shall be punished by a term of imprisonment of fifteen days to two years and a fine of fifty euros to three hundred euros, or one of those penalties only. If the harassment is committed to the detriment of a person whose situation of vulnerability due to age, pregnancy, illness, infirmity or physical or mental disability was apparent or known to the perpetrator, the minimum penalty provided will be doubled.
65. Article 442ter of the Penal Code states that when harassment is motivated by hatred, contempt or hostility towards a person because of his alleged race, skin colour, descent, national or ethnic origin, nationality, sex, sexual orientation, marital status, birth, age, wealth, religious or philosophical belief, current state of health or future disability, language, political belief, trade union belief, physical or genetic characteristics or social background, the minimum penalty may also be doubled.
66. As can be seen, Article 442bis of the Penal Code does not provide a definition of moral harassment. The legislature thus intended to avoid overly restricting the scope of the law

so that it could be applied in a broad manner while allowing for the evolution of the concept.³⁷ The Constitutional Court considered, on several occasions, that **the absence of a legal definition did not undermine the principle of the legality of incriminations and penalties.**³⁸

67. It is apparent from this provision that the offence of harassment is composed of three material elements, namely **a harassing behaviour, a serious breach of the peace of the harassed person and a causal link between the harassment and the feeling of being thus assaulted**, as well as a moral element.³⁹

68. **The behaviour of the author does not have to be illegal as such.** It is because the act is not approved by the person who undergoes it that it becomes illegal.⁴⁰ In addition, this behaviour can be realized both by a direct contact of the agent with the victim, and at a distance.⁴¹

69. The Constitutional Court considered that the harassing behaviour must necessarily consist in **incessant and repetitive acts.**⁴² This interpretation has been confirmed by the Court of Cassation in several successive judgments.⁴³ It follows that Article 442bis of the Criminal Code cannot be used to incriminate isolated acts.

³⁷ Doc. parl., Ch. repr., sess. ord. 1996-1997, n° 1046/8, p. 8.

³⁸ C. Const., 10 mai 2006, arrêt n° 98/2006 ; C. Const., 14 juin 2006, arrêt n° 98/2006 ; C. Const., 5 mai 2009, arrêt 76/2009.

³⁹ Cass., 21 février 2007, J.T., 2007, p. 262 ; R.D.P.C., 2007, p. 529.

⁴⁰ A. De Nauw, *Initiation au droit pénal spécial*, Kluwer, 2008, p. 348 ; Anvers, 28 avril 2004, R.W., 2005-2006, p. 1020.

⁴¹ J.-P. Colin, « Le harcèlement », in *Droit pénal et Procédure pénale*, Malines, Kluwer, 2011, p. 126.

⁴² C. Const., 10 mai 2006, arrêt n° 98/2006.

⁴³ Cass., 21 février 2007, J.T., 2007, p. 262 ; Cass., 24 novembre 2009, RG n° P.09.1060.N.

70. It is not required, however, that these repeated acts be all of the same nature: **harassment can take the form of a succession of different behaviours.**

71. Harassment must necessarily include one or more specific persons. The legislator thus wanted to exclude from the scope of the provision acts that may be perceived as disturbing but which do not have a predetermined addressee, such as, for example, begging in public.⁴⁴ However, it is different if a beggar targets a specific person rather than someone else, for example if he waits regularly at the exit of his home or place of work.⁴⁵

72. In addition, the Constitutional Court specified that the person concerned must necessarily be a natural person, to the exclusion of a legal person. In fact, the Court considered that harassment is a behaviour that disturbs the person's emotional tranquillity and causes him to feel troubled. To the extent that such resentment is inconceivable on the part of a legal person who has neither heart nor affect, the Court considered that it was not discriminatory that Article 442bis of the Penal Code referred only to the harassment of a natural person.⁴⁶

73. Moral harassment in Belgian law requires a specific intentional element: **the perpetrator must have acted when he knew or ought to have known that he would seriously affect the tranquillity of the victim.** Only voluntary harassment is therefore repressed. The legislator did indeed want to exclude the possibility of criminalising involuntary

⁴⁴ J.-P. Colin, « Le harcèlement », in *Droit pénal et Procédure pénale*, Malines, Kluwer, 2011p. 125; Doc. parl., Ch. repr., sess. ord. 1996-1997, n° 1046/8, p. 9.

⁴⁵ C. Meunier, « La répression du harcèlement », R.P.D.C., 1999, p. 745.

⁴⁶ C. Const., 10 mai 2007, arrêt 75/2007.

harassment.⁴⁷ It is not, however, required that the harasser have intended to harm the victim.

Therefore, two levels of intention must be distinguished. First, the perpetrator must have made the material harassment act consciously and voluntarily, for example, that he intentionally sent incessant letters or made phone calls to a person. Secondly, he must have known or ought to have known that his action was such as to disturb the serenity of the victim.⁴⁸

74. It is therefore sufficient for the judge to consider that the author should have been aware of the harmful consequences for the victim of the behaviour he voluntarily adopted, even if that was not his intention. To assess whether the harasser should know that it affects the peace of the person, the judge can base himself on various elements: private or professional context in which the acts occurred⁴⁹ any protests by the victim⁵⁰, the information or third party warnings, the deterioration of the victim's state of health, the educational level of the perpetrator, etc. On the other hand, the motives of the harasser do not matter.

⁴⁷ M.-A. Beernaert & co, *Les infractions (volume 2) Les infractions contre les personnes*, Bruxelles, Larcier, 2011, p. 735.

⁴⁸ P. Thevissen, « Harcèlement », in *Postal Memorialis. Lexique du droit pénal et des lois spéciales*, Kluwer, Waterloo, 2012, p. 463.

⁴⁹ Corr. Neufchâteau, 9 février 2004, *Journ. Proc.*, 2004, n° 475, p. 27.

⁵⁰ Corr. Bruxelles, 8 décembre 2004, *Chron. D.S.*, 2005, p. 463.

(C) PROPOSALS FOR REFORM

75. As has been said, moral harassment does not currently exist in our criminal law. The Law Reform Commission proposed in the “Interim Report on Reform of Criminal Code” [May 2016] to address this gap by introducing a new Section 255⁵¹ in the Criminal Code.
76. This new Section would provide, in its subsection (1), that harassing another person by **repeated conduct** which is **designed to lead or which leads to a deterioration of his work conditions** likely to violate his rights and his dignity, to damage his physical or mental health or **compromise his career prospects**, shall be punished by imprisonment for a term not exceeding two years and a fine not exceeding 100,000 rupees.
77. Subsection (2) would read as follows: “To harass a person by **repeated words or conduct** which have as object or as effect the **degradation of the living conditions** resulting in impaired physical or mental health shall be punished by imprisonment for a term not exceeding one year and a fine not exceeding 50,000 rupees when these acts have caused a total incapacity for work below or equal to eight days or resulted in no disability.”
78. The facts mentioned in the first subsection shall be punished by imprisonment for a term not exceeding two years and a fine not exceeding 100,000 rupees:
- 1° When they caused a total inability to work of more than eight days;
 - 2° When committed against a minor under sixteen years of age;

⁵¹ Based on Articles 222-33-2, 222-33-2-1 and 222-33-2-2 of the French Penal Code.

3° When committed against a person whose particular vulnerability, due to age, illness, infirmity, physical or mental disability or to pregnancy, is apparent or known to the author;

4° When committed by the use of a communication service to the public online.

79. As to subsection (3), it would provide that to harass **one's spouse or partner by repeated words or conduct** which are destined or have as effect the degradation of living conditions resulting in impaired physical or mental health shall be punished by imprisonment for a term not exceeding five years and a fine not exceeding 150,000 rupees when these acts have caused a total incapacity for work below or equal to eight days or resulted in no disability, and by imprisonment for a term not exceeding seven years and a fine not exceeding 200,000 rupees when these acts have caused a total incapacity for work above eight days.

The same penalties are incurred when the offence is committed by a **former spouse or former partner** of the victim.

- **SECTION 255 (1)**

80. The new Section 255 (1) does not specify the quality of the culprit. The offence does not therefore presuppose that the perpetrator of the criminal acts abuses the authority conferred on him by his functions. **It can therefore be a simple co-worker, even of a lower rank than the victim, and not necessarily one of his superiors.**⁵² As for the material element itself, the text only specifies that it must be "**repeated**" acts.⁵³ It is thus

⁵² This would also be the case with the reform of sexual harassment suggested in the Interim Report in Section 254.

⁵³ The Court of Cassation pointed out that repeated prohibited conduct did not necessarily have to be of a different nature for the offence to be constituted, reversing a decision that had decided the opposite (Cass Crim, 26 Jan. 2016, No. 14 -80.455: JurisData n° 2016-001042, Dr. Pen., 2016, comm 58, obs P. Conte).

justified the sentence pronounced after finding a “set of vexatious, unfair and inappropriate measures” in order to obtain the departure of a secretary or that which sanctions a behaviour which causes a deterioration of the conditions of work and compromises the professional future of an employee. But the Court of Cassation considers that the offence is characterised without the consequences of the deterioration of working conditions being “proven” and without the harassment being subordinated to the existence of a hierarchical power. According to this case law, **unlike sexual harassment, moral harassment is not defined by the “purpose” pursued by the perpetrator, but by the “effect” it has on the victim.** No sentence should be pronounced in the absence of a finding of deterioration of working conditions, an attack on dignity or an alteration of the physical or moral health of the victim. But the Court of Cassation sometimes admits to sanctioning facts leading only to a “**possibility**” of **deteriorating working conditions**. The judges thus retain a great freedom of appreciation and cannot be bound by an internal investigation concluding that moral harassment does not exist, whereas it is otherwise established that the defendant exceeded his powers of direction and impaired the health of his subordinate.⁵⁴

81. The **Employment Rights Act (ERA)** only targets harassment based on some **characteristics**, knowingly: age, disability, HIV status, domestic circumstances, sex, sexual orientation, race, colour, language, religion, political, trade union or other opinion or belief, national or social origin, association with a minority, birth or other status, while the new Section 255 (1) does not impose such restrictions. The scope of incrimination is also broadened as the customer of a company or the user of a public service could also be prosecuted under this provision.⁵⁵

⁵⁴ Crim, June 8, 2010, Dr. Criminel 2010, comm 117.

⁵⁵ B. Lapérou-Schneider, *Les mesures de lutte contre le harcèlement moral* : Dr. soc. 2002, p. 313.

82. Moreover, according to the ERA, the offence is committed **only** when the harassment has affected negatively the worker’s dignity. The new Section 255 (1) is wider as the offence would be constituted when the author’s conduct is **likely** to violate the victim’s rights and dignity, to damage his physical or mental health or compromise his career prospects.

- **SECTION 255 (2)**

83. The new Section 255 (2) does not restrict itself to work environment and enumerates several aggravating circumstances relating sometimes to the mode of commission of the offence and sometimes to the quality of the victim. Here, **perpetrators and victims of harassment are strangers to any work relationship**, the bond that unites them is different and could be of a friendly, family or neighbourhood nature. We see, then, that moral harassment has no other limit than the infinity of human relations.⁵⁶

- **SECTION 255 (3)**

84. Finally, the new Section 255 (3) seeks to criminalise moral harassment within the couple. As in the case of workplace moral harassment, the offending act must consist of repeated remarks or behaviours whose purpose or effect is a deterioration of living conditions resulting in an alteration of the physical or mental health of the victim. The relationship between the spouses or partners does not have to be enduring and former spouses and partners are also protected by the provision.

⁵⁶ P. Mistretta, *Harcèlement*, Répertoire de droit pénal et de procédure pénale, janv. 2016, n° 52.

CONCLUSION

85. Generally, harassment is conduct or comment that a reasonable person would consider to be objectionable or unwelcome. The conduct or comment typically humiliates, intimidates, excludes or isolates individuals and is often accompanied by threats or promises regarding opportunities and conditions. A series of incidents often leads to negative, hostile or poisoned environments that interfere with someone's ability to do their job or obtain a service. There is also evidence that some victims suffer post-traumatic stress disorder (PTSD), or at least some of its symptoms. In severe cases, victims may "experience reactions other than PTSD such as depression, substance abuse, phobic anxiety, generalised anxiety, obsessive-compulsive behaviours, and dissociative disorders".⁵⁷ Harassment can range from written or spoken comments to physical or sexual assault. Harassment often involves an abuse of power and has detrimental effects for those suffering from it.
86. Right now, the only form of harassment which is covered in our Criminal Code is sexual harassment, while moral harassment is confined to work relations through the Employment Rights Act. For this reason, the Law Reform Commission has, in its Interim Report on Reform of the Criminal Code (May 2016), suggested the introduction of a new Section 255 in our Criminal Code.
87. Moral harassment would thus find its way in our Criminal Code and would not be limited to work relations. It would also encompass such conduct when committed within the couple.

⁵⁷ Kathleen G. McAnaney, Laura A. Curliss, and C. Elizabeth Abeyta-Price, "From Imprudence to Crime: Anti-stalking Laws" (1993) 68 *The Notre Dame Law Review* 819 at 850-853.