



Laws Protecting Journalists from Online Harassment

Australia • Brazil • Canada • England and Wales
Finland • France • Germany • Israel • Japan
Singapore • Spain • Turkey

International Law

September 2019

LL File No. 2019-018087

This report is provided for reference purposes only.
It does not constitute legal advice and does not represent the official
opinion of the United States Government. The information provided
reflects research undertaken as of the date of writing.
It has not been updated.

Contents

Comparative Summary 1

International Law 9

Australia 13

Brazil 31

Canada 37

England and Wales 44

Finland 61

Germany 71

France 78

Israel 84

Japan 89

Singapore 94

Spain 101

Turkey 105

Map:

Laws Protecting Journalists from Online Harassment 8

Comparative Summary

Ruth Levush
Senior Foreign Law Specialist

Attacks against journalists appear to be on the rise recently in countries around the world. These include attacks allegedly directed by governments or politicians,¹ as well as by individuals displeased with their own media coverage or generally with the press.² The widespread use of social media has facilitated harassment of journalists in online settings by a variety of means, including by disseminating threats and disinformation, stalking, and broadcasting private or personally identifiable information about targeted journalists (doxing). While a significant number of journalists have reportedly faced online abuse and harassment, female journalists have been disproportionately affected.³

Concerns for the impact of online harassment of journalists on freedom of expression and free flow of information have been expressed by international, regional, and national institutions as well as by civil societies around the globe.⁴ Such concerns center on the understanding in many countries that freedom of speech, and particularly of political expression, serves as an essential foundation for maintaining a democratic system of government.⁵

Recognizing these concerns in 2017, the United Nations General Assembly issued a resolution on the safety of journalists and the issue of impunity addressing violence, intimidation and harassment of journalists, especially female journalists, online and offline. The General Assembly called upon states “to create and maintain, in law and in practice, a safe and enabling environment for journalists to perform their work independently and without undue interference.”⁶

The Organization for Security and Co-operation in Europe (OSCE) expressed similar concerns and, in April 2019, proposed to its member states establishing national committees for the safety of journalists that would include “representatives of the prosecutor’s office, the police and journalist associations to verify that all attacks and threats are properly investigated, improve

¹ See, e.g., *Jamal Khashoggi: All You Need to Know about Saudi Journalist's Death*, BBC NEWS (June 19, 2019), <https://perma.cc/G584-J3RF>.

² See e.g., Nicki Peter Petrikowski, *Charlie Hebdo Shooting, Terrorist Attacks, Paris, France [2015]*, Encyclopaedia Britannica, <https://perma.cc/9789-9Q8V>; see also Kevin Rector & Nicholas Bogel-Burroughs, *Five Dead in 'Targeted Attack' at Capital Gazette Newspaper in Annapolis, Police Say; Laurel Man Charged with Murder*, Baltimore Sun (June 29, 2018), <https://www.baltimoresun.com/news/crime/bs-md-gazette-shooting-20180628-story.html>.

³ Press Release, IFJ Global Survey Shows Massive Impact of Online Abuse on Women Journalists, Int’l Fed’n of Journalists (Nov. 23, 2018), <https://perma.cc/M5XR-W2AX>.

⁴ See appended individual countries and international law surveys.

⁵ See relevant portions in appended country surveys, as well as in *Limits on Freedom of Expression* (June 2019), Law Library of Congress, <https://perma.cc/9DQF-LPNK>.

⁶ G.A. Res. 72/175, ¶ 19, *The Safety of Journalists and the Issue of Impunity* (Dec. 19, 2017), <https://perma.cc/US67-3SCX>.

procedures if needed; propose protection measures when necessary and implement preventive action to reinforce the security of journalists.”⁷

This report examines incidents of online harassment of journalists in selected countries and highlights legal measures available in those countries to address the problem. For the purposes of this report, “online harassment” includes activities that are carried out in an online setting, such as “email, social media platforms (such as Twitter, Facebook, and Instagram), messaging apps (such as Facebook Messenger and WhatsApp), blogging platforms (such as Medium, Tumblr, and WordPress), and comments sections (such as those found on digital news platforms, personal blogs, YouTube pages, and Amazon book reviews).”⁸ Online harassment applies to bullying, stalking, doxing, hacking, communicating hateful speech and threats, nonconsensual, intimate images and videos, impersonation or sexual harassment, and trolling, among others.⁹

The report is composed of a survey of relevant international law instruments and activities directed at protection against online threats and harassment of journalists, as well as individual surveys for the following countries: **Australia, Brazil, Canada, England and Wales, Finland, France, Germany, Israel, Japan, Singapore, Spain, and Turkey**. These countries were selected based on their relevant developments in this area, as well as based on staff expertise currently available at the Law Library of Congress’s Global Legal Research Directorate. In preparation of the individual surveys, primary and secondary sources at the Law Library of Congress’s collections, legal databases to which it subscribes, and open sources have been used.

The following summary of the report’s findings is based on more expansive information contained in the individual surveys.

I. Reported Incidents of Online Harassment of Journalists

Incidents involving online harassment of journalists have been identified in a number of countries surveyed.

In March 2019, police in **Australia** reportedly charged one of the country’s most prominent far-right extremists with allegedly making repeated and explicit threats online against a Melbourne journalist and lawyer. The charges included “using a carriage service to menace and to issue threats to do serious harm.”

In 2016, the Guardian newspaper reported that a journalist filed a lawsuit requesting Google to reveal who ordered an advertisement that listed his name and his blog under a notation that says he is lying. Earlier that year, a newspaper in **Brazil** published a fabricated story along with a picture of the journalist’s face, wrongly claiming that he had said “the retired are useless to society,” prompting a cascade of violent verbal abuse. In another case, the Committee to Protect Journalists on September 3, 2019, called for Brazilian authorities to investigate threats against an

⁷ OSCE Representative on Freedom of the Media, International Conference: *Journalists under Attack: A Threat to Media Freedom*, Vienna, Austria (Apr. 12, 2019), <https://perma.cc/27FV-89BF>.

⁸ *Defining “Online Harassment”: A Glossary of Terms*, Pen America, <https://perma.cc/W2WY-EXD5>.

⁹ *Id.*

owner of a newspaper and website made as a reprisal for a publication alleging local landowners and farmers were organizing a day of coordinated fires in the Amazon region. No further information has been reported on the cases.

In **Finland**, a journalist who investigated Russian internet activities was subjected in 2014 to online death threats, publication of her phone number, and attacks on her reputation. The online publisher of the unlawful information against the journalist was convicted in 2018 under general harassment offenses.

A freelance journalist in **France** received many insults and threats after she published an article alleging that the owners of a local bar had praised the colonial era. She was also the victim of doxing, following which she reported that strangers waited in front of her home twice. As of April 2018, this case was still under investigation. Another journalist and radio broadcaster was the target of pornographic postings, death threats, threats of rape, and hate speech after she had denounced members of an online forum for their harassment of two feminist activists. Two of the seven perpetrators were tried in court, one on charges of making death threats, and the other on charges of threatening to commit rape. Both were given six-month suspended prison sentences and a fine. A TV crime reporter who was responsible for leaks from a corruption case involving **Israel's** Prime Minister (PM) Binyamin Netanyahu was reportedly a top target for hostile messages and was attached a personal security guard following a slew of threats directed at him on his personal WhatsApp and other social networks, such as one threatening that "God will make you pay."

In **Spain**, journalists covering the 2017 Catalonia independence referendum became targets of attacks by persons on both sides of the issue.

The survey on **England and Wales** indicates that a member of a far-right group videoed himself knocking and shouting at the door of a journalist late at night and in the early morning hours while live-streaming the event, revealing the journalist's home address, as followers bombarded the journalist with messages through social media. There were no reports anyone was charged with any offense. There have also been reports that the BBC hired a bodyguard to protect one of its political reporters during the 2017 elections.

Violence against and harassment of journalists in **Germany** rose in 2018 compared to the previous year, with most assaults taking place at right-wing events or demonstrations. Among other things, assailants in Germany destroyed the equipment of journalists or called them "lying press." Journalists have also been the victims of doxing.

II. Legal Measures for Protection of Journalists from Online Harassment

None of the countries surveyed were found to have adopted specific provisions for the protection of journalists from online harassment. Instead, the individual country surveys indicate the availability of legislation either specifically targeting online harassment or generally prohibiting harassment by any means, including online. Some countries provide for a mechanism to remove offensive posts which may include those that under certain circumstances constitute harassment.

A. Specific Offenses Involving Online Harassment

Specific offenses involving online harassment applicable to journalists and non-journalists alike were found in a number of countries.

In **Canada**, the Protecting Canadians from Online Crime Act enacted in 2015 prohibits cyberbullying and nonconsensual distribution of intimate images, including by messaging under a false name or information, or by indecent and harassing communications.

The laws of **Finland** contain a number of crimes specific to online behavior, such as violating a person's privacy online and interference with the peaceful enjoyment of communication services. Accordingly, violations perpetrated through messaging over the phone, or on Facebook, Twitter, Instagram, or other social media platforms, are punishable similar to other types of harassment including by repeatedly calling someone, playing loud music to spite another person, etc.

Under **German** law, the practice of doxing could qualify as data espionage, an offense involving the unauthorized obtaining and dissemination to others of someone else's specially protected data stored or transmitted electronically or magnetically. Obtaining non-publicly available data from another person who has obtained that data unlawfully and making it publicly available with the intent to harm another constitutes the offense of "data fencing" under German law. Repeated online harassment of journalists in Germany may also be punishable as stalking by means of telecommunications, among other offenses.

Special provisions against stalking and online harassment were identified in **Singapore**, under the 2014 Protection from Harassment Act (POHA). POHA also prohibits the intentional or reckless issue of a communication that is threatening, abusive, or insulting, which is heard, seen, or otherwise perceived and likely to harass or cause alarm or distress or instill in a person fear or provoke violence. A 2019 amendment of POHA further prohibits the publication of information identifying the victim or a person related to the victim in order to harass, threaten, or facilitate violence against the victim (doxing).

Like the above-mentioned countries, **Spain** has no specific legal protection against the harassment of journalists. However, it does prohibit cyberstalking or harassment in general, including when carried out online.

Under **Turkey's** Penal Code, certain crimes involving online use constitute aggravated offenses. For example, insulting someone "by means of . . . written or visual medium message" or in public is an aggravated offense. Sexual harassment committed "by using the advantage provided by mail or electronic communication instruments, [or] . . . by the act of exposing" is similarly considered an aggravated offense.

B. General Harassment Offenses that May Extend to Online Environment

General protection against harassment appears to extend to online harassment in a number of countries surveyed.

Online harassment may constitute, under appropriate circumstances, one of several federal criminal offenses in **Australia**, including using a carriage service to menace, harass, or cause offense. There are also prohibitions on the nonconsensual sharing of intimate images and racial vilification. Online harassment may also constitute civil or criminal offenses under state laws, including: stalking and threats; vilification based on race, religion etc.; nonconsensual sharing of intimate images; and defamation.

Several provisions of **Brazil's** Penal Code that apply to harassment in general may apply to harassment on the internet. These include prohibitions on slandering, threatening and forcing someone "through violence or grave threat, or after having reduced by any other means his or her ability to resist, not to do what the law permits, or to do what the law does not command."

In addition to specific online offenses under Canadian and Finnish laws, the law of these countries enables using a variety of other offenses to protect journalists from online harassment. Such offenses include in **Canada** intimidation of a journalist by a criminal organization, and criminal harassment, which may apply to cyberstalking. Canadian courts have also reportedly been willing to apply the civil action of libel in the online context ("Cyber-libel"). **Finland's** law criminalizes a number of activities, including defamation, harassment, threats of violence, and stalking, that apply to both offline and online behavior.

France's law similarly contains several general protections that may extend to online harassment. These include laws against defamation, insults, breaches of privacy, threats, malicious messages, and other harassing behavior.

Various general offenses may apply to the online harassment of journalist under **German** law. These include, under qualified circumstances, assault, public incitement to crime, insult and defamation, and processing personal data without authorization.

Online harassment of journalists in **Israel** may be penalized under a variety of offenses including: an incitement to commit violence; threats and intimidation; sexual harassment including by using a computer; defamation by publication via any means of content that might humiliate, make a person a target of hatred, contempt or ridicule, harm a person's position, or disrespect a person for his race, origin, religion, place of residence, age, sex, sexual orientation or disability; as well as violation of the Protection of Privacy Law.

In **Japan**, the crimes of defamation, insults, and threat under the Penal Code and torts under the Civil Code provide protection against online harassment and disinformation.

Similar to other countries mentioned in this section, **England and Wales** have a significant number of pieces of legislation containing offenses that aim to protect any individual from harassment and abuse. Such offenses include those dealing with communication, harassment and abuse, stirring up hatred on the basis of racial, religious or sexual orientation, provocation of violence, publishing an obscene article, publicly displaying indecent matter, possessing extreme pornographic images, disclosing private sexual photographs and films with intent to cause distress, etc. An in-depth "scoping report" conducted by the Law Commission found that existing laws in England and Wales, with some limitations, cover online communications that are abusive, but that there are various overlapping laws that have led to uncertainty. Technological limitations

within the police force and the uncertainty of the law have led to under reporting and difficulties in successfully prosecuting offenders. The Law Commission has recommended that the laws be reviewed and consolidated to provide greater clarity and certainty.

C. Removal of Offensive Posts

A number of country surveys indicate the availability of a mechanism to request removal of offensive posts by persons targeted for online harassment. The following are examples of legislation on the subject.

Federal legislation targeting the nonconsensual sharing of intimate images online was introduced in **Australia** in 2018. Based on this legislation, the Office of the eSafety Commissioner now operates a complaint system and removal notice process in relation to the nonconsensual sharing of such images, whether or not the material is altered.

England and Wales defamation law enables individuals to request website operators (WOs) to remove defamatory material from the website. WOs may be protected from liability for defamation if they can show that they did not post the defamatory statement. This defense may be defeated, however, if the claimant can show that he or she: could not identify the person who posted the allegedly defamatory statement, notified the WO of the complaint relating to the statement, and the WO failed to respond to the complaint.

German law imposes a duty on host providers to delete harassing messages published by third parties on their platforms upon notification. Under legislation adopted in 2017 providers must comply within twenty-four hours after receiving a user complaint if the content is “clearly illegal,” otherwise, they have seven days to comply. Noncompliance results in fines. However, the requirement applies only to networks that have two million or more registered users in Germany.

Japan’s Internet Provider Liability Act similarly facilitates removal of offensive online information, and obtaining information on the identity of the offender for later legal actions is made easier by limiting the providers’ liability.

Controversial legislation in **Turkey**, Law No. 5651, provides a process for blocking internet content that violates a complainant’s personal rights, and thus in principle could be relevant to blockage of content constituting harassment of journalists. The law, however, was subjected to widespread condemnation from domestic and international observers, and the Constitutional Court of Turkey has found its implementation to be in violation of constitutional protections on numerous occasions.

III. Other Measures

The country surveys contain information on activities undertaken in a number of countries to enhance protection of journalists from online harassment, including the developments described below.

In February 2019, **Australia's** government released a draft Online Safety Charter setting out the government's expectations of digital platforms in reducing harm, with the public consultation process running until early April 2019. Recommendations arising from a review of the federal online safety legislation, completed in early 2019, have so far not been developed into legislation, although one of the partners in the current coalition government has stated that it supports the changes. These include extending the cyberbullying coverage in the legislation to adults and a more proactive regulatory regime and toughened enforcement powers.

Finland's Department of Justice published a guide, "Journalists and the Hate Rhetoric," as part of a 2019 campaign against hateful rhetoric, including governmental and nongovernmental entities.

The National Committee for the Safety of Journalists was established in **England and Wales** on July 11, 2019, to prepare a national action plan on the safety of journalists, examine current protections and ensure availability of mechanisms to protect journalists. The government is reportedly working with law enforcement agencies to review whether its "current powers are sufficient to tackle anonymous abuse online." The police on their part are receiving training to improve digital capability and facilitate reporting on online crimes.

On October 30, 2019, the **German** government adopted a set of measures to combat hate crimes and right-wing extremism—in particular, online hate crimes. Among other things, the government proposes to amend the Criminal Code to align the rules with technical developments and the online world by adapting existing or adding new provisions to better address cyberstalking and similar forms of online harassment or insults.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has also been quite active in developing several handbooks, training and position papers designed to protect journalists from online threats and harassment.

IV. Media Organizations' Initiatives

Several initiatives taken by media organizations around the world should be noted.

For example, in 2019, **Finland's** media companies joined forces and set up a "journalist support fund" to counter harassment. As of September 2019, however, the fund is not yet active. Additionally, the Union of Journalists of Finland has issued a guide for active journalists with advice on what to do if they are the target of a hate campaign. Finnish media representatives have also issued statements for a return to "fact-based" journalism.

In recognition of the increase in online attacks on journalists, newsrooms in **Spain** adopted best practices for managing comments on websites. News organizations with a strong social media presence hide insulting or violent comments, whether addressed to journalists or other readers. Additionally, specific protocols were adopted by certain newspapers to provide for procedures for journalists' complaints, assessment of online harassment complaints by the newspaper's social media team, consideration of withdrawal of comments from social media platforms, and referral to legal counsel and human resources for the purpose of filing legal actions.



Source: Susan Taylor, Law Library of Congress, based on information provided in this report. *Note: In some of the surveyed countries, specific laws exist in addition to general harassment laws.

International Law

Elizabeth Boomer
Legal Research Analyst

SUMMARY Journalists are protected from online threats and harassment by international human rights law, and UNESCO provides a variety of tools to address the issue. In addition, civil society has increasingly brought attention to the issue of online threats and harassment against journalists, and the recent ILO Convention concerning the elimination of violence and harassment in the world of work could be an opportunity to further address these threats.

I. Protection of Journalists under the United Nations Framework on Human Rights

A. International Covenant for Civil and Political Rights (ICCPR)

A variety of United Nations instruments, resolutions, reports, and recommendations explain the right to freedom of expression and its outer limits, so as to protect journalists and preserve their rights. The core international legal text is article 19 of the International Covenant for Civil and Political Rights (ICCPR):

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) [f]or respect of the rights or reputations of others; (b) [f]or the protection of national security or of public order (ordre public), or of public health or morals.¹

The tension between the right of freedom of expression and its limits are apparent from a plain reading of article 19, but the provisions can be difficult to interpret and apply, especially in the internet era.² As one commentator has noted, speech online is frequently anonymized and free, so that false news and intentional misinformation are commonplace, thus presenting ongoing challenges to the traditional concepts of freedom of opinion and expression.³

¹ Int'l Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), <https://perma.cc/929S-6DPZ>.

² Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 Notre Dame L. Rev. 1519, 1527-31 (2019), <https://perma.cc/YT6Z-BJAK>.

³ Id. at 1527.

B. United Nations High Commissioner for Human Rights

The scope of the freedoms of opinion and expression under Article 19 was elaborated further by the United Nations High Commissioner for Human Rights in General Comment No. 34.⁴ As paragraph 23 notes,

States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.⁵

C. United Nations Educational, Scientific and Cultural Organization (UNESCO)

In 2017, the United Nations General Assembly requested that the United Nations Educational, Scientific and Cultural Organization (UNESCO) coordinate efforts to propose specific steps to enhance the safety of journalists and to implement the United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity.⁶ To date, UNESCO has developed several handbooks and training and position papers regarding journalism, ‘fake news,’ disinformation, self-censorship, hate speech, and the issue of digital threats and intimidation.⁷

D. United Nations Human Rights Council

The United Nations Human Rights Council has also considered the safety and protection of journalists, with a special focus on online harassment, threats, and intimidation.⁸ These resolutions highlight the outsized effects that online harassment can have on women journalists

⁴ U.N. Human Rights Comm., Gen. Comment No. 34, *Article 19: Freedoms of Opinion and Expression*, ¶ 27, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), <https://perma.cc/53TJ-GRDY>.

⁵ Id. ¶ 23.

⁶ G.A. Res. 72/175, ¶ 19, *The Safety of Journalists and the Issue of Impunity* (Dec. 19, 2017), <https://perma.cc/US67-3SCX>.

⁷ For example, see Cheryl Iretton & Julie Posetti, UNESCO, *Journalism, ‘Fake News’ & Disinformation: Handbook for Journalism Education and Training* (2018), <https://perma.cc/F6EY-Y33X>; Avani Singh, UNESCO, *Legal Standards on Freedom of Expression: Toolkit for the Judiciary in Africa* (2018), <https://perma.cc/RPT6-N5CL>; Iginio Gagliardone et al., UNESCO, *Countering Online Hate Speech* (2015), <https://perma.cc/2T57-4STC>. In general, see the UNESCO Series on Internet Freedom, first published in 2009.

⁸ Human Rights Council Res. 33/2, U.N. Doc. A/HRC/RES/33/2 (Sept. 29, 2016), <https://perma.cc/7LDG-LQNL>; Human Rights Council Res. 39/6, U.N. Doc. A/HRC/RES/39/6 (Sept. 27, 2018), <https://perma.cc/YF4R-TDAB>.

in particular⁹ and urge States to prevent threats by putting in place “gender-sensitive preventive measures and investigative procedures in order to encourage women journalists to report offline and online attacks against them, and providing adequate support, including psychosocial support, to victims and survivors[.]”¹⁰

E. United Nations Special Rapporteur on Freedom of Opinion and Expression

Most recently, the United Nations Special Rapporteur on Freedom of Opinion and Expression issued a Joint Declaration with regional bodies representing Europe, the Americas, and Africa urging the development of “[h]uman rights sensitive solutions to the challenges caused by disinformation, including the growing possibility of ‘deep fakes,’ in publicly accountable and targeted ways, using approaches that meet the international law standards of legality, legitimacy of objective, and necessity and proportionality.”¹¹

II. Civil Society Initiatives to Protect Journalists from Internet Harassment and Disinformation Campaigns

Several prominent civil society organizations are active in the international effort to protect journalists from internet harassment and disinformation campaigns. In particular, ARTICLE 19: Global Campaign for Free Expression, the Centre for Law and Democracy, the International Federation of Journalists, and Reporters without Borders have been active in advocating for international standards regarding the protection of journalists from online threats and harassment. These organizations produce an annual report on the protection of journalism and the safety of journalists in partnership with the Council of Europe (COE).¹² While focused on COE member states, this annual report provides helpful statistical information regarding attacks, harassment, and chilling effects caused by online intimidation and threats.¹³

The International Federation of Journalists (IFJ), the world’s largest organization of journalists, has been particularly active in the area of protecting female journalists from violence and harassment.¹⁴ An interesting intersection between IFJ’s work and international law will be the entry into force of the United Nations’ International Labour Organization (ILO) Convention 190 concerning the elimination of violence and harassment in the world of work, which explicitly

⁹ H.R.C. Res. 33/2, *supra* note 8, ¶ 2; H.R.C. Res. 39/6, *supra* note 8, ¶ 2.

¹⁰ H.R.C. Res. 39/6, *supra* note 8, ¶ 9(g).

¹¹ U.N. Special Rapporteur on Freedom of Op. & Expression, *Twentieth Anniversary Joint Declaration: Challenges to Freedom of Expression in the Next Decade*, ¶ 3(e) (2019), <https://perma.cc/4REA-8NUL>.

¹² Partner Organizations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, *Democracy at Risk: Threats and Attacks against Media Freedom in Europe* (Annual Report 2019), <https://perma.cc/U2FJ-UP4D>.

¹³ *Id.* at 31-33.

¹⁴ For example, see Int’l Fed’n of Journalists Factsheet, *Stop Gender-Based Violence at Work: Support an ILO Convention*, <https://perma.cc/CNB7-94LZ>; Int’l Fed’n of Journalists, *Byteback Campaign: Fighting Online Harassment of Woman Journalists*, <https://perma.cc/A9F5-BUAE>.

applies to violence and harassment linked with or arising out of work “through work-related communications, including those enabled by information and communication technologies.”¹⁵

¹⁵ Int’l Labour Org. Convention No. 190, Convention Concerning the Elimination of Violence and Harassment in the World of Work, art. 3, June 21, 2019, <https://perma.cc/4DBS-3LAU>.

Australia

Kelly Buchanan
Foreign Law Specialist

SUMMARY The Australian Constitution does not expressly guarantee freedom of expression or speech. However, the High Court of Australia has held that there is an implied constitutional guarantee of freedom of political communication. In addition, protections for freedom of speech are found in the common law and in Australia’s international obligations. Various legislative provisions, including criminal law provisions, restrict freedom of speech.

There are no specific provisions in Australian federal, state, or territory laws that deal with the online harassment of journalists. However, a general provision in the federal Criminal Code can be used to prosecute cyberbullying or cyberstalking of different forms. In addition, state and territory provisions related to threats and stalking may be applicable. There are also criminal provisions related to the nonconsensual sharing of intimate images, as well as a national-level complaints system that can lead to removal orders and civil penalties. Federal, state, and territory laws also deal with vilification or “hate speech” based on various grounds, with either or both criminal and civil offenses applying, including in the context of publicly available social media posts. There are also nationally consistent defamation laws containing both civil and criminal offenses. Commentators have noted an increased use of civil defamation laws in the context of social media posts.

While these provisions can potentially all be used with respect to the online harassment of journalists, few cases were located in which the perpetrators of such harassment were prosecuted or sued. Official reviews of legislation relevant to cyberbullying and cyberstalking, including criminal laws and the Enhancing Online Safety Act 2015 (Cth), have noted that journalists, and particularly women, regularly face harassment on social media. The recommended legislative and nonlegislative changes, however, have not been specific to journalists.

I. Introduction

A. Freedom of Speech

There are no constitutional or federal statutory provisions expressly guaranteeing freedom of speech, opinion, expression, or the media in Australia. However, the High Court of Australia has established an implied constitutional guarantee of freedom of political communication, holding that free communication on matters of government and politics is an “indispensable part of the system of representative and responsible government created by the Constitution.”¹ This freedom

¹ *Freedom of Information, Opinion and Expression*, Australian Human Rights Commission (May 1, 2013), <https://perma.cc/6KNB-NDTA>. See also Melissa Castan, *The High Court and the Freedom of Political*

“does not protect a personal right, but rather, the freedom acts as a restraint on the exercise of legislative power by the Commonwealth.”²

One state, Victoria, has a Charter of Rights, while the Australian Capital Territory and Queensland have enacted human rights statutes that include protections for freedom of expression.³

In addition, the different branches of government give consideration to international human rights conventions in developing and applying legislation.⁴ For example, “where a statute is ambiguous courts will generally favour a construction that accords with Australia’s international obligations.”⁵

Freedom of speech is also recognized as a right protected by the common law.⁶ The Australian Law Reform Commission explains that

it is widely recognised that freedom of speech is not absolute. In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts. Some limitations on speech have long been recognised by the common law itself, such as obscenity and sedition, defamation, blasphemy, incitement, and passing off.

Numerous Commonwealth laws may be seen as interfering with freedom of speech and expression. There are, for example, more than 500 government secrecy provisions alone. In the area of commercial and corporate regulation, a range of intellectual property, media, broadcasting and telecommunications laws restrict the content of publications, broadcasts, advertising and other media products. In the context of workplace relations, anti-discrimination law – including the general protections provisions of the Fair Work Act 2009 (Cth) – prohibit certain forms of speech and expression.⁷

The Commission further noted that a number of offenses in the federal Criminal Code “directly criminalise certain forms of speech or expression.”⁸

B. Online Harassment of Journalists in Australia

The online harassment faced by journalists, particularly women, has been identified by media organizations as a particular issue in Australia. For example, in March 2016, it was reported that a survey of 1,054 journalists (91.8% of whom were women) showed that 41% of in-house

Communication, Castan Centre for Human Rights Law, Official Blog (Dec. 5, 2010), <https://perma.cc/XV5X-6HCZ>.

² Australian Law Reform Commission (ALRC), *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* 80 (ALRC Report 129, Mar. 2016), <https://perma.cc/VAB7-5S24>.

³ See *Human Rights Law Research Guide: Australia*, University of Melbourne, <https://perma.cc/TY3Y-LU5Y> (last updated Aug. 13, 2019).

⁴ *Right to Freedom of Opinion and Expression*, Attorney-General’s Department, <https://perma.cc/7UTF-VD72>.

⁵ ALRC, *supra* note 2, at 85.

⁶ *Human Rights Protections*, Attorney-General’s Department, <https://perma.cc/2E9C-KFEB>.

⁷ ALRC, *supra* note 2, at 78.

⁸ *Id.* at 91.

journalists were trolled and 18% of freelancers had been cyberstalked.⁹ According to a report on the survey,

[s]adly, 41% of respondents have experienced harassment, bullying and trolling on social media, from mild instances to death threats and stalking. Several women say they have been silenced, or changed career, because of this harassment.

Only 16% of respondents were aware of their employer's strategies to deal with social media threats. But responsibility extends beyond the media sector, to law enforcement agencies and owners of platforms.¹⁰

There are no specific legislative provisions aimed at protecting journalists from online harassment. However, a general provision in the federal Criminal Code can be used to prosecute those who engage in cyberbullying or online harassment. There are also various potentially relevant criminal provisions at the state and territory level, as well as civil offenses such as defamation and certain forms of vilification. In addition, the federal government has established the role of the eSafety Commissioner, including complaint processes related to social media posts and intimate images, and is considering further expanding its role with respect to cyberbullying.

C. Report on Adequacy of Existing Criminal Laws to Capture Cyberbullying

The adequacy of existing federal, state, and territory criminal laws to capture cyberbullying was considered by the Senate Legal and Constitutional Affairs References Committee in a report published in March 2018.¹¹ Two organizations representing journalists made submissions to the Committee.¹² The Committee's report noted the argument from these submitters that "cyberbullying is a particular problem for those working in public-facing media roles."¹³

The Committee made several recommendations, including that Australian governments ensure that

- the general public has a clear awareness and understanding of how existing criminal offences can be applied to cyberbullying behaviours;
- law enforcement authorities appropriately investigate and prosecute serious cyberbullying complaints under either state or Commonwealth legislation, coordinate their investigations across jurisdictions where appropriate, and make the process clear for victims of cyberbullying, and

⁹ Natalie O'Brien, *Social Media Trolling of Female Journalists is Insidious, Report Shows*, Sydney Morning Herald (Mar. 6, 2016), <https://perma.cc/2UC2-HEFA>.

¹⁰ Women in Media, *Mates Over Merit? The Women in Media Report – A Study of Gender Differences in Australian Media 1-2* (2016), <https://perma.cc/CZ24-QVF4>.

¹¹ See Adequacy of Existing Offences in the Commonwealth Criminal Code and Territorial Criminal Laws to Capture Cyberbullying, Parliament of Australia, <https://perma.cc/H4BZ-ZDKQ>.

¹² See MEAA, *Cyberbullying*, pressfreedom.org.au (May 1, 2018), <https://perma.cc/J3PT-5GAU>.

¹³ Senate Legal and Constitutional Affairs References Committee, *Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying 22* (Mar. 2018), <https://perma.cc/8LW8-EBXA>.

- consistency exists between state, territory and federal laws in relation to cyberbullying.¹⁴

The Committee also recommended that the government consider increasing the maximum penalty under section 474.17 (discussed below) from three years' imprisonment to five years' imprisonment, ensure that the Office of the eSafety Commissioner has appropriate funding and resources and consider certain changes to the Enhancing Online Safety Act 2015 (Cth) with respect to the role of the Commissioner, put regulatory pressure on social media platforms "to both prevent and quickly respond to cyberbullying material on their platforms," and "legislate to create a duty of care on social media platforms to ensure the safety of their users."¹⁵

II. Federal Legislation Relevant to Online Harassment of Journalists

A. Misuse of Carriage Service

1. *Using a Carriage Service to Menace, Harass, or Cause Offense*

The Senate Legal and Constitutional Affairs References Committee noted that, while the Criminal Code Act 1995 (Cth)¹⁶ does not define "cyberbullying," there are a number of offenses that could be relevant to cyberbullying. These include

- section 474.14 (using a telecommunications network with intention to commit a serious offence);
- section 474.15 (using a carriage service to make a threat);
- section 474.16 (using a carriage service for a hoax threat);
- section 474.17 (using a carriage service to menace, harass or cause offence); and
- section 474.29A (using a carriage service for suicide related material).¹⁷

Of these, section 474.17 is the most "notable."¹⁸ Under this section, which provides for a maximum punishment of three years' imprisonment,

- a. A person commits an offence if:
 1. the person uses a carriage service; and
 2. the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.¹⁹

In a submission to the Committee, the Attorney-General's Department provided the following explanation of this offense:

¹⁴ Id. at vii.

¹⁵ Id. at vii-viii.

¹⁶ Criminal Code Act 1995 (Cth) (vol. 2), <https://perma.cc/52CS-XTVP>.

¹⁷ Senate Legal and Constitutional Affairs References Committee, *supra* note 13, at 31.

¹⁸ Id.

¹⁹ Criminal Code Act 1995 (Cth) s 474.17.

The 'reasonable person' frames the offence by reference to what a reasonable person would regard as menacing, harassing or offensive, not what the accused intended. It follows that the prosecution would not have to prove that the person *intended* to menace, harass or cause offence.

Consistent with the principles set out in Chapter 2 of the *Criminal Code*, the individual concerned must have intended to use the carriage service and have been reckless as to whether they were using a carriage service in a way that a 'reasonable person' would regard, in all the circumstances, as menacing, harassing or offensive.

...

Section 474.17 does not further define what constitutes menacing, harassing or offensive conduct. This enables community standards and common sense to be imported into a decision on whether the conduct is in fact menacing, harassing or offensive.

However, section 474.17 was constructed to ensure the use of a carriage service by a person can be menacing, harassing or offensive to the reasonable person because of the *way* the carriage service has been used or the *content* of the communication, or both.

The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* introduced section 474.17 into the *Criminal Code*. The Explanatory Memorandum for the Bill states that the offence covers scenarios such as the use of a carriage service to make a person apprehensive as to their safety or well-being or the safety of their property, to encourage or incite violence, or to vilify persons on the basis of their race or religion.

The use of a carriage service may be 'harassing' through the quantity and frequency of communications being sent. 'The method of use' refers to the actual way the carriage service is used, rather than what is communicated during that use. The continual making of unwanted telephone calls to a particular person would likely fall into this category.

The use of a carriage service may be 'menacing' where an individual causes another person to be in fear. The sending of threatening and abusive messages and images via social media would likely fall into this category.

The use of a carriage service may 'cause offence' where the content of those communications are considered offensive subject to the 'reasonable person' test. Sending unwanted offensive and sexually explicit communications would likely fall in this category.

Section 473.4 of the *Criminal Code* provides matters to be taken into account where determining whether material or the particular use of a carriage service is offensive. These are standards of morality, decency and propriety generally accepted by reasonable adults, the literary, artistic or educational merit (if any) of the material, and the general character of the material, including whether it is of a medical, legal or scientific character.²⁰

²⁰ Attorney-General's Department, Submission of the Attorney-General's Department - Senate Legal and Constitutional Affairs References Committee: The Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying 6 (Submission 20, Oct. 24, 2017), <https://perma.cc/CZD5-DZ3A>.

The Committee noted that, according to data from the Commonwealth Director of Public Prosecutions, 927 charges against 458 defendants had been found proven under section 474.17 since it was introduced in 2004.²¹ Although it was not possible to say how many of the cases involved cyberbullying, the Attorney-General's Department said that there had been "numerous instances" of cyberbullying prosecuted. In addition, the figures did not include prosecutions under the provision taken by state and territory authorities.²²

A recent example of an arrest under section 474.17 occurred in March 2019, when police charged "one of Australia's most prominent far-right extremists with allegedly making repeated and explicit threats against a Melbourne journalist and lawyer."²³ The accused faces multiple charges, "including using a carriage service to menace and to issue threats to do serious harm."²⁴

The Women in Media (WiM) submission to the Committee stated that WiM members "receive vast numbers of menacing, harassing and intimidating messages on social media platforms and by email on a regular basis."²⁵ It also noted that the "nature of the social media environment makes it easy to target WiM members, and it can often be difficult to resolve these issues."²⁶ The group had sought advice on the application of section 474.17 from the New South Wales Police Force (NSWPF), which said that they take cyberbullying, threats, and harassment seriously, and that officers are "now trained in attending to the victims' welfare and preserving all evidence available."²⁷ They advised that WiM members should report online material targeting them to their local police. However, WiM noted that investigations and prosecutions can be problematic due to the anonymity afforded by technology.²⁸

The Media, Entertainment and Arts Alliance (MEAA) submission similarly stated that "[t]he lived experience of many MEAA members working in the media industry is of being regularly subjected to harassment, abuse and threats on social media, where existing laws are not enforced and where there are gaps in the current legislative regime."²⁹ Both submissions called for greater education with respect to cyberbullying and the penalties that can apply under section 474.17.³⁰

²¹ Senate Legal and Constitutional Affairs References Committee, *supra* note 13, at 32.

²² *Id.*

²³ Nick McKenzie & Richard Baker, *Police Swoop on Right-Wing Troll Over Alleged Violent Threats*, Sydney Morning Herald (Mar. 22, 2019), <https://perma.cc/G922-7PQB>.

²⁴ *Id.*

²⁵ Women in Media, *Women in Media Submission to the Senate Inquiry on the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyber-bullying 7* (Submission 26, Oct. 2017), <https://perma.cc/2CCD-SPA2>.

²⁶ *Id.* at 8.

²⁷ *Id.* at 11.

²⁸ *Id.* at 12.

²⁹ Media, Entertainment and Arts Alliance (MEAA), *MEAA Media Submission to the Senate Legal and Constitutional Affairs References Committee's Inquiry into the Adequacy of Existing Offences in the Commonwealth Criminal Code and of State and Territory Criminal Laws to Capture Cyberbullying 5* (Submission 28, Dec. 21, 2017), <https://perma.cc/VS3W-QBR6>.

³⁰ *Id.* at 7; Women in Media, *Submission 26*, *supra* note 25, at 6.

2. *Aggravated Offenses Involving Private Sexual Material*

A new provision, section 474.17A, was inserted into the Criminal Code by the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018 (Cth)³¹ and came into effect on August 31, 2018. Under this provision, where a person commits an offense under section 474.17, and the commission of that offense involves the “transmission, making available, publication, distribution, advertisement or promotion” of material that is “private sexual material,” they can be guilty of an aggravated offense and be imprisoned for up to five years.³² A “special aggravated offense,” subject to a penalty of imprisonment for up to seven years, applies where, before the commission of the aggravated offense, three or more civil penalty orders were made against the person in relation to breaches of the relevant provision of the Enhancing Online Safety Act 2015 (Cth).³³ This latter Act is discussed further below.

B. Racial Vilification Law

Section 18C of the Racial Discrimination Act 1975 (Cth) (RDA) provides that it is unlawful to do an act, “otherwise than in private,” if

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.³⁴

This includes where the act “causes words, sounds, images or writing to be communicated to the public.”³⁵ Certain exemptions apply, including where something was said or done reasonably and in good faith in making or publishing “a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.”³⁶

Individuals can make complaints to the Australian Human Rights Commission, where such claims are dealt with through a conciliation process. The Commission explains that

[i]f conciliation fails at the Commission, a complaint can proceed to the Federal Court or Federal Circuit Court. This happens in a very small number of cases. In 2015-16, the Commission finalised 86 complaints about racial hatred. Only one complaint about racial hatred proceeded to court.

³¹ Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018 (Cth), <https://perma.cc/W9QR-XDGH>.

³² Criminal Code Act 1995 (Cth) s 474.17A(1).

³³ Id. s 474.17A(4).

³⁴ Racial Discrimination Act 1975 (Cth) s 18C(1), <https://perma.cc/ENA9-BT9K>.

³⁵ Id. s 18C(2)(a).

³⁶ Id. s 18D(c)(ii).

The RDA does not make racial vilification a criminal offence, and offers only a civil remedy. Where a court finds a contravention of the Act, it may make orders for an apology or a correction, and/or award monetary damages.³⁷

Section 18C has been the subject of political and public debate in recent years. In 2017, the federal government introduced amendments to section 18C that included replacing the terms “offend, insult, humiliate” with the term “harass,”³⁸ and providing that “an assessment of whether an act is reasonably likely to harass or intimidate a person or group of persons is made against the standard of a reasonable member of the Australian community.”³⁹ During debate on the bill, the government introduced further amendments that sought to clarify that the prohibited harassment can occur at a distance, including online on social media.⁴⁰ None of the amendments to section 18C were included in the final bill that was passed by the Parliament, having been defeated by opposition parties in the Senate.⁴¹

C. Sexual Harassment Law

The federal sexual harassment law, contained in the Sex Discrimination Act 1984 (Cth),⁴² provides that sexual harassment is unlawful “in different areas of public life, including employment, service delivery, accommodation and education.”⁴³ It does not appear to apply to, for example, online harassment of a sexual nature by a stranger outside of these contexts.

D. Enhancing Online Safety Act 2015

1. Role of the eSafety Commissioner

In 2015, the Australian government established the role of the eSafety Commissioner under the Enhancing Online Safety Act 2015 (Cth).⁴⁴ The Act establishes a complaints service and system for the removal of cyberbullying material from participating social media services; however, this is only available for cyberbullying material targeted at an Australian child.⁴⁵ In addition, the Commissioner has responsibilities with respect to promoting and enhancing online safety for all Australians, and provides “audience-specific content” to help educate Australians about online

³⁷ *Race Hate and the RDA*, Australian Human Rights Commission (Sept. 8, 2016), <https://perma.cc/4SD4-3A2F>.

³⁸ Human Rights Legislation Amendment Bill 2017 (Cth), <https://perma.cc/JWZ3-3R2C>.

³⁹ *Human Rights Legislation Amendment Bill 2017*, Parliament of Australia, <https://perma.cc/EB9Q-WQFX>.

⁴⁰ Paul Karp, *18C Amendments Don't Solve Concerns about 'Harassment,' Law Council Says*, *Guardian* (Mar. 29, 2017), <https://perma.cc/99Y6-YKUC>.

⁴¹ Human Rights Legislation Amendment Act 2017 (Cth), <https://perma.cc/7G4N-55SF>; Ashlynne McGhee, *18C: Proposed Changes to Racial Discrimination Act Defeated in Senate*, *ABC News* (Mar. 30, 2017), <https://perma.cc/RQ4Y-E8N2>.

⁴² Sex Discrimination Act 1984 (Cth) pt II div 3, <https://perma.cc/GU87-CJWS>.

⁴³ *Sexual Harassment*, Australian Human Rights Commission, <https://perma.cc/375R-CJLW>.

⁴⁴ Enhancing Online Safety Act 2015 (Cth), <https://perma.cc/YUV2-6JEF>.

⁴⁵ *Legislation*, Office of the eSafety Commissioner, <https://perma.cc/BF5U-8XTD?type=image>.

safety.⁴⁶ The Commissioner also administers the Online Content Scheme under the Broadcasting Services Act 1992 (Cth), with powers to investigate certain illegal or offensive content.⁴⁷

2. *Nonconsensual Sharing of Intimate Images*

Under amendments to the Enhancing Online Safety Act made by the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018 (Cth),⁴⁸ the Office of the eSafety Commissioner now operates a complaint system and removal notice process in relation to the nonconsensual sharing of intimate images, whether or not the material is altered.⁴⁹ The Office has an “image-based abuse” portal on its website with information on reporting abuse to the relevant social media service, the Office, and police.⁵⁰ The complaints and objections system in the Act includes the following components:

- (a) a person who posts, or threatens to post, an intimate image may be liable to a civil penalty;
- (b) the provider of a social media service, relevant electronic service or designated internet service may be given a notice (a removal notice) requiring the provider to remove an intimate image from the service;
- (c) an end-user of a social media service, relevant electronic service or designated internet service who posts an intimate image on the service may be given a notice (a removal notice) requiring the end-user to remove the image from the service;
- (d) a hosting service provider who hosts an intimate image may be given a notice (a removal notice) requiring the provider to cease hosting the image.⁵¹

3. *Review of the Act*

In mid-2018, the Australian government commissioned an independent review of the Enhancing Online Safety Act and the Broadcasting Services Act to “ensure we continue to have the right controls and support systems in place to protect Australians against harmful online content and ensure people can confidently participate in the online environment.”⁵² The report on the review, which was released in February 2019, referred to a submission from Women in Media, stating:

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ See Kelly Buchanan, *Australia: Legislation Imposing Penalties for Publishing Intimate Images without Consent Comes into Force*, Global Legal Monitor (Sept. 21, 2018), <https://www.loc.gov/law/foreign-news/article/australia-legislation-imposing-penalties-for-publishing-intimate-images-without-consent-comes-into-force/>.

⁴⁹ *How to Report Image-Based Abuse to the eSafety Commissioner*, Office of the eSafety Commissioner, <https://perma.cc/9U4H-3X4C?type=image>; Enhancing Online Safety Act 2015 (Cth) s 9B (definition of intimate image).

⁵⁰ *Image-Based Abuse*, Office of the eSafety Commissioner, <https://perma.cc/A6WS-HLW8?type=image>.

⁵¹ Enhancing Online Safety Act 2015 (Cth) s 3. The full provisions are contained in part 5A of the Act.

⁵² Press Release, Mitch Fifield, *New Reviews of Online Safety for Australians* (June 26, 2018), <https://perma.cc/HQL5-7KVQ>.

I found in this review that the tight limitation on the eSafety Commissioner's role with respect to adults flies in the face of the experience of many people (especially women with high profiles, like journalists and politicians, Aboriginal and Torres Strait Islander women, Islamic spokespeople, and the families of murder and rape victims) with online harassment, vitriol, and predator trolling. A number of these women have approached the eSafety Commissioner for assistance.

"[In the words of Dunja Mitjatovic] 'Female journalists and bloggers throughout the globe are being inundated with threats of murder, rape, physical violence and graphic imagery via email, commenting sections and across all social media . . . Male journalists are also targeted with online abuse, however, the severity, in terms of the sheer amount and content of abuse . . . is much more for female journalists.' . . . These dangers do not stay online. Following extreme online harassment campaigns, we have had Women in Media members punched in the street and followed home. A couple of our members have had rape and death threats against them and their daughters."

Such behaviour is totally unacceptable, and action needs to be taken to prevent it.

International experience suggests that it is no longer sensible to distinguish between the needs of children and adults for protection against online abuse. Online bullying and harassment can happen at all ages, and can escalate to physical violence. Accordingly, I recommend that the eSafety Commissioner's remit should be extended to cover all adults experiencing cyber-bullying so that all children and all adults experiencing online abuse problems of a serious nature are within her remit, and that the Government provide additional resources and increased staffing resources (and ASL [Average Staffing Level]) to support the extended function.⁵³

The report recommended the introduction of new online safety legislation incorporating the directions in the report, including:

- objectives to protect against harm and promote online safety,
- the roles and responsibilities of the eSafety Commissioner in online safety and regulation,
- a technology, platform, service, distribution and device neutral approach to regulation,
- new legislative standards for a more proactive regulatory regime and toughened enforcement powers,
- streamlined industry requirements alongside a new mandatory industry code for all industry participants with online and digital activities, with the code commencing within a year of the new legislation being enacted,
- coverage of all Australians, including cyber-bullying coverage for all children and all adults,
- data collection and reporting requirements,

⁵³ Lynelle Briggs, Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme) 32-33 (Oct. 2018), <https://perma.cc/KG82-PA66>.

- new classification arrangements that focus on illegal, dangerous and harmful content, and
- other necessary adjustments as proposed.⁵⁴

In February 2019, following the release of the report, the Australian government released a draft Online Safety Charter setting out the government's expectations of digital platforms in reducing harm, with the public consultation process running until early April 2019.⁵⁵ The government states that, when finalized, "the Charter will be an important foundation document to shape the direction of future reform of online safety in Australia."⁵⁶

In May 2019, the Liberal Party set out its online safety platform prior to the 2019 federal election that was held that month, following which it formed a government with its coalition partners. The platform included increasing penalties for the offense under section 474.17 of the Criminal Code, the introduction of new aggravated offenses, and new online safety legislation, as recommended in the review report.⁵⁷ However, no relevant legislation has been introduced to date.

III. State-Level Laws Relevant to Online Harassment of Journalists

The Senate Committee noted that

[s]tate and territory criminal offences that could apply to cyberbullying vary between jurisdictions. Generally speaking, there are a variety of offences in each jurisdiction that could apply to cyberbullying behaviours. These offences tend to relate to stalking, harassment, assault, threats, and defamation.⁵⁸

In addition, states and territories have enacted legislation containing criminal provisions with respect to the nonconsensual sharing of intimate images, and other provisions prohibit or criminalize vilification based on race and other grounds (i.e., hate speech).

A. Stalking and Threats

Stalking, which may include an element of harassment, is a crime in all Australian states and territories and appears to be applicable to online communications.⁵⁹ Other relevant provisions cover threats to kill or harm an individual. Existing offenses include:

⁵⁴ Id. at 42.

⁵⁵ Press Release, Mitch Fifield, Modernising Australia's Online Safety Framework (Feb. 16, 2019), <https://perma.cc/7F66-ARWE>.

⁵⁶ *Online Safety Charter Consultation*, Department of Communication and the Arts, <https://perma.cc/L3WU-SJER>.

⁵⁷ Press Release, Liberal Party, Keeping Australians Safe Online (May 5, 2019), <https://perma.cc/2WT6-CRT9>; *Our Plan to Keep Australians Safe Online*, Liberal Party, <https://perma.cc/B3MM-WRUX>.

⁵⁸ Senate Legal and Constitutional Affairs References Committee, *supra* note 13, at 7-8.

⁵⁹ See *What is Cyberstalking?*, Office of the eSafety Commissioner, <https://perma.cc/8D5U-E5VD?type=image>.

- Australian Capital Territory: Crimes Act 1900 (ACT) sections 30 (threat to kill), 31 (threat to inflict grievous bodily harm), and 35 (stalking);⁶⁰
- New South Wales: Crimes (Domestic and Personal Violence) Act 2007 (NSW) sections 8 and 13 (stalking or intimidation with intent to cause fear of physical or mental harm);⁶¹ Crimes Act 1900 (NSW) sections 31 (documents containing threats) and 545B (intimidation or annoyance by violence or otherwise);⁶²
- Northern Territory: Criminal Code Act 1983 (NT) sections 166 (threats to kill) and 189 (stalking);⁶³
- Queensland: Criminal Code Act 1899 (Qld) sections 308 (threats to murder in document), 359 (threats), and 359A to 359F (stalking);⁶⁴
- South Australia: Criminal Law Consolidation Act 1935 (SA) sections 19 (threats) and 19AA (stalking);⁶⁵
- Tasmania: Criminal Code Act 1924 (Tas) sections 163 (threats to kill in writing) and 192 (stalking);⁶⁶
- Victoria: Crimes Act 1958 (Vic) sections 20 (threats to kill), 21 (threats to inflict serious injury), and 21A (stalking);⁶⁷
- Western Australia: Criminal Code Act Compilation 1913 (WA) sections 338A to 338C (threats) and 338D to 338E (stalking).⁶⁸

It appears that such provisions are rarely applied to cyberstalking or cyberbullying. For example, the Legal Services Commission of South Australia states that

[d]espite the provisions of the legislation, the prosecution of stalking-type offences is very difficult. Not only must there be at least two proven instances of the behaviour but the mental element of intention to cause harm or create fear must be established by the prosecution (in each instance being relied upon). Police policy is to caution or warn an offender in the first instance and this, in a majority of cases, is an effective way of dealing with the problem.

The expansion of legislation to allow for intervention orders on the basis of cyberstalking provides an alternative to prosecution [see Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 8(4)]. As with any criminal offence, a charge of stalking/cyberstalking must be

⁶⁰ Crimes Act 1900 (ACT), <https://perma.cc/L7YG-HFBL>.

⁶¹ Crimes (Domestic and Personal Violence) Act 2007 (NSW), <https://perma.cc/H4CW-4823>.

⁶² Crimes Act 1900 (NSW), <https://perma.cc/A6JN-SPJV>.

⁶³ Criminal Code Act 1983 (NT), <https://perma.cc/A2EM-7CQ7>.

⁶⁴ Criminal Code Act 1899 (Qld), <https://perma.cc/MJ5U-3G2M>.

⁶⁵ Criminal Law Consolidation Act 1935 (SA), <https://perma.cc/85DD-FCJ4>.

⁶⁶ Criminal Code Act 1924 (Tas), <https://perma.cc/ZD8V-AFLA>.

⁶⁷ Crimes Act 1958 (Vic), <https://perma.cc/9AXZ-JPGF>.

⁶⁸ Criminal Code Act Compilation Act 1913 (WA), <https://perma.cc/QY3X-C27Y>.

proved beyond a reasonable doubt. In contrast, an application for an intervention order requires only that it can be established that a danger exists on the balance of probabilities. In addition, given terms of imprisonment for stalking are rare, an intervention order potentially offers a longer period of protection than a conviction could.⁶⁹

B. Anti-Vilification Laws

In addition to the federal racial vilification provision discussed above, state and territory anti-discrimination laws also contain provisions related to vilification or “hate speech.” However, these are not uniform. For example, several of the laws also prohibit inciting hatred on the basis of additional grounds, such as sexual orientation, religion, gender identity, and disability. Some jurisdictions have established both civil and criminal sanctions, while other laws only include one type of offense. All of the offenses appear to capture writing publicly viewable posts on social media; they do not cover private correspondence such as direct messages.

In Tasmania, only civil penalties apply to vilification on the basis of the extended categories above.⁷⁰ The Australian Capital Territory’s civil vilification offense also covers extended grounds, being disability, gender identity, HIV/AIDS status, intersex status, race, religious conviction, and sexuality.⁷¹ Serious vilification based on these grounds is an offense under the territory’s Criminal Code.⁷²

In Queensland, vilification on the grounds of race, religion, sexuality or gender identification is unlawful.⁷³ The legislation also contains an offense of serious racial, religious, sexuality or gender identity vilification.⁷⁴

In New South Wales, the Anti-Discrimination Act 1977 (NSW) prohibits racial, transgender, homosexual, and HIV/AIDS vilification,⁷⁵ while the Crimes Act 1900 (NSW) criminalizes “publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.”⁷⁶ This offense was introduced through amending legislation passed in 2018, which also repealed the serious vilification offenses that had previously been included in the Anti-Discrimination Act.⁷⁷

⁶⁹ *Stalking, Cyber Stalking and Cyber Bullying*, Legal Services Commission of South Australia, <https://perma.cc/4Z26-4MAV>.

⁷⁰ Anti-Discrimination Act 1998 (Tas) s 19, <https://perma.cc/A3J2-LX8Z>.

⁷¹ Discrimination Act 1991 (ACT) s 67A, <https://perma.cc/GTH2-JDAZ>.

⁷² Criminal Code 2002 (ACT) s 750, <https://perma.cc/R6T8-65YW>.

⁷³ Anti-Discrimination Act 1991 (Qld) s 124A, <https://perma.cc/CD9U-PPGX>.

⁷⁴ *Id.* s 131A.

⁷⁵ Anti-Discrimination Act 1977 (NSW) ss 20C, 38S, 49ZT & 49ZXB, <https://perma.cc/MQJ3-ZDB5>.

⁷⁶ Crimes Act 1900 (NSW) s 93Z.

⁷⁷ Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018 (NSW), <https://perma.cc/GHF9-BDUL>.

Victoria's Racial and Religious Intolerance Act 2001 (Vic) provides that racial and religious vilification is unlawful and criminalizes offenses of serious racial and religious vilification.⁷⁸ South Australia also has civil and criminal sanctions for racial vilification.⁷⁹

The Western Australia Criminal Code contains provisions that make intentionally inciting racial animosity or racist harassment punishable by up to fourteen years' imprisonment,⁸⁰ while conduct that is "likely" to incite racial animosity or harassment is punishable by imprisonment for five years.⁸¹ Intentional racial harassment itself is also punishable by five years' imprisonment.⁸² The state does not have a civil vilification law.

Vilification crimes are very rarely prosecuted in Australia. For example, a news report in May 2019 stated that only three people have been convicted under Victoria's Racial and Religious Tolerance Act, while no convictions had been recorded in New South Wales and South Australia since the offenses had been introduced in 1994 and 1996 respectively.⁸³ No cases were located in which a journalist was the alleged victim of such offenses.

C. Nonconsensual Sharing of Intimate Images

In May 2017, the federal, state, and territory governments agreed to the National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images.⁸⁴ All states and territories except Tasmania have subsequently enacted legislation inserting relevant offenses into their respective criminal laws.⁸⁵ The following provisions are currently in effect:⁸⁶

- Australian Capital Territory: Crimes Act 1900 (ACT) pt 3A (offenses of nonconsensual distribution of intimate images and for threatening to capture or distribute intimate images);
- New South Wales: Crimes Act 1900 (NSW) div 15C (offenses of recording, distributing, or threatening to distribute an intimate image without consent);

⁷⁸ Racial and Religious Intolerance Act 2001 (Vic) ss 7, 8, 24 & 25, <https://perma.cc/9AK6-4TV3>.

⁷⁹ Racial Vilification Act 1996 (SA), <https://perma.cc/8G4A-D2RH>.

⁸⁰ Criminal Code Compilation Act 1913 (WA) s 77.

⁸¹ *Id.* s 78.

⁸² *Id.* s 80A.

⁸³ Hagar Cohen & Scott Mitchell, *Hate Crime Laws Rarely Used by Australian Authorities, Police Figures Reveal*, ABC News (May 2, 2019), <https://perma.cc/6HGR-AVMN>.

⁸⁴ Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images* (2017), <https://perma.cc/7WNN-XFYQ>.

⁸⁵ See Deborah de Fina & Parisa Haider, *The Development of Intimate Images Laws in a Digital Era*, SchoolGovernance (July 10, 2019), <https://perma.cc/963L-6EAS>.

⁸⁶ See *What's the Law in My State or Territory?*, Office of the eSafety Commissioner, <https://perma.cc/AY57-KU8W?type=image>.

- Northern Territory: Criminal Code Act 1983 (NT) pt VI div 7A (offenses of distributing or threatening to distribute intimate images without consent);
- Queensland: Criminal Code Act 1899 (Qld) sections 223 and 229A (offenses of distributing or threatening to distribute an intimate image without consent);
- South Australia: Summary Offences Act 1953 (SA) pt 5A (includes offenses of distributing an invasive image without consent and threatening to distribute an invasive image);⁸⁷
- Victoria: Summary Offences Act 1966 (Vic) sections 41DA and 41DB (offenses of distributing or threatening to distribute an intimate image without consent);⁸⁸ and
- Western Australia: Criminal Code Compilation Act 1913 (WA) ch XXVA (offenses involving distribution of intimate images).

As the relevant provisions are relatively new, there is limited information available on the number of prosecutions for these offenses. For example, the first prosecution under the Western Australia provisions only occurred in June 2019.⁸⁹ According to a July 2019 news report, “[i]n the five months since “revenge porn” laws were passed in Queensland, 198 charges were laid.”⁹⁰ This included “12 charges for distributing intimate images, 185 for distributing prohibited visual recordings and one for threatening to share images or videos.”⁹¹ No cases were located in which journalists were the alleged victims of prosecuted offenses.

D. Defamation

1. Civil Defamation

Defamation law in Australia is governed by state and territory legislation, with such laws being largely consistent across the jurisdictions, having been modeled on uniform defamation provisions developed by the former Standing Committee of Attorneys-General (now the Council of Attorneys-General) in 2005.⁹² Under the defamation laws, “a publication will be defamatory if the published material has consequences of”:

1. Exposing the person to ridicule; or
2. Lowering the person’s reputation in the eyes of members of the community; or
3. Causes people to shun or avoid the person; or
4. Injures the person’s professional reputation.

⁸⁷ Summary Offences Act 1953 (SA), <https://perma.cc/T9JQ-CC8F>.

⁸⁸ Summary Offences Act 1966 (Vic), <https://perma.cc/NR5E-XM8E>.

⁸⁹ David Weber, *First Guilty Plea for WA Revenge Porn Laws as Man Admits Posting Instagram Images of Ex-Girlfriend*, ABC News (June 11, 2019), <https://perma.cc/NS6Y-QUHD>.

⁹⁰ Felicity Caldwell, *Revenge Porn Crimes Are Happening Every Day in Queensland*, Brisbane Times (July 26, 2019), <https://perma.cc/C7V3-A6LH>.

⁹¹ Id.

⁹² See *The New Uniform Defamation Laws*, Arts Law Centre of Australia (June 30, 2007), <https://perma.cc/SAB5-DHZZ>.

Defamatory material will be considered to have been ‘published’ where it was communicated to someone other than the aggrieved person. The means of communication may be oral, written or through conduct – and includes electronic or online communication, postings on Facebook, twitter and other social media online forums.⁹³

The uniform defamation laws contain “statutory defences which operate in addition to the defences available under the common law and other specific legislation.”⁹⁴ The statutory defences include justification or truth, contextual truth, honest opinion, and innocent dissemination.

Commentators have argued that civil defamation law tends to favor plaintiffs.⁹⁵ They also note that there has been an increase in the use of civil defamation laws by individuals suing over social media postings.⁹⁶ A study conducted in 2018 found that “just one in five plaintiffs in Australian defamation cases between 2013 and 2017 were public figures, and just one in four defendants were media companies. Over half the defamation cases (51 per cent) were digital.”⁹⁷ One article noted that

Australia’s defamation laws weren’t written with social media in mind – in fact, some elements of our existing law are based on English precedents that predate the printing press, to say nothing of the smartphone.

But increasing numbers of Australians are nevertheless turning to the courts to protest defamatory comments made about them online or in texts – something which legal experts say leads to arduous and costly, years-long legal battles.⁹⁸

One recent case involving a defamation claim by a journalist related to a Twitter post by the actress Rebel Wilson, who published a photo of a journalist and called her “total scum” for allegedly harassing Wilson’s grandmother. In fact, the photo was of a different journalist of the same name. The misidentified journalist sued but the case was reportedly settled out of court before trial began.⁹⁹

In 2018, the New South Wales government announced that it intended to push for the reform of the uniform defamation laws, following a review of the state’s Defamation Act, calling it a “cyber-

⁹³ *Australian Uniform Defamation Laws*, Stephens Lawyers & Consultants, <https://perma.cc/L23R-AP5P>.

⁹⁴ *Id.*

⁹⁵ Jeremy Story Carter & Damien Carrick, *Do Australia’s Strict Defamation Laws Help Protect High-Profile Abusers?*, ABC News (Dec. 6, 2017), <https://perma.cc/9PT3-DTPA>.

⁹⁶ Adam Courtenay, *Social Media Defamation: How Bad ‘Netiquette’ Can Cost You in Court*, InTheBlack (Aug. 1, 2018), <https://perma.cc/S293-RESM>.

⁹⁷ Evan Young, *What Is Defamation and Where Do We Draw the Line in Australia?*, SBS News (Oct. 22, 2018), <https://perma.cc/5HND-H846>.

⁹⁸ Stephen Smiley & Angela Lavoipierre, *Why Dozens of Australians Are Suing over Emails and Posts on Facebook and Twitter*, ABC News (Nov. 6, 2018), <https://perma.cc/58PL-T2DP>.

⁹⁹ Neil Douglas, *Rebel Wilson’s Defamation Win (And Loss)*, McLeods Barristers and Solicitors (Mar. 7, 2018), <https://perma.cc/RR5T-ZDDZ>.

age reboot.”¹⁰⁰ Subsequently, at a meeting of the Council of Attorneys-General, the states and territories agreed to convene a working party to consider reforms of the relevant statutes.¹⁰¹ In January 2019, an eighteen-month timetable was unveiled for the completion of the reforms. A discussion paper was then released in February 2019. Key issues being considered include “the capacity of corporations to take action; the processes for the resolution of disputes without litigation (including offers to make amends); and the possible introduction of a ‘single publication rule’ to address issues with material made available online.”¹⁰²

Broader technological issues were among the matters considered in the paper:

The discussion paper notes concerns raised by legal, media and technology stakeholders regarding the potential liability of online publishers and other digital services for defamatory matters communicated by others. In particular, the scope and utility of the existing defence of ‘innocent dissemination’ and the lack of a clear ‘safe harbour’ for online intermediaries of defamatory matter are being considered.

The Broadcasting Services Act 1992 (Cth) provides that state or territory law has no effect to the extent that it subjects an internet content host or internet service provider to liability for hosting or carrying particular content where they were not aware of the nature of the content. However, the scope of this protection has been questioned as it is unclear how it applies to search engines, social media sites or messaging services. The volume of content carried by these services also makes it challenging for them to remove material after being made aware of it.

The discussion paper acknowledges this issue is ‘one of the most complex to address and has implications beyond defamation law alone’. The overlap with other online content regulation issues is reflected in the ongoing Australian Competition and Consumer Commission inquiry into Digital Platforms and recent criminal laws regarding the sharing of abhorrent violent material. Potentially, the review’s findings could contribute to the amendment of the Broadcasting Services Act to clarify protections and responsibilities of online intermediaries in relation to content (such as responding to takedown notices).¹⁰³

2. Criminal Defamation

State and territory criminal codes include defamation as a criminal offense, also based on a provision in the model defamation law (except for Victoria, where this is a common law offense,¹⁰⁴ supplemented by a statutory offense of publishing “false defamatory libel”). Such offenses are contained in the following provisions:

¹⁰⁰ Press Release, NSW Department of Justice, Review Recommends Defamation Cyber-Age Reboot (June 7, 2018), <https://perma.cc/AC28-7ZP8>; Michael Douglas, *Protecting Google from Defamation Is Worth Seriously Considering*, Gizmodo (June 19, 2018), <https://perma.cc/JJL7-FTV3>.

¹⁰¹ Owen Griffiths, *Reform of Defamation Law*, in Parliamentary Library, *Parliamentary Library Briefing Book: Key Issues for the 46th Parliament* (July 2019), <https://perma.cc/DRU9-2UPQ>.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ *King v R* (1876) 2 VLR 17.

- Australian Capital Territory: Criminal Code Act 2002 (ACT) section 439;
- New South Wales: Crimes Act 1900 (NSW) section 529;
- Northern Territory: Criminal Code 1983 (NT) section 204;
- Queensland: Criminal Code 1899 (Qld) section 365;
- South Australia: Criminal Law Consolidation Act 1935 (SA) section 257;
- Tasmania: Criminal Code Act 1924 (Tas) section 196;
- Victoria: Wrongs Act 1958 (Vic) section 10;¹⁰⁵
- Western Australia: Criminal Code Act Compilation 1913 (WA) section 345.

The criminal defamation provisions are largely similar and impose a punishment of imprisonment for up to three years, with a fine also being an available punishment in some jurisdictions. It appears, however, that these provisions are very rarely applied.¹⁰⁶ Various jurisdictions require leave from the Director of Public Prosecutions in order to prosecute a person for criminal defamation, with certain matters having to be considered. In addition, the same defenses that apply to civil defamation claims also apply in the context of criminal defamation. No cases were located involving the prosecution of individuals for making statements online with respect to journalists.

¹⁰⁵ Wrongs Act 1958 (Vic), <https://perma.cc/A94M-43N8>.

¹⁰⁶ Craig Burgess, *Criminal Defamation in Australia: Time to Go or Stay?*, 20(1) Murdoch U. L. Rev. 1, 3 (2013), <https://perma.cc/L4BN-WKSX>; Mark Pearson, *Rare Criminal Defamation Charge in Queensland - #MLGriff*, Journlaw (June 5, 2019), <https://perma.cc/F3PH-UD8S>.

Brazil

Eduardo Soares
Senior Foreign Law Specialist

SUMMARY The Brazilian Constitution protects freedom of expression and prohibits censorship. The Penal Code criminalizes several types of conduct that constitute harassment, and the relevant provisions are applicable to online conduct. In the absence of specific laws for the protection of journalists against online harassment, the provisions of the Penal Code can be used. Cases of online aggression against journalists are abundant. However, prosecution and conviction of the perpetrators is scarce. Bills of law are pending in Congress that are designed to further protect journalists against violence in general and to enable the involvement of the Federal Police in investigations of crimes against journalists.

I. Constitutional Principles of the Freedom of Expression

Article 5 of the Brazilian Constitution states that everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the rights to life, liberty, equality, security and property, on the following terms:

IV – manifestation of thought is free, but anonymity is forbidden;

V – the right of reply is assured, in proportion to the offense, as well as compensation for pecuniary or moral damages or damages to reputation;

IX – expression of intellectual, artistic, scientific, and communication activity is free, independent of any censorship or license;

X – personal intimacy, private life, honor and reputation are inviolable, guaranteeing the right to compensation for pecuniary or moral damages resulting from the violation thereof;

XIII – exercise of any job, trade or profession is free, observing the professional qualifications that the law establishes;

XIV – access to information is assured to everyone, protecting the confidentiality of sources when necessary for professional activity;

XLI – the law must punish any discrimination attacking fundamental rights and liberties[.]¹

Under the provisions of the Constitution, the expression of thoughts, creation, speech, and information, through whatever form, process, or vehicle, should not be subject to any restrictions.² Subject to the provisions of article 5 of the Constitution set out above, no law should contain any

¹ Constituição Federal, art. 5, <https://perma.cc/5WJR-TFN4>.

² Id. art. 220.

provision that may constitute an impediment to full freedom of the press, in any medium of social communication.³ Any and all censorship of a political, ideological, or artistic nature is forbidden.⁴

II. Criminal Activities and Sanctions

A. Penal Code

Several provisions of the Brazilian Penal Code are applicable to harassment in general, including on the internet. Slandering (*caluniar*) someone, “falsely attributing to him or her a fact defined as a crime,” is punished with imprisonment from six months to two years and a fine.⁵ The same punishment applies to those who, knowing the attribution is false, propagate or disclose it.⁶

Defaming (*difamar*) someone by attributing to him or her “a fact offensive to his or her reputation” is punished with imprisonment from three months to one year and a fine.⁷ Injuring (*injuriar*) someone, “offending his or her dignity or decorum,” is punished with imprisonment from one to six months or a fine.⁸

Forcing (*constrangimento ilegal*) someone, “through violence or grave threat, or after having reduced by any other means his or her ability to resist, not to do what the law permits, or to do what the law does not command,” is punished with imprisonment from three months to one year or a fine.⁹ Threatening (*ameaçar*) someone “by word, writing or gesture, or any other symbolic means, to cause them unjust and grave harm” is punished with imprisonment from one to six months or a fine.¹⁰

Assigning or attributing to a third party “a false identity to gain advantage, for one’s own or another’s benefit,” or causing harm to another, is punished with imprisonment from three months to one year, or with a fine if the act does not constitute an element of a more serious crime.¹¹

B. Decree-Law No. 3,688 of October 3, 1941

Decree-Law No. 3,688 of October 3, 1941, which defines misdemeanors (*contravenções penais*), punishes with imprisonment from fifteen days to three months, or a fine, whomever disturbs

³ Id. art. 220(§ 1).

⁴ Id. art. 220(§ 2).

⁵ Código Penal, Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, art. 138, <https://perma.cc/3J8J-HHQS>. All translations by author.

⁶ Id. art. 138(§ 1).

⁷ Id. art. 139.

⁸ Id. art. 140.

⁹ Id. art. 146.

¹⁰ Id. art. 147.

¹¹ Id. art. 307.

someone else's work or rest.¹² Harassing someone or disturbing his or her tranquility, on purpose or for an objectionable reason, is punished with imprisonment from fifteen days to two months or a fine.¹³

C. Law No. 12,735 of November 30, 2012

Law No. 12,735, enacted on November 30, 2012, established specialized police stations (*delegacias especializadas*) to fight digital crimes.¹⁴

D. Law No. 12,737 of November 30, 2012

Law No. 12,737 of November 30, 2012, amended the Penal Code to include, as criminal offenses, certain activities involving the use of a computer. It added article 154-A to the Penal Code, which states that hacking into someone else's computer device, whether or not connected to a computer network, through an "improper breach of security mechanisms and for the purpose of obtaining, tampering with or destroying data or information without the express or tacit authorization of the device holder," or "installing vulnerabilities to gain unlawful advantage," is punished with imprisonment from three months to one year and a fine.¹⁵

The punishment is increased from one sixth to one third if the invasion results in economic loss.¹⁶ If the invasion results in the obtaining of private electronic communications content, trade or industrial secrets, confidential information as defined by law, or unauthorized remote control of the invaded device, the offender is punished with imprisonment from six months to two years, and with a fine if the conduct is not a more serious crime.¹⁷ The punishment is increased from one to two thirds if there is disclosure, commercialization, or transmission to third parties, in any capacity, of the data or information obtained.¹⁸

III. Internet Rules

On April 24, 2014, Brazil published Law No. 12,965, which establishes principles, guarantees, rights, and duties for the use of the internet in Brazil and determines the guidelines for the action of the Union, the states, the Federal District and the municipalities in relation to this matter.¹⁹

The regulation of the use of the internet in Brazil is based, *inter alia*, on respect for freedom of expression, human rights, personality development, and the exercise of citizenship in digital

¹² Decreto-Lei No. 3.688, de 3 de Outubro de 1941, art. 42, <https://perma.cc/FCF8-2E72>.

¹³ Id. art. 65.

¹⁴ Lei No. 12.735, de 30 de Novembro de 2012, art. 4, <https://perma.cc/3HSF-NLN5>.

¹⁵ Lei No. 12.737, de 30 de Novembro de 2012, art. 2, <https://perma.cc/JG3A-YSTT>.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Lei No. 12.965, de 23 de Abril de 2014, art. 1, <https://perma.cc/KG37-QMS4>.

media; plurality and diversity; openness and collaboration; free enterprise, free competition, and consumer protection; and the social purpose of the internet.²⁰

According to Law No. 12,965, internet access is essential to the exercise of citizenship. For this purpose, the Law lists the rights of and guarantees of internet users, which include, but are not limited to, the inviolability of intimacy and privacy; protection and compensation for property or moral damages resulting from such violation; inviolability and secrecy of the flow of a person's communications through the internet, except by court order, as provided by law; and inviolability and secrecy of a person's private communications that have been stored, except by court order.²¹

IV. Protection of Journalists

It does not appear that there are specific protections for journalists against online harassment. However, all the provisions discussed above would be applicable to their protection.

V. Internet Harassment of Journalists

A. Prosecution

In 2016, Leonardo Sakamoto, a journalist who is also president of the nongovernmental organization Repórter Brasil, filed a lawsuit in a civil court in the state of São Paulo requesting that Google release information about who ordered an advertisement that listed the journalist's name and his blog and stated "Leonardo Sakamoto Lies."²²

Google cited the name, address, and phone number of a meat processing company called JBS in its response to the court order, as well as a number of IP addresses. However, it declined to state who paid for the advert, citing client confidentiality.²³ A separate judicial request to supply the identity of the IP addresses revealed that the majority of them were linked to 4Buzz, a digital marketing agency, which was contracted in 2015 by JBS.²⁴

A Google spokesperson said the company was "not responsible for, and cannot interfere with content published by advertisers on [Google's advertising platform]," but added that violation of its policies could result in removal of an ad.²⁵

Sakamoto's work reportedly has resulted in defamation and death threats. Earlier in 2016, a Brazilian newspaper published an entirely fabricated story along with a picture of Sakamoto's

²⁰ Id. art. 2.

²¹ Id. art. 7.

²² *Meat Company Denies Backing Advertisement against Brazilian Activist*, The Guardian (Apr. 10, 2016), <https://perma.cc/8Q6B-P99D>.

²³ Id.

²⁴ Id.

²⁵ Id.

face, claiming he had said “the retired are useless to society,” prompting a cascade of violent abuse.²⁶

It was not reported, however, if any legal action was taken against the authors of the fabricated story or whether further legal action was taken against the authors of the mentioned advertisement.

B. Lack of Prosecution

On September 3, 2019, the Committee to Protect Journalists published an article arguing that Brazilian authorities should thoroughly investigate threats against journalist Adecio Piran, prosecute those responsible, and ensure his safety.²⁷ Piran is the owner of a newspaper and website called *Folha do Progresso* in the municipality of Novo Progresso, located in the northern state of Pará.²⁸

According to *Amazônia Real*, the threats to Piran were reprisals by local landowners and farmers after *Folha do Progresso* published that these groups were organizing a day of coordinated fires in the region.²⁹ Fires occurred in the Brazilian Amazon rainforest for much of August, according to local and international reports.³⁰ The article mentions that Piran had reported the threats to local police, who said they were investigating those responsible for the threats, and expected more information the following week.³¹

Several other situations involving online harassment of Brazilian journalists were located.³² However, it was not possible to determine whether situations where journalists were subjected to internet harassment and disinformation campaigns resulted in indictments against suspected perpetrators.

C. Development of Legislation to Protect Journalists

There are currently several bills of law pending analysis in the Brazilian Chamber of Deputies proposing the amendment of different laws for the protection of journalists. Bill of Law No. 1838/2019 proposes to add a new paragraph to article 1 of the Heinous Crimes Act, Law 8,072 of 25 July 1990, classifying as heinous crimes committed against the life, safety, and physical integrity of journalists and press professionals in the exercise of their activities.³³ Bill of Law No.

²⁶ Id.

²⁷ *Jornalista Brasileiro Adecio Piran Ameaçado Após Noticiar Incêndios na Amazônia*, Committee to Protect Journalists (Sept. 3, 2019), <https://perma.cc/AB9L-MFKT>.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² See generally *Nossas publicações*, Reporteres Sem Fronteiras, <https://perma.cc/3A7V-AWYK>.

³³ Projeto de Lei 1838/2019, Câmara dos Deputados, <https://perma.cc/CV83-B5RY>.

3288/2019 would amend Law 10,446 of May 8, 2002, to provide for the participation of the Federal Police in the investigation of crimes against journalistic activity.³⁴

³⁴ Projeto de Lei 3288/2019, Câmara dos Deputados, <https://perma.cc/URP8-9KG8>.

Canada

Tariq Ahmad
Foreign Law Specialist

SUMMARY Canada does not have a specific law that deals with online harassment of journalists. The Criminal Code contains provisions of more general application that can apply to the online environment, such as provisions that deal with cyberbullying and prohibit the non-consensual distribution of intimate images. Cyberstalking may also fall under the offense of “criminal harassment” in the Criminal Code. Courts in Canada appear to have upheld the constitutionality of this provision and do not see it as a violation of the right to freedom of expression in the Canadian Charter of Rights and Freedoms. The courts also appear to be willing to apply the civil action of libel to the online context, which is sometimes described as “cyber-libel.”

I. Freedom of Expression and the Law on Harassment

Attempts to address the problem of online harassment must be balanced against the right to freedom of expression protected by subsection 2(b) of the Canadian Charter of Rights and Freedoms, which provides that everyone has the fundamental freedom of “thought, belief, opinion and expression, including freedom of the press and the media communication.”¹ Fundamental rights, including freedom of expression, are subject to section 1 of the Charter, which allows “reasonable” limits to be placed on those rights.² This means that “once an infringement of a Charter right has been established, the courts must decide whether the violation by the government or other institution to which the Charter applies can be considered justified.”³ As part of the section 1 analysis, courts must determine whether the limit on the right is “prescribed by law,” “reasonable,” and “demonstrably justified” (applying the test the Supreme Court established in *R. v. Oakes*⁴), and the law must have a pressing and substantial objective.⁵

For example, Canadian courts have held that section 264 of Canada’s Criminal Code, containing the offense of criminal harassment (discussed below), is constitutional. In 1995, in one of the most authoritative pronouncements on this issue, the Court of Queen’s Bench of Alberta upheld the constitutionality of section 264 and observed that it did not violate the right to freedom of expression under section 2(b) of the Charter as it is “carefully designed to achieve the objective

¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (1982), c. 11 (U.K.), § 2(b), <https://perma.cc/2SZZ-TRYJ>.

² Julian Walker, *Hate Speech and Freedom of Expression: Legal Boundaries in Canada 3* (Pub. No. 2018-25-E, Library of Parliament, June 29, 2018), <https://perma.cc/8JPB-BMJ9>.

³ *Id.*

⁴ *R. v. Oakes*, [1986] 1 S.C.R. 103, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>, archived at <https://perma.cc/33SB-8LYW>.

⁵ Department of Justice, *Charterpedia: Section 1 – Reasonable Limits*, <https://www.justice.gc.ca/eng/csjsjc/rfc-dlc/ccrf-ccd1/check/art1.html> (last updated Apr. 25, 2019), <https://perma.cc/RL54-3T89>.

desired”, “suffers from neither overbreadth nor vague-ness”, represents a “a minimal impairment of freedom of that form of expression”, and is “is reasonable and demonstrably justified in a free and democratic society.”⁶

II. General Protection against Online Harassment

A. Protecting Canadians from Online Crime Act

The Protecting Canadians from Online Crime Act⁷ came into force on March 10, 2015. The Act was introduced by the government to deal with cyberbullying and to prohibit the non-consensual distribution of intimate images.⁸ It added section 162.1(1) to Canada’s Criminal Code,⁹ making it an offense to “share intimate images of a person without the consent of the person in the image.”¹⁰ According to Public Safety Canada,

[t]his law applies to everyone, not just people under 18. The purpose of this offence is to protect the privacy a person has in his or her nudity or sexual activity. With digital technology rapidly changing, there has been an increase of cyberbullying in the form of distributing intimate or sexual images without the consent of the person in the photo or video. This type of behaviour can occur in a variety of situations. Often it appears to be a form of revenge: a person has willingly shared an intimate image of themselves with a boyfriend or girlfriend, and when the relationship ends, the partner may distribute those photos in what is sometimes called ‘revenge porn’. Whatever the motivation, the impact of this kind of cyberbullying can be devastating to a person’s self-esteem, reputation and mental health. In some cases, these acts may have played a part in teens taking their own lives.¹¹

Judges have the “authority to order the removal of intimate images from the Internet if the images were posted without the consent of the person or persons in the image.”¹²

An “intimate image” is defined under section 162.1(2) as an “image that depicts a person engaged in explicit sexual activity or that depicts a sexual organ, anal region or breast. Furthermore, the image would have to be one where the person depicted had a reasonable expectation of privacy at the time of the recording and had not relinquished his or her privacy interest at the time of the offence.”¹³

⁶ R. v. Sillipp, 1995 CanLII 5591 (AB QB), <https://perma.cc/SP2M-LQWU>.

⁷ Protecting Canadians from Online Crime Act S.C. 2014, c. 31, <https://perma.cc/4893-TG8W>.

⁸ *What Are the Potential Legal Consequences of Cyberbullying?*, Public Safety Canada, <https://perma.cc/NL4R-9QKN>.

⁹ Criminal Code, R.S.C., 1985, c. C-46, <https://perma.cc/GT99-FMQF>.

¹⁰ Public Safety Canada, *supra* note 5.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Anyone convicted of distributing an intimate image without consent could face the following punishments:

- They could be imprisoned for up to five years;
- Their computer, cell phone or other device used to share the image could be seized; and
- They could be ordered to reimburse the victim for costs incurred in removing the intimate image from the Internet or elsewhere.¹⁴

The law also replaced sections 371 and 372 of the Criminal Code with the following sections to deal with cyberbullying:

Message in false name

371. Everyone who, with intent to defraud, causes a message to be sent as if it were sent under the authority of another person, knowing that it is not sent under that authority and with intent that it should be acted on as if it were, is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.

False information

372. (1) Everyone commits an offence who, with intent to injure or alarm a person, conveys information that they know is false, or causes such information to be conveyed by letter or any means of telecommunication.

Indecent communications

(2) Everyone commits an offence who, with intent to alarm or annoy a person, makes an indecent communication to that person or to any other person by a means of telecommunication.

Harassing communications

(3) Everyone commits an offence who, without lawful excuse and with intent to harass a person, repeatedly communicates, or causes repeated communications to be made, with them by a means of telecommunication.

Punishment

Everyone who commits an offence under this section is

- (a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b) guilty of an offence punishable on summary conviction.¹⁵

¹⁴ Id.

¹⁵ Protecting Canadians from Online Crime Act S.C. 2014, § 18 (replacing sections 371 and 372 of the Criminal Code).

B. Other Criminal Code Provisions that May Apply to the Online Environment

Several other Criminal Code offenses also deal with bullying and harassment and may apply to the online environment depending on the “exact nature of the behavior.”¹⁶ Canada does not have a specific criminal law dealing with cyberstalking (also known as “online harassment”).¹⁷ However, cyberstalking appears to also fall under section 264 of the Code, containing the offense of “criminal harassment”¹⁸:

Criminal harassment

264 (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Prohibited conduct

- (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;
 - (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.

Punishment

- (3) Every person who contravenes this section is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
 - (b) an offence punishable on summary conviction.¹⁹

The Department of Justice Canada describes contacting a person “on the Internet or through constant e-mail messages” as an example of criminal harassment.²⁰

¹⁶ Public Safety Canada, *supra* note 5.

¹⁷ *Cyberstalking*, University of New Brunswick, <https://perma.cc/KGT6-4DXP>.

¹⁸ Alexia Kapralos, *What Can I Do if I'm Being Cyber-stalked?*, FindLaw Canada (Jan. 24, 2018), <https://perma.cc/2ARE-G79C>.

¹⁹ Criminal Code, R.S.C., 1985, c. C-46, § 264.

²⁰ Department of Justice Canada, *Stalking is a Crime Called Criminal Harassment 2* (2003), <https://perma.cc/XXY5-VL7J>.

Other offenses in the Criminal Code that may be relevant to online harassment include:

- Uttering threats (section 264.1)
- Intimidation (section 423.1)
- Mischief in relation to computer data (section 430(1.1))
- Unauthorized use of computer (section 342.1)
- Identity fraud (section 403)
- Extortion (section 346(1))
- False messages, indecent or harassing telephone calls
- Counselling suicide (section 241(1)(a))
- Public Incitement of hatred (section 319(1))
- Willful promotion of hatred (section 319(2))
- Defamatory libel (sections 297-301)²¹

III. Protection against Online Harassment of Journalists

The only provision in the Criminal Code that seems to be specifically relevant to the harassment of journalists is the offense of intimidation of a journalist by a criminal organization:

Intimidation of a justice system participant or a journalist

423.1 (1) No person shall, without lawful authority, engage in any conduct with the intent to provoke a state of fear in

- (a) a group of persons or the general public in order to impede the administration of criminal justice;
- (b) a justice system participant in order to impede him or her in the performance of his or her duties; or
- (c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.

Punishment

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.²²

²¹ Public Safety Canada, *supra* note 5.

²² Criminal Code, R.S.C., 1985, c. C-46, § 423.1.

IV. Defamation Law

In Canada, defamation law varies from province to province and can be subdivided into libel and slander.²³ In Ontario, for example, the law is found in the Libel and Slander Act.²⁴ The courts in Canada appear to be quite willing to apply the civil action of libel in the online context, which is sometimes described as “cyber-libel,” to “hold responsible anyone who uses the Internet to defame others, even if the defamer is outside the country.”²⁵ Cyber-libel is a term used “when someone has posted or e-mailed a statement that is untrue and damaging relating to another individual on the Internet, including in message boards, bulletin boards, blogs, chat rooms, personal websites, social media, social networking sites, or other published articles.”²⁶ One recent Ontario case looks at the unique aspect of internet defamation and damages:

This leads to an additional, key consideration. This is an Internet defamation case. As this court held in *Barrick*, at para. 28, the pernicious effect of defamation on the Internet, or “cyber libel”, distinguishes it, for the purposes of damages, from defamation in another medium. Consequently, while the traditional factors to be considered in determining general damages for defamation remain relevant (for instance, the plaintiff’s conduct, position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any apology or retraction, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances: *Hill*, at para. 185), they must be examined in light of the Internet context of the offending conduct. Justice Blair explained in *Barrick*, at para. 31:

[O]f the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed. [Citation omitted.]

He continued, at para. 34:

It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and

²³ *Defamation, Libel and Slander: What are My Rights To Free Expression?*, Canadian Journalists For Free Expression (CJFE) (June 15, 2015), <https://perma.cc/JV6U-ZBC7>.

²⁴ Libel and Slander Act, R.S.O. 1990, c. L.12, <https://perma.cc/9AHT-U57A>.

²⁵ *Defamation Laws (Cyber-libel) and the Internet*, Legal Line, <https://perma.cc/K4SU-FLGU>.

²⁶ *Defamation in the Internet Age: The Law and Social Media*, McCague Borlack (June 2017), <https://perma.cc/QB3G-8W3Q>.

accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.²⁷

V. Reported Cases

No court cases were located involving online harassment or disinformation campaigns against journalists in Canada. A 2016 case, *R. v. Elliott*,²⁸ was notable as the first criminal harassment case in Canada involving Twitter. In that case, the Ontario Court of Justice found a Toronto man not guilty of criminal harassing two feminist activists on the internet.²⁹

²⁷ *Rutman v. Rabinowitz*, 2018 ONCA 80 (CanLII), ¶¶ 68 & 69, <https://perma.cc/35SR-XT34>, citing *Barrick Gold Corporation v. Lopehandia et al.*, 71 O.R. (3d) 416, ¶¶ 31 & 34, <https://perma.cc/N47B-EBQD>.

²⁸ *R. v. Elliott*, 2016 ONCJ 35, <https://perma.cc/XH4D-YFUW>.

²⁹ See *Toronto Man Acquitted In Canada's First Criminal Harassment Case Involving Twitter*, Gelman & Associates, <https://perma.cc/424Q-FFDX>.

England and Wales

Clare Feikert-Ahalt
Senior Foreign Law Specialist

SUMMARY A number of laws protect freedom of expression in England and Wales. While freedom of expression is protected, there are certain circumstances in which it may be overridden.

There are a significant number of pieces of criminal legislation that can be applied to harassing or abusive online communications that range from the Communications Act 2003 to the Public Order Act 1986 and the Protection from Harassment Act 1992. The Law Commission has conducted an in depth “scoping report” and found that the laws, with some limitations, cover online communications that are abusive, but that the various overlapping laws have led to uncertainty. Technological limitations within the police force and this uncertainty of the law have led to underreporting and difficulties in successfully prosecuting offenders. The Law Commission has recommended that the laws be reviewed and consolidated to provide greater clarity and certainty.

The defamation law of England and Wales has recently been overhauled and provides a specific process for individuals to request the removal of material that they believe is defamatory. The process uses website operators as an intermediary to facilitate the removal of this type of information.

I. Introduction

Intimidation and harassment of those in public life, including journalists, has increased significantly over the past decade, particularly for political and female journalists.¹ A government report notes that

[t]he rise of the internet and social media in recent decades has fundamentally reshaped the way we engage with each other and as a society. This radical shift has brought many benefits, but there are also associated risks and harms, and it has proved challenging for the law to keep pace with this rapidly changing environment.²

The widespread use of social media has been the most significant factor accelerating and enabling intimidatory behavior in recent years. Although social media helps to promote widespread access to ideas and engagement in debate, it also creates an intensely hostile online environment.³

¹ HM Government, *Online Harms*, CP 57 (2019), <https://perma.cc/6D3L-X72F>.

² *Abusive and Offensive Online Communications*, Law Commission, <https://perma.cc/MKS4-8237>.

³ Committee on Standards in Public Life, *Intimidation in Public Life* Cm. 9543 (2017), <https://perma.cc/FZC3-YXES>.

The use of communications by people to abuse others is not a new phenomenon and, over the past 130 years, the laws have evolved to respond to address abuse through new means of communication.⁴ The Post Office Protection Act 1884 made it an offense to send grossly offensive materials through the mail and the Post Office Amendment Act 1935 prohibited the use of telephones to communicate indecent, obscene or abusive messages. Half a century later the Malicious Communications Act 1988 was enacted to address anonymous “poison pen letters.” Most laws that could be relevant to the misuse and abuse of online communications were drafted before the rapid growth in communications technology.⁵ As technology continues to evolve, there has been significant discourse over whether the law should be reformed.

While a significant number of journalists have faced online abuse and harassment, female journalists have been disproportionately affected.⁶ An international survey of female journalists found that almost two thirds experienced abuse online, that half of these did not report the abuse, and that two fifths admitted they had censored their work as a result of the abuse.⁷ Concerns have been raised that this “represents a broader threat to the freedom of the press”⁸ and the government has said that the issue of intimidation must be addressed, stating: “[t]his abuse is unacceptable – it goes beyond free speech and free debate, dissuades good people from going into public life, and corrodes the values on which our democracy rests.”⁹ The United Nations Human Rights Office of the High Commissioner has stated that abusive online communications directed at journalists, particularly female journalists, could have a widespread and long-term impact:

[F]ailure to legislate effectively against abusive online communications has a disproportionate economic impact on women, who feel unsafe on the internet and may disengage with the many opportunities it offers; . . . large-scale online abuse suffered by high-profile women may further erode the willingness of women to stand for elected public office, or to take up senior positions, reducing diversity in the workforce and public life for the next generation.¹⁰

⁴ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* ¶ 1.36 (2018), <https://perma.cc/VZ3M-FPZH>.

⁵ House of Lords, Select Committee on Communications, *Social Media & Criminal Offences*, First Report, 2014-15, HL 37, <https://perma.cc/5P4J-VGGL>.

⁶ Erika Fraser & Laura Martineau-Searle, *VAWG Helpdesk Research Report No. 211: Nature and Prevalence of Cyber Violence against Women and Girls*, UK Aid (Oct. 8, 2018), <https://perma.cc/8NTW-WNKF>.

⁷ Press Release, Int’l Fed’n of Journalists, *IFJ Global Survey Shows Massive Impact of Online Abuse on Women Journalists* (Nov. 23, 2018), <https://perma.cc/M5XR-W2AX>. See also Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 1.49; Fraser & Martineau-Searle, supra note 6, at 10.

⁸ Committee on Standards in Public Life, *Intimidation in Public Life*, Cm. 9543 (Dec. 2017) at 79-80, <https://perma.cc/XLK8-4AKW>. See also Graham Ruddick, *BBC Chair Calls for End to Abuse of Journalists – Especially Women*, *Guardian* (London) (Sept. 13, 2017), <https://perma.cc/84DG-C8HX>.

⁹ HM Government, *Online Harms*, supra note 1, Box 14.

¹⁰ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 1.49 (citing United Nations Human Rights: Office of the High Commissioner, *UN Experts Urge States and Companies to Address Online Gender-Based Abuse but Warn against Censorship* (Mar. 8, 2017), <https://perma.cc/HTV7-TK3B>).

II. Freedom of Speech

The European Convention on Human Rights was incorporated into the national law of the United Kingdom by the Human Rights Act 1998.¹¹ Article 10 of the European Convention on Human Rights provides for freedom of expression and grants individuals the right to hold opinions and to receive and share ideas, without state interference. It specifically includes politics and matters of public interest:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.¹²

Freedom of expression is a qualified right, which means that it may be restricted in certain circumstances provided it is prescribed by law and necessary in a democratic society to protect a legitimate aim. Article 10(2) specifies that

[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary.¹³

The European Court of Human Rights has noted that the right does not just extend to information that is “favorably received” but extends beyond that to also cover “those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.”¹⁴ The European Court of Human Rights has further determined that whether the restriction on freedom of expression is necessary “requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate”¹⁵ and that a legitimate aim extends to “the protection of the reputation or rights of others.”¹⁶

The Law Commission notes that it is “difficult to anticipate where the boundaries lie”¹⁷ between protected and unprotected speech. The Crown Prosecution Service (CPS), the public body responsible for criminal prosecutions in England and Wales, has issued guidance that prosecutions should only be undertaken for communication offenses if “interference with the

¹¹ Human Rights Act 1998, c. 42, <https://perma.cc/ZKN8-XVNC>.

¹² Id. sched. 1, art. 10(1).

¹³ Id. sched. 1, art. 10(2).

¹⁴ *Handyside v. UK* (1976) 1 EHRR 737 at 49. See also *Muller v. Switzerland* (1988) 13 EHRR 212 at 33.

¹⁵ Ursula Smartt, *Media & Entertainment Law* 64 (3d ed. 2017).

¹⁶ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 2.68.

¹⁷ Id. ¶ 2.72.

freedom of expression is unquestionably prescribed by law, is necessary and is proportionate.”¹⁸ Despite this guidance, which aims to achieve consistency in prosecutions across the country, the Law Commission has expressed concern that the lack of clarity in the law of communications offenses means

. . . there is a risk of overcriminalisation of online communication for gross offensiveness. This can tip the balance of parity between offline and online communication; with online communication being subject to a greater risk of prosecution for “gross offensiveness” than offline communication.¹⁹

The Law Commission has further stated that the communications offenses

are remarkably broad, both in terms of the different forms of communications now captured, and the proscribed behaviour and speech caught by the section 127 provision. When combined, the result is a criminalisation of some forms of communication that many may find surprising . . . [and] criminalises many forms of speech that would not be an offence in the “offline” world, even if spoken with the intention described in section 127 . . . were it not for prosecution guidance, and human rights protections, they could conceivably be used to police a huge array of low level speech.²⁰

III. Protection from Online Harassment

There do not appear to be any laws that specifically apply to the online harassment of journalists. However; England and Wales have a significant number of statutes that aim to protect individuals from harassment and abuse and that can be applied to any person, regardless of their occupation, and cover abuse and harassment through online communications.²¹ Given the extent and number of statutes that can apply, this report provides a summary of the most commonly used laws to prosecute individuals who harass individuals online.

A. Communications Offenses

The primary statutes addressing abusive online communications are the Malicious Communications Act 1988 and the Communications Act 2003.

¹⁸ Crown Prosecution Service, *Guidelines on Prosecuting Cases Involving Communications Sent via Social Media* (Aug. 21, 2018) ¶ 27, <https://perma.cc/6G5G-EHKX>.

¹⁹ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 5.84.

²⁰ Id. ¶¶ 4.63 & 13.47.

²¹ Communications Act 2003, c. 21, <https://perma.cc/5JKX-3CFX>; Criminal Attempts Act 1981, c. 47, <https://perma.cc/UHC5-XVZE>; Crime and Disorder Act 1998, c. 37, <https://perma.cc/K5RQ-UGGJ>; Criminal Justice Act 2003, c. 44, <https://perma.cc/LUG8-PVAP>; Criminal Justice and Courts Act 2015, c. 2, <https://perma.cc/RB3Y-8DTB>; Criminal Justice and Immigration Act 2008, c. 4, <https://perma.cc/UDY4-YEPU>; Data Protection Act 2018, c. 12, <https://perma.cc/W57W-HMZ9>; Indecent Displays (Control) Act 1981, c. 42, <https://perma.cc/F52D-2KUR>; Malicious Communications Act 1988, c. 27, <https://perma.cc/G844-4UT6>; Obscene Publications Act 1959, 7 & 8 Eliz. II, c. 66, <https://perma.cc/6AU2-8BCZ>; Protection from Harassment Act 1997, c. 40, <https://perma.cc/EPC9-YHHQ>; Public Order Act 1986, c. 64, <https://perma.cc/8A8B-QRNW>; Serious Crime Act 2007, c. 27, <https://perma.cc/HWN4-DF2R>; Sexual Offences Act 2003, c. 42, <https://perma.cc/2XM8-AYMW>.

Section 1 of the Malicious Communications Act 1988 provides that it is an offense to send electronically any communication that conveys a message that is indecent or grossly offensive, a threat, or false information if the purpose of the communication is to cause distress or anxiety to either the recipient or another person.²² The maximum penalty is imprisonment for up to two years, a fine, or both.

Section 127(1) of the Communications Act provides that it is a criminal offense to send, or cause to be sent, a message through a public electronic communications network “that is grossly offensive or of an indecent, obscene or menacing character.”²³ When considering whether a message is menacing the means through which the message was sent, and context of the communication should be considered, and it must “create fear or apprehension in those to whom it is communicated, or who may reasonably be expected to see it.”²⁴

Whether the message is grossly offensive is a question of fact and

in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances.²⁵

The term “grossly offensive” has been criticized by the Law Commission as being ambiguous and subjective, “leading to inconsistent outcomes.”²⁶

Section 127(2) of the Communications Act provides that it is an offense to send, or cause to be sent, a message through a public electronic communications network that the sender knows is false. This offense has a relatively low threshold for fault as the offender only needs to have the intent of sending the false message “for the purpose of causing annoyance, inconvenience or needless anxiety to another.”²⁷ This offense is committed as soon as the message is sent for this purpose. It does not matter if the message was later retracted or deleted or whether or not the intended recipient opened the message.²⁸ Thus, liability is not dependent on receipt of the message or any evidence of harm caused by it. Rather, the purposeful sending of such a message is an offense under this section. The Law Commission has criticized the application of this section, noting that the absence of the recipient being offended or feeling menaced

. . . suggests that the offence is not exclusively concerned with protecting other people from receipt of unsolicited messages of the proscribed character.²⁹

²² Malicious Communications Act 1988, c. 27, § 1.

²³ Communications Act 2003, c. 21, § 127(1).

²⁴ *Chambers v. DPP* [2012] EWHC 2157 (Admin); [2013] 1 WLR 1833 ¶ 30, <https://perma.cc/TC26-6PQA>.

²⁵ *DPP v. Collins* [2006] UKHL 40; [2006] 1 WLR 2223 ¶ 9, <https://perma.cc/N4HQ-VBVJ>.

²⁶ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 13.18.

²⁷ Communications Act 2003, c. 21, § 127(2).

²⁸ *Id.* ¶ 4.65.

²⁹ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 4.77.

Proceedings for this offense must start within three years from the date of the offense,³⁰ and the maximum penalty for offenses under section 127 of the Communications Act 2003 is up to six months' imprisonment, a fine, or both.

This section has been applied to messages sent through social media services, including Facebook, Facebook Messenger, and Twitter,³¹ which were not in existence at the time the act was written.³² There remains uncertainty over whether the offense applies to communications posted on social media in public forums.³³ As the offense requires the use of a public electronic communications network, communications sent over private networks, which the Law Commission notes include Bluetooth connections, are not covered.³⁴

The Law Commission has stated there is a mismatch between how the Communications Act is written and the practice of the CPS in deciding whether any prosecution is legally justified, as CPS must take into account the right to freedom of expression and whether the prosecution is in the public interest, and the Law Commission has noted freedom of expression is not adequately protected in the act. The effect of this has rendered the law unclear and uncertain.³⁵ The Law Commission is also of the opinion that the offenses contained in the Malicious Communications Act and the Communications Act have significant overlap that can lead to confusion and that the offenses should be reviewed and consideration given to "amalgamation into one coherent set of offences."³⁶

B. Harassment

The Protection from Harassment Act 1997 was introduced to protect individuals from harassment and stalking.³⁷ This act provides that harassment is both a criminal offense and cause of a civil action. Section 1 of the act prohibits individuals from acting in a manner that amounts to harassment of another person, where the perpetrator knows, or ought to know, that the action amounts to harassment. Aiding, abetting, counseling or procuring one or more people to harass a person is also an offense.³⁸ Unlike the communications offenses, there must be at least two

³⁰ Communications Act 2003, c. 21, § 125(5).

³¹ *Chambers v. DPP* [2012] EWHC 2157 (Admin); [2013] 1 WLR 1833 ¶¶ 23-24.

³² Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 4.82.

³³ Law Commission, *Abusive and Offensive Online Communications: Summary of Scoping Report* (undated) 6, <https://perma.cc/FV6U-SR5G>.

³⁴ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 4.92.

³⁵ Law Commission, *Abusive and Offensive Online Communications: Summary of Scoping Report*, supra note 3333, at 10.

³⁶ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 4.153.

³⁷ Protection from Harassment Act 1997, c. 40. See also Steve Foster, *Human Rights and Civil Liberties* 545 (3d ed. 2011).

³⁸ Protection from Harassment Act 1997, c. 40 § 7(3A).

incidents by the same person, or group of people, in order for their actions to constitute harassment.³⁹ This offense is punishable with up to six months of imprisonment, a fine, or both.⁴⁰

Civil action can be started, even if the alleged harasser has not been convicted of a criminal offense, and the court may issue an injunction to restrain individuals from engaging in conduct that amounts to harassment.⁴¹ It is a criminal offense for the person named in the injunction to do any acts prohibited by the injunction, and breaching the terms of any injunction is punishable with up to five years' imprisonment, a fine, or both.⁴² In cases where the harassment has caused financial loss or emotional issues, such as anxiety, the court may also award compensation.⁴³

Stalking is an offense under the Protection from Harassment Act and occurs where a person engages in behavior he or she knows, or ought to know, amounts to the harassment of another person, and the behavior involves those associated with stalking, such as following a person, contacting a person using any means, publishing a statement or other material about another person, or monitoring a person's use of the internet or other form of electronic communication.⁴⁴ This offense is punishable by up to six months' imprisonment, a fine, or both.

The Protection from Harassment Act also contains the offense of putting a person "in fear of violence."⁴⁵ This offense arises when a person, on at least two occasions, engages in a course of conduct that causes another person to fear that violence will be used against them. The offense may also occur when the course of conduct amounts to stalking and, on at least two occasions, causes a person to fear that violence will be used against them, or causes them "serious alarm or distress which has a substantial adverse effect on [their] usual day-to-day activities."⁴⁶ In contrast to the offense of harassment, this offense has a significantly longer penalty and is punishable with up to ten years' imprisonment, a fine, or both.

The Law Commission notes that, while the offenses contained in the Protection from Harassment Act can apply to harassment conducted online by "pile on" abuse, where a significant number of people collectively harass a single person, the provisions "are complex and . . . [not] well understood or widely used,"⁴⁷ and thus, not adequately addressed by the current legislation.⁴⁸

³⁹ *Taking Action About Harassment*, Citizens Advice, <https://perma.cc/8B4E-55PL>.

⁴⁰ Protection from Harassment Act 1997, c. 40 §§ 1-2.

⁴¹ *Id.* § 3.

⁴² *Id.* § 3(9).

⁴³ *Id.* § 3.

⁴⁴ *Id.* § 2A.

⁴⁵ *Id.* §§ 4-4A.

⁴⁶ *Id.* § 4A(b)(ii).

⁴⁷ Law Commission, *Abusive and Offensive Online Communications: Summary of Scoping Report*, *supra* note 33, at 6. See also Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, *supra* note 4, ¶ 8.162.

⁴⁸ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, *supra* note 4, ¶ 8.207.

The result of this has been “that the criminal law is having little effect in punishing or deterring forms of “group abuse.”⁴⁹

C. Other Offenses

In addition to the communication offenses and harassment and abuse offenses, there are a number of acts that may also be an offense under the laws of England and Wales including, but not limited to

- stirring up hatred on the basis of racial, religious, or sexual orientation;⁵⁰
- intentionally harassing, causing alarm or distress;⁵¹
- using threatening, abusive, or insulting actions to cause fear or provoke violence;⁵²
- publishing an obscene article;⁵³
- publicly displaying indecent matter;⁵⁴
- possessing extreme pornography;⁵⁵
- disclosing private sexual photographs and films with intent to cause distress;⁵⁶ and
- inchoate offenses, such as conspiracy, assisting, or encouraging another to commit a crime.⁵⁷

D. Prosecutorial Guidance

Prosecutors must consider a number of other factors when making the decision whether or not to prosecute a case, including whether there is sufficient evidence; it is in the public interest to prosecute the offense, and the prosecution is proportionate and justified, giving particular regard to the right to freedom of expression contained in Article 10 of the European Convention on Human Rights.⁵⁸

⁴⁹ Id.

⁵⁰ Public Order Act 1986, c. 64 Part III & 3A, <https://perma.cc/L7YQ-74J2>. The number of prosecutions for these offenses is very low. See also Crown Prosecution Service, *Hate Crime Report 2017-18* (Oct. 2018) at 13, <https://perma.cc/W2LH-9YBL>.

⁵¹ Public Order Act 1986, c. 64 § 4A.

⁵² Id. § 4.

⁵³ Obscene Publications Act 1959, c. 66 § 2.

⁵⁴ Indecent Displays (Control) Act 1981, c. 42 § 1, <https://perma.cc/36WP-8XSR>.

⁵⁵ Criminal Justice and Immigration Act 2008, c. 4 § 63, <https://perma.cc/FAR6-S5EF>.

⁵⁶ Criminal Justice and Courts Act 2015, c. 2 § 33, <https://perma.cc/95MS-ERVG>.

⁵⁷ Serious Crime Act 2007, c. 27 §§ 44-46, <https://perma.cc/WZ4E-TPXH>.

⁵⁸ *Social Media – Guidelines on Prosecuting Cases Involving Communications Sent via Social Media*, Crown Prosecution Serv. (Revised Aug. 21, 2018), ¶ 31, <https://perma.cc/MH38-TUCA>.

CPS has published guidance that is specific to offenses involving communications sent via social media.⁵⁹ This guidance requires prosecutors to consider whether another substantive offense, such as stalking or harassment, has been committed, and to pursue these, rather than communications offenses.⁶⁰ If communications offenses are prosecuted, section 127 of the Communications Act should be the starting point, unless a higher sentence is required due to the facts and circumstances of the case.⁶¹ Despite this guidance, the Law Commission has noted that “the majority of online hate speech is pursued as one of the communications offences.”⁶²

The CPS has also issued guidance to prosecutors for cases that involve journalists. While the guidance states that it also applies to cases involving journalists as victims, it leans more towards cases that involve the prosecution of journalists, ensuring prosecutors have regard for the protection of freedom of the press.⁶³

E. Extraterritorial Application

Given the ease of international communications the internet provides, the courts have recently adopted the substantive measure test, which means that offenses with a foreign aspect may be tried in the courts of England and Wales if a substantial measure of the activities that constitute the crime occur within its jurisdiction. The Law Commission has stated that “uncertainty exists in relation to this approach, as it applies to Internet activities.”⁶⁴

IV. Defamation

The law relating to defamatory material – that is, published material that causes, or is likely to cause, serious harm to a person’s reputation – is contained in the Defamation Act 2013,⁶⁵ which was enacted, in part, to provide a fairer system for addressing materials published online. The update

... reflects the Government’s view that disputes should be resolved directly between the complainant and the poster [of the information] where possible. It aims to support freedom of expression by giving the poster an opportunity to express his or her views. It also aims to enable complainants to protect their reputation by resolving matters with the person who is responsible for the defamatory posting where they can be identified, while ensuring

⁵⁹ Id. Part A.

⁶⁰ Id.

⁶¹ Crown Prosecution Serv., *supra* note 18, ¶ 13.

⁶² Law Commission, *Abusive and Offensive Online Communications: Summary of Scoping Report*, *supra* note 33, at 8.

⁶³ *Media: Guidance for Prosecutors on Assessing the Public Interest in Cases Affecting the Media*, Dir. for Pub. Prosecutions (Sept. 13, 2012), <https://perma.cc/9E9J-YDTX>.

⁶⁴ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, *supra* note 4, ¶ 4.138.

⁶⁵ Defamation Act 2013, c. 26, § 1(1), <https://perma.cc/2X3V-3SGC>.

that material is removed where the poster cannot be identified or is unwilling to engage in the process.⁶⁶

Prior to the enactment of the Defamation Act 2013, website operators generally automatically removed content upon the receipt of a complaint in order to avoid becoming a party to a lawsuit, as they were considered to be the publisher of the statement at common law and could be held liable for the content of these posts.⁶⁷ Concerns were raised that this cautious approach was limiting free speech, as it meant that some non-defamatory content was being removed and, in cases where content was not removed, individuals were pursuing legal actions against the website operator rather than the individual who authored and posted the content.⁶⁸ Given the vast increase in online users, the government determined that failing to take action in this area of law would negatively impact free speech.⁶⁹

The Defamation Act places the website operator as a liaison point between the aggrieved party and the author of the content.⁷⁰ The regulatory process is contained in Defamation (Operators of Websites) Regulations 2013. Website operators are not under a duty to follow this procedure, and they may instead choose by themselves whether or not to remove any disputed material, or whether they wish to rely on other defenses to the defamation action.⁷¹

Section 5 of the Defamation Act 2013 provides a defense against claims of defamation to website operators that host third-party content. In order to use the defense, a website operator must “show that it was not the operator who posted the statement on the website.”⁷² The defense may be defeated if the claimant can show that

- he or she could not identify the person who posted the allegedly defamatory statement;
- he or she notified the operator of the complaint relating to the statement; and
- the website operator failed to respond to the complaint in accordance with the process contained in the Defamation (Operators of Websites) Regulations 2013.⁷³

Section 5(6) of the Act provides that the complainant must include the following information in the complaint: his or her name, the statement as it appears on the website in question, and the reasons why the statement is believed to be defamatory. Regulation 2 of the Defamation

⁶⁶ Explanatory Memorandum to the Defamation (Operators of Websites) Regulations 2013, SI 2013/3028, ¶ 7.6, <https://perma.cc/5DT8-HNC3>.

⁶⁷ *Godfrey v. Demon Internet Ltd.* [1999] EWHC QB 244, <https://perma.cc/YBV8-7JLY>.

⁶⁸ Explanatory Memorandum to the Defamation (Operators of Websites) Regulations 2013, *supra* note 66, ¶ 7.2.

⁶⁹ *Id.*

⁷⁰ Defamation Act 2013, c. 26 § 5, <https://perma.cc/2X3V-3SGC>. The regulatory process is contained in the Defamation (Operators of Websites) Regulations 2013, SI 2013/3028, <https://perma.cc/W7Y9-49BG>.

⁷¹ Explanatory Memorandum to the Defamation (Operators of Websites) Regulations 2013, *supra* note 66, ¶ 7.4.

⁷² Defamation Act 2013, c. 26, § 5(2).

⁷³ *Id.* § 5.

(Operators of Websites) Regulations 2013 provides that the complainant must also include the following information when contacting the service provider:

- (a) specify the electronic mail address at which the complainant can be contacted;
- (b) set out the meaning which the complainant attributes to the statement referred to in the notice;
- (c) set out the aspects of the statement which the complainant believes are –
 - (i) factually inaccurate; or
 - (ii) opinions not supported by fact;
- (d) confirm that the complainant does not have sufficient information about the poster to bring proceedings against that person; and
- (e) confirm whether the complainant consents to the operator providing the poster with –
 - (i) the complainant's name; and
 - (ii) the complainant's electronic mail address.⁷⁴

Even if the notice provided to the website operator does not contain all the information required by both the Act and the Regulations, the Regulations provide that it must be treated as a complaint for the purposes of the Defamation Act 2013.⁷⁵

Within forty-eight hours of receiving a complaint, the website operator must send the poster of the content complained of

- a copy of the complaint, with the complainant's information concealed if he or she has not consented to the sharing of this information; and
- written notice that the content complained of will be removed unless the poster provides a written response by midnight no later than the fifth day after the notification was sent.⁷⁶

The poster must then notify the operator whether he or she wants the content to be removed from the website specified in the notice. If the poster does not want the content to be removed, the poster must provide his or her full name and postal address, and indicate whether the website operator may provide this personal information to the complainant. If the poster fails to respond to a notice from the website operator, or does respond but fails to include all the required information, the website operator must, within forty-eight hours after the deadline provided to the poster, remove the statement from the website contained in the notice of complaint and notify the complainant of this. If the poster responds to the website operator that he or she wants the content removed, the website operator has forty-eight hours after notification to remove the information, and must then notify the complainant that the content has been removed.

If the website operator does not have a means of contacting the poster, he or she must remove the statement complained of within forty-eight hours of receiving a written notice from the complainant. The website operator has forty-eight hours after receiving the complaint to send an

⁷⁴ Defamation (Operators of Websites) Regulations 2013, SI 2013/3028, ¶ 2.

⁷⁵ Id. ¶ 4.

⁷⁶ Id. Sched. ¶ 2.

acknowledgement to the claimant stating that either the poster has been notified, or the post has been removed.⁷⁷

The law also provides an expedited process in cases where an alleged defamatory statement is posted repeatedly. If the same complainant has requested the removal of the same material from the same website operator more than two times, and the information has been removed in accordance with the provisions of the Regulations, the complainant must specify this in the complaint and the website operator must remove the statement within forty-eight hours of receiving the complaint.⁷⁸

If the website operator fails to follow the procedure specified in the Regulations and meet the time limits, the operator can potentially be held liable for the content.⁷⁹

V. Implementation

A. General Concerns

While there are a significant number of laws that have been interpreted to cover online harassment and abuse, statistics of recorded incidents of alleged crimes do not indicate the laws are being robustly implemented. Malicious communications accounted for 11% of all recorded violence against the person offenses in that year, and the charge rate was 3%.⁸⁰ Reasons cited by the Home Office for the low prosecution rate were that, in 46% of cases, the victims did not support police action,⁸¹ and the perpetrator was unidentifiable in 22% of these cases, due to what the Law Commission has described as a constant “arms race” occurring between criminals and law enforcement over the traceability of communications.⁸² The low charge rate has also been attributed in part to the volume of complaints. The Law Commission has noted that, with an estimated 44 million social media users across the United Kingdom (UK), any kind of coordinated and comprehensive response will face significant challenges.⁸³

The Law Commission has noted that the current legislation has resulted in the police response frequently being “confused and minimal,”⁸⁴ resulting in cases of abuse often being underreported. A chief constable of police has stated that the number of different statutes that can be involved in malicious communications cases are not “helping investigators, the Crown

⁷⁷ Id. Sched. ¶¶ 2-4.

⁷⁸ Id. Sched. ¶ 9.

⁷⁹ House of Commons Library, *The Defamation Act 2013*, Jan. 2014, SN/HA/6801, at 6, <https://perma.cc/2H2Y-JBCF>.

⁸⁰ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶ 2.116.

⁸¹ Id. ¶ 2.117.

⁸² Id. ¶ 2.127.

⁸³ Id. ¶ 2.145.

⁸⁴ Id.

Prosecution Service or victims to bring these people to justice.”⁸⁵ Inconsistency and knowledge variances across the different police forces have also played a role,⁸⁶ along with overlapping offenses causing confusion.⁸⁷ This has led to a “mismatch here between the forms of harm that are occurring online and the response of the criminal justice system.”⁸⁸ Concerns have also been raised that interactions between law enforcement and service providers have been too informal without adequate processes to ensure the right to freedom of expression is protected.⁸⁹

There currently appear to be no judgments involving journalists who have been harassed in the Law Reports. This may be due to any prosecutions occurring in the Magistrates’ Court, the judgments of which are not included in the Law Reports. There are a number of newspaper articles that describe the harassment of journalists, but none indicate that police action has been taken. One incident was recently reported in the news in which a member of a far-right group live-streamed himself knocking and shouting at a journalist’s door at 11:00 p.m. and again at 5:00 a.m., revealing the journalist’s home address as his followers bombarded the journalist with messages through social media. The police were called to both incidents but there are no reports that the individual, or anyone else, was charged with any offense.⁹⁰ There have also been reports that the BBC hired a bodyguard to protect one of its political reporters during the 2017 elections.⁹¹

B. Evidentiary Issues

Cases that involve evidence held in another country can take significant periods of time to obtain under the current mutual legal assistance procedures, with reports that the police are waiting for up to eighteen months for social media companies to provide evidence to them.⁹² In addition to the lack of timeliness provided by the mutual legal assistance procedures, the cost and human resources required to obtain this evidence “will sometimes simply be prohibitive for law enforcement to pursue in the context of abusive and offensive communication offences.”⁹³ In response to these concerns, the Crime (Overseas Production Order) Act was enacted in 2019. This act enables UK law enforcement agencies to apply to the court for an order to obtain electronically stored data directly from a person or company located outside of the UK, if the purpose of

⁸⁵ Id. ¶ 2.133; Matthew Weaver, *Police Are Inconsistent in Tackling Online Abuse, Admits Chief Constable*, *Guardian* (London) (Apr. 14, 2016), <https://perma.cc/925T-R7AZ>.

⁸⁶ Id. ¶ 2.132.

⁸⁷ Law Commission, *Abusive and Offensive Online Communications: Summary of Scoping Report*, *supra* note 33, at 7.

⁸⁸ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, *supra* note 4, ¶ 8.208.

⁸⁹ Id. See also Article 19, *Self-Regulation and ‘Hate Speech’ on Social Media Platforms* (2018), <https://perma.cc/G6BL-HDGL>.

⁹⁰ Tom Embury-Dennis, *Tommy Robinson: Police Called After Ranting Anti-Islam Activist Bangs on Door of Historian Who Helped Fund Lawsuit Against Him*, *Independent* (London) (Mar. 5, 2019), <https://perma.cc/26YY-88WM>; Mike Stuchbery, *Tommy Robinson Hammered on My Door at 5am and Brought a Torrent of Abuse in His Wake – But He Won’t Shut Me Up*, *Independent* (London) (Mar. 5, 2019), <https://perma.cc/PB5T-64MN>.

⁹¹ Lizzy Buchan, *Laura Kuenssberg: BBC Political Editor ‘Given Bodyguards’ at Labour Party Conference After Online Abuse*, *Independent* (London) (Sept. 25, 2017), <https://perma.cc/4PFY-5KV9>.

⁹² Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, *supra* note 4, ¶ 2.111.

⁹³ Id. ¶ 2.111.

obtaining the communication is to assist with domestic investigations and the prosecution of serious crime.⁹⁴ The orders only work in jurisdictions that are subject to an international cooperation arrangement that permits the orders to be recognized, and are designated countries under the act.

VI. Proposals for Reform

The Law Commission has noted that, in the majority of cases, the criminal laws of England and Wales cover harassing and abusive online communications, in some cases criminalizing online behavior to a greater degree than offline offenses. It has acknowledged that there are some ambiguities and technical issues with the law, which along with considerable overlap in some offenses, has led to uncertainty and there is “considerable scope for reform.”⁹⁵ The Law Commission recommended that communication offenses be reformed and consolidated to provide clarity and ensure proportionality, and that the criminal law be reviewed to see how it can “more effectively address the specific harm caused to an individual who is subjected to a campaign of online harassment,”⁹⁶ along with “a review of how effectively the criminal law protects personal privacy online.”⁹⁷

While the Law Commission has made these recommendations, opinions on the reform of the criminal laws relating to abusive online communications in the recent past has been divided. A 2014 Select Committee of the House of Lords determined that “the criminal law in this area, almost entirely enacted before the invention of social media, is generally appropriate for the prosecution of offenses committed using social media.”⁹⁸ A 2017 report by the Select Committee on Home Affairs recommended that the entire legislative framework be revised to ensure that, among other offenses, online hate speech and harassment laws are up to date, as most criminal provisions predate the use of social media and, in some cases, the internet.⁹⁹ Conversely, the Committee on Standards in Public Life determined that the current legislative framework addressing online abuse is sufficient and that any new legislation specific to social media would be unnecessary and “could be rendered out of date quickly.”¹⁰⁰ This committee did recommend that liability should be extended to social media companies if they fail to remove abusive content from their platforms.¹⁰¹

⁹⁴ Crime (Overseas Production Orders) Act 2019, c. 5, <https://perma.cc/WD95-PKFK>.

⁹⁵ *Reform of the Criminal Law Needed to Protect Victims from Online Abuse Says Law Commission*, Law Commission (Nov. 1, 2018), <https://perma.cc/PZ2D-M5T5>.

⁹⁶ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, 1.31.

⁹⁷ *Id.*

⁹⁸ House of Lords Select Committee on Communications, *Social Media and Criminal Offences* (July 2014) HL 37, <https://perma.cc/AY46-86SV>.

⁹⁹ Select Committee on Home Affairs, *Hate Crime: Abuse, Hate and Extremism Online* (May 2017) HC 609 ¶ 56, <https://perma.cc/Y49S-QM2H>.

¹⁰⁰ Committee on Standards in Public Life, *Intimidation in Public Life* (Dec. 2017) Cm. 9543 at 16, <https://perma.cc/2S42-8VTM>.

¹⁰¹ *Id.* at 14.

Any changes to the law will face problems, including ensuring that the qualified right to freedom of expression is adequately balanced against any criminal provisions, investigative and evidentiary issues, and jurisdictional issues that frequently arise when the victim and the offender are in different countries or the content is hosted in a separate jurisdiction.¹⁰² The enforcement of any laws will also require ensuring that both the technical capabilities and resources of the police are up to date and fully funded.¹⁰³

VII. Further Action

A. National Committee for the Safety of Journalists

In April 2019, the Organization for Security and Co-operation in Europe (OSCE) proposed that its member states should establish

a national committee for safety of journalists which would gather representatives of the prosecutor's office, the police and journalist associations to verify that all attacks and threats are properly investigated, improve procedures if needed; propose protection measures when necessary and implement preventive action to reinforce the security of journalists.¹⁰⁴

On July 11, 2019 the Secretary of State for Digital, Culture, Media and Sport acted in response to this proposal and announced the establishment of the National Committee for the Safety of Journalists.¹⁰⁵ The Committee is responsible for setting out a National Action Plan on the Safety of Journalists to examine the current protections journalists have and make sure that mechanisms are in place to make anyone who threatens journalists accountable:

With rising disinformation and threats against the media, the UK's strong and independent press is a beacon of freedom that this Government is committed to supporting and preserving.

The Committee will champion journalists' ability to safely carry out their important roles in society and to continue to hold the powerful to account. This is part of our broader commitment to ensuring the future sustainability of high-quality, public interest news.¹⁰⁶

¹⁰² R v. Smith (No. 4) [2004] EWCA Crim 631 [2004] QB 1418; [2004] QB 1418, <https://perma.cc/5EYW-PXFE>. See further *Legal Guidance: Jurisdiction*, Crown Prosecution Service, <https://perma.cc/Z28A-2RKM>.

¹⁰³ Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, supra note 4, ¶¶ 2.65 & 2.128.

¹⁰⁴ OSCE Representative on Freedom of the Media, Opening Speech, International Conference, Vienna, Austria, *Journalists Under Attack: A Threat to Media Freedom* (Apr. 12, 2019), <https://perma.cc/27FV-89BF>.

¹⁰⁵ Press Release, Department for Digital, Culture, Media & Sport and The Rt. Hon Jeremy Wright MP, UK to Establish National Committee for the Safety of Journalists (July 11, 2019), <https://perma.cc/5U3X-WSL3>.

¹⁰⁶ Id.

B. Engaging Law Enforcement

The government is also working with law enforcement to review whether its “current powers are sufficient to tackle anonymous abuse online.”¹⁰⁷ The police are also receiving training to improve digital capability and are working to make it easier for people to report online crimes. The Digital Public Contact program enables the public to contact the police digitally in order to facilitate the reporting of crime.¹⁰⁸

C. Regulation of Online Platforms

In 2017, the government criticized Google, Facebook, and Twitter over a lack of transparency regarding both their collection of data and performance of reporting and takedown procedures. The government expressed concern that no targets were set for the time it took these platforms to remove reported content.¹⁰⁹

The Digital, Culture, Media and Sport Committee released a report in late February 2019. The committee’s chair, Damian Collins, stated,

[w]e need a radical shift in the balance of power between the platforms and the people. The age of inadequate self regulation must come to an end. The rights of the citizen need to be established in statute, by requiring the tech companies to adhere to a code of conduct written into law by Parliament, and overseen by an independent regulator.¹¹⁰

The report recommended that laws be introduced to establish a legal duty of care for companies that host online content and to provide

... for clear legal liabilities to be established for tech companies to act against harmful or illegal content on their sites, and calls for a compulsory Code of Ethics defining what constitutes harmful content.

An independent regulator should be responsible for monitoring tech companies, backed by statutory powers to launch legal action against companies in breach of the code. Companies failing obligations on harmful or illegal content would face hefty fines.¹¹¹

The committee recommended that any new regulator be funded through a levy on tech companies operating in the UK.¹¹² The committee further recommended that a new category be created for social media companies that would tighten the liabilities of tech companies that are

¹⁰⁷ HM Government, *Online Harms*, supra note 1, Box 6.

¹⁰⁸ Id.

¹⁰⁹ Committee on Standards in Public Life, supra note 3, at 41.

¹¹⁰ Ofcom, *Addressing Harmful Online Content 2* (Sept. 18, 2018), <https://perma.cc/ZPN9-BWK7>.

¹¹¹ *Democracy Is at Risk from the Relentless Targeting of Citizens with Disinformation*, House of Commons, <https://perma.cc/LM8H-R2XV>.

¹¹² House of Commons Digital, Culture, Media and Sport Committee, *Disinformation and ‘Fake News’: Final Report*, 2019, H.C. 1791, <https://perma.cc/5H2X-G2WU>.

“not necessarily either a ‘platform’ or a ‘publisher.’ This approach would see the tech companies assume legal liability for content identified as harmful after it has been posted by users.”¹¹³ The government is currently working to consult on legislation that can be introduced to implement these recommendations.¹¹⁴

¹¹³ Id. ¶ 14.

¹¹⁴ Cabinet Office, *Protecting the Debate: Intimidation, Influence and Information* 12 (May 2019), <https://perma.cc/43DZ-A22H>.

Finland

*Elin Hofverberg
Foreign Law Specialist*

SUMMARY Finland ranks high internationally on press freedom indexes. While freedom of speech is guaranteed by the Finnish Constitution, the European Convention on Human Rights, and individual pieces of legislation, Finnish law criminalizes defamation, harassment, threats, stalking, violations of privacy, and hate speech. Journalists may also be punished for the language they use in response to what they perceive as online harassment. Finland has also criminalized specific behavior that often takes place online or through smartphones by way of provisions barring the dissemination of information that infringes on the right to private life and crimes infringing on other's peaceful enjoyment of communication.

One well-publicized incident involving a journalist in Finland was the online harassment of Jessica Aro for investigating Russian internet activities.

To stem hateful speech generally, the government has initiated a cross-ministry project aimed at reducing hateful rhetoric online, but no legislation on the topic, nor any specific to journalists, is currently pending in the Finnish Parliament. The journalism industry itself has also undertaken a number of initiatives, including publishing a guide for journalists on how to respond to harassment online and establishing a fund for journalists that are victims of harassment in connection with their profession.

I. Background

Finland ranks second in the Reporters Without Borders 2019 World Press Freedom Index.¹ Also, a 2017 Freedom House report ranked it as one of the least-restrictive countries with regard to freedom of the press.² Finland previously held the number-one spot on the of World Press Freedom Index, but lost it over what became known as the “Sipilägate” of 2017, when the Prime Minister of Finland tried to discourage Finnish journalists from reporting on his potential conflict of interest related to a state-funded nickel mine.³

¹ 2019 *World Press Freedom Index*, Reporters Without Borders (2019), <https://perma.cc/4X2B-7LH9>; *Finland: “The Land of the Free Press”*, Reporters Without Borders (2019), <https://perma.cc/BKD8-FB2T>.

² *Freedom of the Press 2017 – Finland*, Freedom House (2017), <https://perma.cc/B87A-VZEP>.

³ “Sipilägate” *Topples Finland from Top of Press Freedom Table*, Yle (Apr. 18, 2017), <https://perma.cc/99DH-JZ2Y>.

Generally, online harassment and cyberbullying is considered a problem in Finland,⁴ and one which is growing.⁵ In 2018, the Finnish government recognized that journalists, together with other professionals such as “researchers, judges and human right activists,” are at an increased and special risk of being harassed online because of the nature of their work.⁶ The media industry itself views scared and intimidated journalists as a threat to democracy.⁷ A report from 2018 also indicates that certain news topics cause more harassment against journalists than other news,⁸ the biggest culprits being news related to contentious topics such as those concerning immigration and Russia.⁹

II. Legislation

A. Freedom of Speech

The right to freedom of speech is guaranteed in the Finnish Constitution, the European Convention on Human Rights, and individual pieces of legislation such as the Act on the Exercise of Freedom of Expression in Mass Media.¹⁰ In 1766, the Swedish Kingdom, of which Sweden and Finland were then a part, became the first jurisdiction in the world to pass a Freedom of the Press Act.¹¹ However, in Finland freedom of expression does not provide citizens or the media with a right to utter hate speech. Determining what is considered free speech and what is hate speech can be difficult. For example, Finland has lost cases before the European Court of Human Rights (ECtHR) for punishing speech too harshly, including with prison sentences.¹² In *Niskasaari v. Finland*, the ECtHR found that the Finnish courts had gone beyond what was “necessary in a democratic society” when it punished a reporter for misreporting on (and thereby defaming) the

⁴ Laura Klingberg, *Trakasserier och mobbning ar ett problem pa sociala medier*, HBL (Feb. 21, 2018), <https://perma.cc/C2AR-NCEN>.

⁵ *Selvitimme, millaista vainoaminen Suomessa on: roskien penkomista ja eroottisten vaatteiden tilaamista uhrin nimissä – “Vain mielikuviutus on rajana”*, Yle (Apr. 23, 2018), <https://perma.cc/FH94-DYAF>.

⁶ Justitieminister Antti Häkkänen, Svar på skriftligt spørsmål (SSS127/2018rd), Svar på skriftligt spørsmål om tryggande av yttrandefriheten (May, 2, 2018), <https://perma.cc/ZH5W-K2WC>; see also International Press Institute (IPI), *Journalists in Finland Face ‘Unprecedented’ Levels of Online Abuse*, Ifex (Sept. 22, 2017), <https://perma.cc/S3VG-TYZL>.

⁷ Markus Ekholm, *“Rädda journalister hot mot demokratin”*, Yle (Sept. 23, 2014), <https://perma.cc/A72N-NX4C>.

⁸ IPI, *Finland: Countering Online Harassment in Newsrooms* (2018), <https://ipi.media/countering-online-harassment-in-newsrooms-finland/>; see also *Report: Stories on Immigration, Russia Most Often Trigger Harassment of Finnish Journalists*, Yle (Aug. 10, 2018), <https://perma.cc/RWT2-PVKR>.

⁹ Id.

¹⁰ Lag om yttrandefrihet i masskommunikation [Act on Freedom of Expression in Mass Communications] (FFS 13.6.2003/460), <https://perma.cc/G826-BXHC>.

¹¹ Kongl. Maj:ts Nådige Förordning, Angående Skrif- och Tryckfriheten; Gifwen Stockholm i Råd-Cammaren then 2. Decembr.1766 [His Royal Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press, Delivered at Stockholm in the on December 2, 1766], <https://perma.cc/9NTW-XA76>; see also Elin Hofverberg, *250 Years of Press Freedom in Sweden*, In *Custodia Legis* (Dec. 19, 2016), <https://perma.cc/UP2Q-SC5A>.

¹² For example, *Niskasaari v. Finland*, App. No. 37520/07, Eur. Ct. H.R. (2010), <https://perma.cc/K7LQ-FMNX>; see also European Court of Human Rights Factsheet, *Hate Speech* (Mar. 2019), <https://perma.cc/884L-7BKA>.

Child Ombudsman with forty day-fines as well as damages.¹³ Recently, the national prosecutor has been reluctant to prosecute members of Parliament for defamatory language used against journalists or minority groups, if used in connection with a political topic.¹⁴

B. General Criminal and Civil Offenses Related to Harassment

Finnish law criminalizes a number of activities, including defamation, harassment, threats of violence, and stalking, that apply to both offline and online behavior, but also describes a number of crimes specific to online behavior, such as violating a person's privacy online.¹⁵ In addition to the penalties described below, these criminal provisions also entitle the victim to damages from the perpetrator.¹⁶

1. Defamation and Aggravated Defamation

Finland criminalizes defamation and "aggravated defamation."¹⁷ Aggravated defamation occurs when the defamation causes great suffering or "especially great harm."¹⁸ Defamation is punishable with monetary fines, and aggravated defamation with up to two years of imprisonment.¹⁹ The legislation is medium neutral, meaning defamation may occur either verbally, in print, through broadcasts, or online.²⁰

2. Harassment

The Discrimination Act criminalizes harassment related to "age, national origin, nationality, language, religion, faith, opinion, political activity, unionized activity, family situation, health,

¹³ *Niskasaari v. Finland*, supra note 12. However, see also *Pentikäinen v. Finland*, App. No. 11882/10, Eur. Ct. H.R. (2015), <https://perma.cc/3J9T-NK9J> (finding no violation when police asked photographer to leave demonstration).

¹⁴ For instance, the Finnish Prosecutor General decided not to prosecute the Finnish Member of Parliament (MP) Juho Eerola for a comment he made on Facebook. The MP was suspect of having committed "agitation against a protected group" (*hets mot folkgrupp*) by publishing comments on his Facebook page. The prosecutor found that because he was commenting on a big drug case in Finland, the comment should be seen in this political context, and that such political discussions were important, and thus the comment was not a crime. Press Release, Riksåklagarämbetet, Riksåklagaren väckte inte åtal mot riksdagsmannen Juho Eerola i brottsärendet rörande Facebook-skrivieriet (Apr. 6, 2018), <https://perma.cc/UY9K-FUCW>.

¹⁵ Strafflagen [Criminal Code] (FFS 19.12.1889/39), <https://perma.cc/8U74-KKS2>.

¹⁶ 5 kap. 6 § Skadeståndslag [Act on Damages] (FFS 31,5,1974/412), <https://perma.cc/4CY7-GWAA>.

¹⁷ 24 kap. 9-10 §§ Strafflagen.

¹⁸ Id. 24 kap. 10 §.

¹⁹ Id. 24 kap 9-10 §.

²⁰ See id.

disability, sexual orientation, or any other circumstance pertaining to an individual person.”²¹ In addition, sexual harassment is prohibited and considered a form of discrimination.²²

3. *Threats of Violence*

Threats of violence are criminalized in the Criminal Code.²³ It is immaterial whether the threats are made in person or online.²⁴

4. *Agitative Speech Targeting a Special Group of People (Hets mot folkgrupp) (Hate Speech)*

Agitative speech targeting a special group of people (*hets mot folkgrupp*, or hate speech) is criminalized, irrespective of the medium used.²⁵ The crime is punishable with monetary fines or up to two years of imprisonment.²⁶ Aggravated agitation of a specially designated group is its own crime and pertains to cases where the agitator incites genocide, crimes against humanity, or other aggravated violence.²⁷ Aggravated agitation of a special group is punishable with a minimum of four months’ but no more than four years’ imprisonment.²⁸

5. *Stalking*

As of 2014, stalking is a separate crime in Finland, defined as follows in the Criminal Code:

A person who repeatedly, follows, watches, or contacts, or in another similar manner without permission stalks someone where the behavior is meant to invoke fear or anxiety in the person that is being stalked . . . is guilty of unlawful stalking and may be sentenced to monetary fines or imprisonment of up to two years.²⁹

During the legislative process, the Finnish legislature found it important to ensure that this crime could be prosecuted without the participation of the victim, as victims are generally perceived as unwilling to step forward out of fear that the behavior will then escalate into other types of crimes.³⁰

²¹ 8, 14 §§ Diskrimineringslag [Discrimination Act] (FFS 30.12.2014/1325), <https://perma.cc/3KA3-NXKJ>.

²² 7 § Lag om jämställdhet mellan kvinnor och män [Act on Equality Between Women and Men] (FFS 1986/609), <https://perma.cc/3BPS-KLZN>.

²³ 25 kap. 7 § Strafflagen.

²⁴ See Id.

²⁵ 11 kap. 10 § Strafflagen.

²⁶ Id.

²⁷ Id.

²⁸ 11 kap. 10 a § Strafflagen.

²⁹ 25 kap. 7a § Strafflagen, <https://perma.cc/8U74-KKS2> (translation by author), as amended by Lag om ändring av strafflagen (FFS 13.12.2013/879), <https://perma.cc/PP32-8D97>; see also Press Release, Justitieministeriet, Förföljelse blir straffbart vid ingången av nästa år (Dec. 12, 2013), <https://perma.cc/62LG-8KES>.

³⁰ See Press Release, Justitieministeriet, *supra* note 29.

6. *Dissemination of Information that Infringes the Right to Privacy*

Finland prohibits the dissemination of information that infringes on the right to private life.³¹ In addition, such violations that may be considered aggravated are subject to imprisonment of up to two years.³² Dissemination of information that infringes on the right to private life is defined as follows:

A person who

- 1) by the use of mass media or
- 2) in another way makes available, to a large number of people,

distributes information, insinuation, or pictures pertaining to someone else's private life, in a manner which is designed to cause harm or suffering for the violated person or exposes him or her to discredit, shall be convicted of having disseminated information that infringes on the right to privacy, and be sentenced to monetary fines,

Information pertaining to persons who are active in politics, business, or public service, or in another public assignment, or in another activity that may be considered similar to the aforementioned activities, shall not be considered dissemination of information that infringes on the right to private life, if the information, insinuation, or picture may affect the determination of the person's actions in connection with the assignment and the dissemination is needed for discussion of a question important to society.

Nor should information that has been disseminated because of a question that is of importance to discuss from a societal perspective, if the information in light of its content, other people's rights, and other circumstances, does not clearly exceed what may be considered acceptable, be considered infringement of the right to private life.

The Finnish Supreme Court has ruled on this provision several times, allowing newspapers to report on the suspected immoral or illegal activity of prominent Finnish citizens, while convicting private persons for the publication on Facebook of the picture of a convicted pedophile and the online publication of a video of the Finnish police removing a child from its parent.³³ Thus, in conformity with the language above, mass media outlets have been given greater freedom in cases where the societal interest outweighs the interest of the affected person.

³¹ 24 kap. 8-8a §§ Strafflagen.

³² Id. 24 kap. 8a §.

³³ See the following Supreme Court Cases: KKO:2013:69 (publication of adultery story - dismissed), <https://perma.cc/6XF5-788N>; KKO:2011:72 (reporting of questionable paternity - dismissed), <https://perma.cc/HKF4-TK87>; KKO:2013:100 (reporting of financial crimes - dismissed), <https://perma.cc/4RY9-3EGE>; KKO:2018:51 (Facebook publication of photo of convicted pedophile - convicted), <https://perma.cc/3ZTU-GZ4D>; KKO:2018:81 (video of own child posted on Facebook - convicted), <https://perma.cc/S669-T2KN>.

7. Crimes against Peaceful Communication

In 2013, the Finnish Parliament passed legislation criminalizing interference with the peaceful enjoyment of communication services (*brott mot kommunikationsfrid*).³⁴

1 a § (13.12.2013/879)

Crimes infringing on [other's] peaceful enjoyment of communication services

A person who, with the intent of disrupting, repeatedly sends messages to or calls someone else, in a manner meant to cause [the recipient] considerable disruption or inconvenience, shall be found guilty of crimes infringing on [other's] peaceful enjoyment of communication and be sentenced to monetary fines or imprisonment of no more than six months.³⁵

The law can be described as an expansion of the principle of “home peace protection” (*hemfridsbrott*).³⁶ Thus, violations that happen through messaging over the phone,³⁷ or on Facebook, Twitter, Instagram, or other social media platforms, are now punishable similar to repeatedly calling someone, playing loud music to spite another person,³⁸ hiding in someone's backyard, or throwing stones at someone's window.³⁹ Both *hemfridsbrott* and *brott mot kommunikationsfrid* are punishable with monetary fines or up to six months of imprisonment. However, only the crime *hemfridsbrott* has an aggravated offense tied to it (*groot hemfridsbrott*).⁴⁰ A *hemfridsbrott* is aggravated if the person uses a weapon, meaning either a gun or another item that can be used to injure a person.⁴¹ This crime is punishable with imprisonment for up to two years.⁴²

The 2013 legislation was intentionally written to be technology neutral, as communications technology, and likewise the means by which people may harass one another through repeated contact, is developing quickly.⁴³ When adopting the legislation, the Finnish Parliament,

³⁴ Lag om ändring av strafflagen (FFS 13.12.2013/879), <https://perma.cc/PP32-8D97>; see also Press Release, Justitieministeriet, supra note 29.

³⁵ 24 kap. 1 a § Strafflagen.

³⁶ Id. 24 kap. 1 §.

³⁷ In 2008 the Finnish Supreme Court found that texting a person did not qualify as a *hemfridsbrott*. Finnish Supreme Court, KKO:2008:86, Sept. 9, 2008, <https://perma.cc/NPW5-MHW6>. The new provision in 24 kap. 1 a § Strafflagen specifically criminalizes such behavior. The *hemfridsbrott* provision does, however, protect victims from phone calls made on a cellphone late at night when a person can be expected to be at home, enjoying the peace and quiet of one's own home.

³⁸ Finnish Supreme Court Decision, KKO:1985-II-55, Mar. 27, 1985, <https://perma.cc/FB68-BEQS>.

³⁹ 24 kap. 1 § Strafflagen.

⁴⁰ Id. 24 kap. 2 §.

⁴¹ Id.

⁴² Id.

⁴³ Lagutskottets betänkande 11/2013 rd, at 3, <https://perma.cc/AW5A-WMMW>.

considering the legal precedent of the European Court of Human Rights,⁴⁴ made certain crimes that are “only” expressions related to freedom of speech subject only to monetary fines.⁴⁵

The Finnish Supreme Court has not yet tried a case involving crimes infringing on other’s peaceful enjoyment of communication services, but reportedly the police have aided victims in removing online comments with reference to the new law.⁴⁶

III. Cases Pertaining to Journalists

A. Prosecutions for Online Harassment of Journalists

The most famous online harassment case of a journalist is the case of harassment of Jessica Aro, a Finnish Broadcasting Company (Yleisradio Oy, Yle) investigative journalist. Aro and two other Finnish journalists were victims of defamation by online publisher Ilja Janitskin and researcher Johan Bäckman.⁴⁷

In 2014, Aro became known for her investigative reporting on Russian “troll-factories” and, in response, received death threats, had her phone number published online, and was otherwise smeared online in both discussion forums and on videos.⁴⁸ She even received a text message purporting to be from her dead father.⁴⁹ In 2016, the national prosecutor initiated an investigation into the threats made against, and defamation of, Aro.⁵⁰

Ultimately, on October 18, 2018, the Helsinki District Court convicted Ilja Janitskin and two of his colleagues for defaming Aro and two other Finnish journalists, Linda Pelkonen and Rebekka Härkönen.⁵¹ In total Ilja Janitskin was convicted of sixteen counts of criminal acts: three instances of aggravated defamation, two instances of agitation of a special group, three instances of intellectual property rights violations, two instances of secrecy crimes, two instances of monetary gambling crimes, and four instances of monetary collection crimes.⁵²

⁴⁴ Id. at 2, 6.

⁴⁵ Id. at 2.

⁴⁶ Linn Ljung, *Instagramstalkern var 8-årig flicka*, Yle (July 14, 2014), <https://perma.cc/9WGM-AEY5>.

⁴⁷ See Mikael Sjövall, *Rättegången mot Ilja Janitskin stakar ut yttrandefrihetens gränser*, HBL (June 13, 2018), <https://perma.cc/V5AZ-BCS8>; Jessica Aro, *My Year as a Pro-Russia Troll Magnet: International Shaming Campaign and an SMS from Dead Father*, Yle (Nov. 9, 2015), <https://perma.cc/9MCQ-JGLD>.

⁴⁸ Jessica Aro, *My Year as a Pro-Russia Troll Magnet: International Shaming Campaign and an SMS from Dead Father*, supra note 47.

⁴⁹ Id.

⁵⁰ Press Release, Åklagarväsendet, *Förundersökning beträffande hot mot journalist inleds* (Mar. 23, 2016), <https://perma.cc/3D3X-YPKT>.

⁵¹ Mikael Sjövall, *Ilja Janitskin och Johan Bäckman döms till fängelse för rasistiska texter i webbtidningen MV-lehti och Uber Uutiset*, HBL (Oct. 18, 2018), <https://perma.cc/RSW7-USKU>.

⁵² Id.

Thus, none of the actions for which Janitskin was convicted fell under the online-specific crimes mentioned in Part II, above, such as dissemination of information that infringes the right to private life, or violation of the right to peaceful enjoyment of communication services.

Commentators have claimed that it is important that lengthy prison sentences be handed out in response to these types of crimes.⁵³ One of the important factors in the Janitskin case was the responsibility Janitskin had in his role as a de facto online publisher (*ansvarig utgivare*). Because false, hateful, and defamatory comments and articles were published in his online publications *MV-lehti* and *Uber Utiset*, Janitskin was deemed responsible.⁵⁴

B. Defamation by Journalists

While Finnish law protects journalists from online harassment, defamation provisions also circumscribe what targeted journalists can post in response to such harassment, as illustrated by the case of Finnish journalist Johanna Vehkoo. Vehkoo claimed she was harassed by local politician Junes Lokka, but was later convicted of defamation for calling Lokka a Nazi on her Facebook page.⁵⁵ The case caused an outcry from Finnish media outlets.⁵⁶ Some journalists have even argued that the judgment against Vehkoo will “encourage those who harass others online.”⁵⁷

IV. Parliamentary Discussions

Media outlets have called for both tougher sentences but also tougher legislation against hate crime and harassment online, especially when targeted towards journalists.⁵⁸ Members of the Finnish Parliament have petitioned Parliament for legislation on hate rhetoric.⁵⁹ Upon the direct question “What measures will you undertake to intervene in hateful rhetoric using legislation?,” the Minister for Justice has responded that most of the crimes committed online are covered by general legislation, such as defamation and threats.⁶⁰ The Minister did point out, however, that

⁵³ Susanna Ginman, *Hårda domar ger viktiga signaler*, HBL (Oct. 19, 2018), <https://perma.cc/334A-U32F>.

⁵⁴ Id.

⁵⁵ Henri Forss, *Journalist som kallade politiker nazist åtalad för ärekränkning – ”Ett hot mot yttrandefriheten”*, HBL (Mar. 20, 2019), <https://perma.cc/9TCX-4QQB>.

⁵⁶ *Oulu Politician Wins Defamation Case against Journalist, Gets Slapped with Ethnic Agitation Charges*, YLE (Apr. 12, 2019), <https://perma.cc/SA2N-9CN4>.

⁵⁷ Lina Laurent, *Hanne Aho: ”Domen mot Johanna Vehkoo känns orimlig”*, Finlands Journalistförbund (Apr. 12, 2019), <https://perma.cc/87V2-ZFHE>.

⁵⁸ Ginman, *supra* note 53; Laura Klinberg, *Bättre lagstiftning och ökad förståelse – så knäcker vi hatretoriken*, HBL (May 17, 2019), <https://perma.cc/YRF2-8T4L>; Lina Laurent, *Journalistförbundet: Det måste bli ett slut på trakasserier mot journalister*, Finlands Journalistförbund (Oct. 16, 2018), <https://perma.cc/2LUM-LBPZ>.

⁵⁹ SS 133/2018 rd, *Skriftligt spörsmål om att ingripa mot hatretorik genom lagstiftning*, <https://perma.cc/YP9M-5ELS>.

⁶⁰ Justitieminister Antti Häkkinen, *Svar på skriftligt spörsmål (SSS133/2018rd) Svar på skriftligt spörsmål om att ingripa mot hatretorik genom lagstiftning*, <https://perma.cc/E8CA-QUR5>. See also *Finnish Journalist Johanna Vehkoo Fined for Criminal Defamation*, Committee to Protect Journalists (Apr. 17, 2019), <https://perma.cc/P3KR-J9N3>.

an increased effort to combat the targeted harassment of professionals such as journalists is needed.⁶¹ As of yet, these concerns have not resulted in any concrete proposals in Parliament.

V. Other Government Actions

The Finnish Department of Justice has published a guide titled *Journalists and Hate Rhetoric*,⁶² which was part of a 2019 campaign against hateful rhetoric.⁶³ The purpose of the campaign was to develop greater support for victims of hate crimes, and to support agencies in their efforts to combat hateful rhetoric.⁶⁴ The campaign included both government agencies and nongovernment organizations, as well as the Police and the National Prosecutor's Office.⁶⁵

Also in 2019, the Ministry of the Interior published a report suggesting government actions to prevent hateful comments from being published.⁶⁶ It was translated into English with the title *Words Are Actions: More Efficient Measures against Hate Speech and Cyberbullying*.⁶⁷ The purpose of the report, the Ministry said, was to

- . . . provide an overview of the current action to counter the hate speech prohibited under the Non-Discrimination Act and the Act on Equality between Women and Men (hereafter also referred to as Equality Act) and made punishable under the Criminal Code;
- assess, in cooperation with civil society actors, the current situation concerning the countering of hate speech and the measures under way;
- prepare recommendations for new measures to combat hate speech in the short and in the long run, drawing attention to such issues as the general prerequisites for restricting fundamental rights;
 - prepare a proposal on how the measures against illegal and punishable hate speech implemented by the authorities and civil society and the exchange of information on the matter could be better coordinated and harmonized;
 - draft proposals for a discussion culture in which other individuals are respected and properly considered. The proposals should contain measures to disseminate among the public information on illegal hate speech, its impact and consequences.⁶⁸

⁶¹ Id.

⁶² Justitieministeriet, *Journalister och hatretorik* (undated), <https://perma.cc/K9MK-URFW>.

⁶³ *En kampanj mot hatretorik inleds*, Statsrådet och ministerierna (Feb. 4, 2019), <https://perma.cc/9S5M-8ZD8>.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Sisäministeriö, *Sanat ovat tekoja Vihapuheen ja nettikiusaamisen vastaisten toimien tehostamine* (2019) (in Finnish), <https://perma.cc/3QZA-9ADS>; Ministry of the Interior, *Words Are Actions: More Efficient Measures against Hate Speech and Cyberbullying* (2019) (in English), <https://perma.cc/3GJQ-BC4P>; Inrikesministeriet, *Ord är handlingar Åtgärder mot hatretorik och nätmobbning effektiviserar* (2019) (in Swedish), <https://perma.cc/JA9T-4AP9>.

⁶⁷ Ministry of the Interior, *supra* note 66.

⁶⁸ *Id.* at 10-11.

The working group behind the report issued the following recommendations to deal with hateful rhetoric and cyberbullying:

- Create an Action Plan against hate speech (hateful rhetoric)
- Establish a Center for Excellence (research center) with the purpose of collecting and analyzing information on hateful rhetoric, discrimination, racism, hate crimes, and other hateful acts
- Develop current legislation
- Online platforms should take more responsibility
- Promote media's opportunities to combat hate speech
- Improve the support of persons who have been subjected to hate speech (hateful rhetoric)
- Ensure that the employer and principal take responsibility when an employee is subject to hateful speech or a hate campaign
- [Provide] more information and education on hateful rhetoric and freedom of expressions, and the boundaries thereof
- Strengthen media literacy
- More effective measures against faith-based hate speech
- Increase teachers' and educational staffs' preparedness for intervening in hateful rhetoric and cyberbullying
- Prevent political hateful rhetoric⁶⁹

VI. Industry Responses to Increased Harassment of Journalists

As a response to the harassment of journalists the mass media industry has launched a number of initiatives. For instance, in 2019, the Finnish media companies joined forces and set up a "journalist support fund" to counter harassment.⁷⁰ The fund will be administered by the Foundation for the Promotion of Journalistic Culture (Journalistisen kulttuurin edistämissäätiö, Jokes), but as of September 2019 is not yet active.⁷¹ Moreover, the Union of Journalists of Finland has issued a guide for active journalists with advice on what to do if they are the target of a hate campaign.⁷² Finnish media representatives have also issued cries for a return to "fact-based" journalism.⁷³

⁶⁹ Inrikesministeriet, *supra* note 66, Swedish version (translation by author).

⁷⁰ *Finnish Media Companies, Unions Establish Journalist Support Fund to Counter Harassment*, Yle (May 25, 2019), <https://perma.cc/QM8M-9JUV>; *Media Houses and Unions Set Up Fund to Support Journalists Facing Harassment*, The Union of Journalists in Finland (May 28, 2019), <https://perma.cc/NPF9-H9YZ>.

⁷¹ The Union of Journalists in Finland, *supra* note 70; *Vad är Jokes*, Journalistisen kulttuurin edistämissäätiö (JOKES), <https://perma.cc/GYE4-AWAS>.

⁷² Juha Rekola, *Hate Campaigns – What You Should Do*, Suomen Journalistiliitto, <https://perma.cc/T74T-KF9K>.

⁷³ *Så säger chefredaktörerna ifrån*, Yle (Mar. 1, 2016), <https://perma.cc/D2RC-TRLG>.

Germany

Jenny Gesley
Foreign Law Specialist

SUMMARY The German Basic Law protects freedom of expression and freedom of the press. These freedoms are limited by general laws that “aim to protect a legal interest per se without regard to a specific opinion.” Germany does not have a specific law that deals with online harassment of journalists. However, general criminal and civil law legislation on insult, defamation, stalking, and hate speech, among others, can be applied in these cases to limit freedom of speech and freedom of the press. The German government recently adopted a set of measures that would amend the Criminal Code to better capture cyberstalking and similar forms of online harassment or insult.

I. Introduction

According to numbers collected by the organization “Reporters without Borders,” violence against and harassment of journalists in Germany rose in 2018 compared to the previous year.¹ Most assaults took place at right-wing events or demonstrations. Assaultants, among other things, destroyed the equipment of journalists or called them “lying press.” Journalists have also been victims of “doxing,” a practice where private or personally identifiable information about the victim is published online.²

II. Freedom of Expression and Freedom of the Press

Article 5 of the German Basic Law, the country’s constitution, guarantees freedom of expression and freedom of the press, among other enumerated communication rights.³ The communication rights are not restricted to Germans; they are applicable to “every person.”

Freedom of expression covers value judgments and statements of facts, if those statements of facts form the basis for an opinion. The term “opinion” is understood broadly. Expressions of a viewpoint, the taking of a position, or the holding of an opinion within the framework of intellectual dispute fall within its scope. If the statement “contributes to the intellectual battle of

¹ Reporter ohne Grenzen, *Rangliste der Pressefreiheit 2019: Nahaufnahme Deutschland* (Apr. 2019), <https://perma.cc/A99F-6H7P>.

² *Id.* at 6.

³ Grundgesetz [GG], May 23, 1949, Bundesgesetzblatt [BGBl.] I at 1, as amended, art. 5, paras. 1 & 2, <https://perma.cc/S3DU-HUG4> (original), <https://perma.cc/7EKT-M3Z7> (unofficial English translation). For additional information, see Jenny Gesley, *Limits on Freedom of Expression: Germany* (Law Library of Congress, July 2019), <https://perma.cc/28MY-SSF6>.

opinions on an issue of public concern,” there is a presumption in favor of its permissibility. Untrue facts, however, fall outside the scope of freedom of expression.⁴

Freedom of the press is not just a subcategory of freedom of expression; it is an independent and separate freedom under article 5 of the Basic Law. In addition to expressing and disseminating an opinion using the press, the basic right guarantees the “institutional independence of the press that extends from the acquisition of information to the dissemination of news and opinion; [. . .] this includes the right of persons working for the press to express their opinion as freely and unrestricted as every other citizen.”⁵

The communication freedoms are limited by general laws, provisions for the protection of young persons, and the right to personal honor.⁶ The last two categories are generally seen as included in the category “general laws.”⁷ The Federal Constitutional Court defines “general laws” as laws that “do not prohibit or target the expression of an opinion as such,” but rather “aim to protect a legal interest per se without regard to a specific opinion.”⁸ An example of a general law that might be relevant in the context of this report is, among others, the Criminal Code, in particular the provisions on insult, defamation, or stalking.⁹ However, these general laws have to be examined in light of the constitutional significance of the basic right they are restricting, meaning the limitations must themselves be interpreted restrictively in order to preserve the substance of the basic right (balancing of interests).¹⁰

III. Legal Protection against Online Harassment

There do not seem to be any special provisions for the protection of journalists from online harassment. However, the general protections against acts of harassment can be applied. These include civil and criminal law provisions on data espionage, assault, stalking, insult, and defamation, among others.

⁴ Bundesverfassungsgericht [BVerfG], 61 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, paras. 13-16, <https://perma.cc/7B2V-44EQ> (original), <https://perma.cc/JU43-L7BC> (unofficial English translation).

⁵ BVerfG, 10 BVerfGE 118, para. 14, <https://perma.cc/MM74-37DA>.

⁶ GG, art. 5, para. 2.

⁷ BVerfG, Nov. 4, 2009, docket no. 1 BvR 2150/08, ECLI:DE:BVerfG:2009:rs20091104.1bvr215008, para. 63, <https://perma.cc/TXA9-4V97> (original), <https://perma.cc/K5TL-D3DN> (English translation (extract only)).

⁸ BVerfG, 7 BVerfGE 198 (Lüth decision), para. 36, <https://perma.cc/2QZ5-5AWS>, (original), <https://perma.cc/5M6Y-GRVX> (unofficial English translation).

⁹ Strafgesetzbuch [StGB], Nov. 13, 1998, BGBl. I at 3322, §§ 185-187, § 238, <https://perma.cc/Y774-JR78> (original), <https://perma.cc/HG7D-QFBY> (unofficial English translation, updated through Oct. 10, 2013).

¹⁰ BVerfG, Nov. 4, 2009, docket no. 1 BvR 2150/08, ECLI:DE:BVerfG:2009:rs20091104.1bvr215008, para. 34, <https://perma.cc/TXA9-4V97> (original), <https://perma.cc/K5TL-D3DN> (English translation (extract only)).

A. Criminal Law

1. *Data Espionage and Data Fencing*

The practice of doxing, meaning publishing private or personally identifiable information about the victim online, could fall under data espionage or data fencing.¹¹ The Criminal Code provides that persons who unlawfully obtain someone else's especially protected data which was not meant for the perpetrators by circumventing that protection and make the data available to themselves or third parties can be punished by up to three years' imprisonment or a fine.¹² Data within the meaning of that provision is only data that is stored or transmitted electronically or magnetically or otherwise in a manner not immediately viewable.¹³ Examples are data saved on cellphones or transmitted in online networks.

In addition, obtaining non-publicly available data from another person who has obtained that data unlawfully and making it publicly available with the intent to harm another (data fencing) is punishable by imprisonment not exceeding three years or a fine.¹⁴

2. *Stalking*

Online harassment of journalists may also be punishable as stalking. Section 238 of the Criminal Code criminalizes unlawfully stalking a person by trying to establish contact with him or her by means of telecommunications.¹⁵ "Means of telecommunications" include phones, fax machines, text messages, email, and the internet, among others.¹⁶ Furthermore, threatening a person or a person close to him with loss of life or limb, damage to health or deprivation of freedom is a crime.¹⁷ In addition, abusing someone's personal data for the purpose of ordering goods or services for him or her or causing third persons to make contact with him or her could apply to doxing.¹⁸

These acts must be performed repeatedly and be capable of seriously infringing the person's lifestyle, meaning the person is, for example, forced to severely change his or her leisure activities. Stalking is punishable by imprisonment not exceeding three years or a fine.¹⁹

¹¹ StGB, § 202a, para. 1, § 202d. Please note that § 202d is not reflected in the English translation.

¹² Id. § 202a, para. 1.

¹³ Id. § 202a, para. 2.

¹⁴ Id. § 202d.

¹⁵ Id. § 238, para. 1, no. 2.

¹⁶ Telekommunikationsgesetz [TKG], June 22, 2004, BGBl. I at 1190, as amended, § 3, nos. 22, 23, <https://perma.cc/Z2CV-5TAL>.

¹⁷ StGB, § 238, para. 1, no. 4.

¹⁸ Id. § 238, para. 1, no. 3.

¹⁹ Id. § 238, para. 1.

3. *Assault*

Online harassment could also be punished as assault with a term of imprisonment not exceeding five years or a fine.²⁰ In general, assault is limited to physical assault. However, if the online harassment is so severe that it results in somatic symptoms, it may be punished under this provision.²¹

4. *Public Incitement to Crime*

Furthermore, the Criminal Code provides that “[w]hosoever publicly[. . .] incites the commission of an unlawful act, shall be held liable as an abettor.”²² The internet and social networks are generally considered public places, except when information is posted in closed groups.²³ An unsuccessful incitement is punishable by imprisonment not exceeding five years or a fine; however, the punishment cannot be more severe than the one for a successful incitement.²⁴

5. *Insult and Defamation*

Under German criminal law, there are several provisions that prohibit insult and the assertion or dissemination of personal information that is either false or cannot be proved to be true.²⁵ A requirement is that the information is capable of defaming a person or of negatively affecting public opinion about the person.²⁶ Insulting someone is punishable by imprisonment not exceeding one year or a fine.²⁷ The crime of defamation is punishable with imprisonment not exceeding one year or a fine and, if it was committed publicly or through the dissemination of written materials, with imprisonment not exceeding two years or a fine.²⁸ If the defamation was done intentionally, the term of imprisonment may not exceed two years or a fine; if it was committed publicly, in a meeting, or through the dissemination of written materials, it will be punished with imprisonment not exceeding five years or with a fine.²⁹

²⁰ Id. § 223.

²¹ Bundesgerichtshof [BGH], docket no. 1 StR 393/85, 6 *Neue Zeitschrift für Strafrecht* [NStZ] 166 (1986).

²² StGB, § 111, para. 1.

²³ Heribert Ostendorf et al., *Internetaufrufe zur Lynchjustiz und organisiertes Mobbing*, 32 NStZ 529, 533 (2012).

²⁴ StGB, § 111, para. 2.

²⁵ Id. §§ 185-187.

²⁶ Id.

²⁷ Id. § 185.

²⁸ Id. § 186.

²⁹ Id. § 187.

Insult, defamation, and intentional defamation are only prosecuted upon the request of the victim.³⁰ The Public Prosecutor, however, will only open an investigation if it is in the public interest.³¹

6. *Processing of Personal Data Without Authorization*

The Federal Data Protection Act also contains several penal provisions. Among others, it criminalizes the unauthorized processing of non-publicly accessible personal data with the intention of harming someone.³² “Processing” is defined as “any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.”³³ The crime is punishable by up to two years’ imprisonment or a fine. It will only be prosecuted upon request.³⁴

Doxing could be punished under this provision, however, it is debated in the legal community whether this crime can only be committed by the data controller or by any private person. The prevailing legal opinion applies it to everyone due to the wording of the provision. (“Wer” (whoever) in the German version.)³⁵

B. Civil Law

1. *Host Provider Liability*

As long as host providers have no actual knowledge of harassing messages published by third parties on their platforms, they can generally not be held liable.³⁶ However, once they are notified of a rights violation, they must delete the content immediately in order to avoid liability.³⁷ The notification itself must be so specific and provide enough information that the host provider has a basis to qualify and verify the illegality of the posted information.³⁸ However, in practice, host

³⁰ Id. § 194, para. 1.

³¹ Strafprozeßordnung [StPO], Apr. 7, 1987, BGBl. I at 1074, 1319, as amended, §§ 374, 376, <https://perma.cc/2J82-5LW3> (original), <https://perma.cc/N6L5-3JE2> (unofficial English translation, updated through Apr. 23, 2014).

³² Bundesdatenschutzgesetz [BDSG], June 30, 2017, BGBl. I at 2097, § 42, para. 2, <https://perma.cc/S9HG-D8TV> (original), <https://perma.cc/2GRC-CYMQ> (unofficial English translation).

³³ Consolidated Version of the General Data Protection Regulation [GDPR], art. 4, no. 2, 2016 O.J. (L 119) 1, <https://perma.cc/WHB6-GAW5>. The GDPR is directly applicable in Germany.

³⁴ BDSG, § 42, para. 3

³⁵ Michael Kubiciel & Sven Großmann, *Doxing als Testfall für das Datenschutzstrafrecht*, 72 NJW 1050, 1053 (2019).

³⁶ Telemediengesetz [TMG], Feb. 26, 2007, BGBl. I at 179, as amended, § 10, <https://perma.cc/E8B5-GS79> (original), <http://perma.cc/77GL-8FNJ> (unofficial English translation, not updated).

³⁷ Id.

³⁸ Oberlandesgericht Hamburg [OLG Hamburg], Mar. 2, 2010, docket no. 7 U 70/09, 7 MultiMedia und Recht [MMR] 490, 491 (2010) (in German).

providers have regularly ignored notifications, which was one of the reasons for enacting the Network Enforcement Act, described below.

2. Network Enforcement Act

In 2017, Germany passed the Network Enforcement Act (NetzDG),³⁹ which aims “to introduce rules to make social networks comply on pain of a fine in order to enable prompt, effective action against hate crime and other criminal content on the internet.”⁴⁰ However, it did not create new duties to delete content, but imposes fines if social media companies do not comply with existing duties (host provider liability).⁴¹

The Network Enforcement Act is only applicable to social media networks that have two million or more registered users in Germany.⁴² Social media networks are defined as “telematic service providers that operate online platforms with the intent to make a profit and on which users can share content with other users or make that content publicly available.”⁴³ The Act does not apply to platforms that post original journalistic content, or to email or messaging services.⁴⁴

The Act obligates the covered social media networks to remove content that is “clearly illegal” within twenty-four hours after receiving a user complaint.⁴⁵ If the illegality of the content is not obvious on its face, the social network has seven days to investigate and delete it. The seven-day deadline may be extended if additional facts are necessary to determine the truthfulness of the information or if the social network hires an outside agency to perform the vetting process (a recognized “Agency of Regulated Self-Regulation”). Failure to comply with these obligations may result in fines of up to €50million (about US\$57.8 million).⁴⁶

³⁹ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Netzwerkdurchsetzungsgesetz] [NetzDG], Sept. 1, 2017, BGBl. I at 3352, <https://perma.cc/4LPN-WS7Z> (original), <http://perma.cc/J86H-GTY4> (unofficial English translation).

⁴⁰ BT-Drs. 18/12356, at 2, <http://perma.cc/MD44-LD9G> (original), <https://perma.cc/SLD4-DACA> (English translation).

⁴¹ For more information on the NetzDG, see Jenny Gesley, *Initiatives to Counter Fake News: Germany* (Law Library of Congress, Apr. 2019), <https://perma.cc/3G23-Z44A>.

⁴² NetzDG § 1, paras. 1, 2.

⁴³ Id. § 1, para. 1, sentence 1.

⁴⁴ Id. § 1, para. 1, sentences 2, 3.

⁴⁵ Id. § 3, para. 2, no. 2.

⁴⁶ Id. § 4, in conjunction with Gesetz über Ordnungswidrigkeiten [OWiG], Feb. 19, 1987, BGBl. I at 602, as amended, § 30, para. 2, sentence 3, <https://perma.cc/ZW88-ECAE> (original), <https://perma.cc/HJ5U-JS5K> (unofficial English translation, updated through Aug. 27, 2017).

3. *Protection against Violence Act*

The Protection against Violence Act enables victims to get a civil protection order against a perpetrator who harasses them.⁴⁷ It applies, among other cases, when the perpetrator “unreasonably harasses another person by stalking that person against that person’s explicit wishes or by using means of telecommunication to pursue him or her.”⁴⁸ A judge will issue a temporary protection order that will prohibit the perpetrator from, among other things, contacting the victim, in particular by using means of telecommunication like the internet.⁴⁹ It may be extended.⁵⁰ The initial period for which the temporary protection order is issued is decided on a case-by-case basis and depends on the severity, duration, and type of violation of rights.⁵¹ Violations of civil protection orders may result in imprisonment not exceeding one year or a fine.⁵²

4. *Defamation*

In addition to a criminal prosecution as outlined above, a person who has been defamed may also sue for libel in civil court and request a preliminary injunction.⁵³ In the main proceedings, a cease and desist order and damages may be obtained.⁵⁴

C. **Current Proposals**

On October 30, 2019, the German government adopted a set of measures to combat hate crimes and right-wing extremism, in particular online.⁵⁵ Among other things, the government proposes to amend the Criminal Code to align the rules with technical developments and the online world, by adapting existing or adding new provisions to better capture cyberstalking and similar forms of online harassment or insult.⁵⁶

⁴⁷ Gesetz zum zivilrechtlichen Schutz vor Gewalttaten und Nachstellungen [Gewaltschutzgesetz] [GewSchG], Dec. 11, 2001, BGBl. I at 3513, as amended, <https://perma.cc/3EZX-YWJ7>.

⁴⁸ Id. § 1, para. 2, no. 2b.

⁴⁹ Id. § 1, para. 1, sentence 3, no. 4 in conjunction with BGB, §§ 823, 1004.

⁵⁰ GewSchG, § 1, para. 1, sentence 2.

⁵¹ BT-Drs. 14/5429, at 28, <https://perma.cc/566A-5D9N>.

⁵² GewSchG, § 4.

⁵³ Zivilprozessordnung [ZPO], Dec. 5, 2005, BGBl. I at 3202; 2006 BGBl. I at 431; 2007 BGBl. I at 1781, as amended, §§ 935, 940, <https://perma.cc/A5FE-YU8L> (original), <https://perma.cc/U3CT-U84L> (unofficial English translation).

⁵⁴ Bürgerliches Gesetzbuch [BGB], Jan. 2, 2002, BGBl. I at 42, 2909; corrected in 2003 BGBl. I at 738, § 1004 in conjunction with § 823, para. 1, as amended, <https://perma.cc/DSD8-SDC3> (original), <https://perma.cc/4FNW-ER4Y> (unofficial English translation, updated through Oct. 1, 2013.)

⁵⁵ *Maßnahmenpaket zur Bekämpfung des Rechtsextremismus und der Hasskriminalität* (Oct. 2019), <https://perma.cc/WYZ8-UF87>.

⁵⁶ Id. no. 2.

France

Nicolas Boring
Foreign Law Specialist

SUMMARY Freedom of expression is considered an essential freedom in France, but it was never understood to be absolute. It is limited by, among other things, the right to privacy, the right to human dignity, and laws against defamation and insults. There does not appear to be any legal protection against online harassment specifically for journalists in France, but there are laws against online harassment that can protect anyone, journalists included. Defamation and insults are prohibited by French law, although legislators have tried to find a balance between those prohibitions and freedom of speech. Additionally, some common harassment methods such as “doxing” can be fought through legislation protecting the right to privacy. Furthermore, the French Penal Code contains several provisions against harassment, including sexual harassment, threats, and malicious messages. While some of these provisions apply to specific types of harassment, such as sexual harassment, a new article was added to the Penal Code in 2014 that addresses harassment in broader, more general terms. There have been at least two reported cases over the last few years of law enforcement authorities investigating online harassment of journalists. In one of these cases, two individuals were charged and found guilty under legislation prohibiting threats.

I. Introduction

Freedom of expression is considered an “essential freedom” in France.¹ It is protected by the French Constitution, which incorporates the Declaration of Human and Civic Rights of 1789.² Articles 10 and 11 of the Declaration protect freedoms of opinion and expression, describing the “free communication of ideas and of opinions” as “one of the most precious rights of man.”³ Similarly, the European Convention on Human Rights, by which France is bound, provides that “[e]veryone has the right to freedom of expression,” including “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁴

Freedom of speech was never understood to be absolute, however. Indeed, the 1789 Declaration of Human and Civic Rights provided limits to freedom of expression in its very definition. Article 10 declares that “[n]o one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.”⁵ Article 11 provides that “[a]ny citizen may therefore speak, write and publish freely,

¹ Xavier Dupré de Boulois, *Droit des libertés fondamentales* 360 (2018).

² Constitution du 4 octobre 1958, Preamble), <https://perma.cc/95S6-F4KX>.

³ Déclaration des Droits de l'Homme et du Citoyen de 1789, art. 11, <https://perma.cc/G3K5-CBGQ>.

⁴ European Convention on Human Rights, art. 10, Apr. 11, 1950, E.T.S. 005, <https://perma.cc/BFR2-WU6M>.

⁵ Déclaration des Droits de l'Homme et du Citoyen de 1789, art. 10.

except what is tantamount to the abuse of this liberty in the cases determined by Law.”⁶ Similarly, the European Convention on Human Rights declares that freedom of speech, “since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.”⁷ The boundaries of free expression depend on several factors, but one of the main guideposts is a phrase from the 1789 Declaration of Human and Civic Rights defining freedom as “being able to do anything that does not harm others.”⁸ Consistent with that definition, freedom of speech in France is limited by the right to privacy, the presumption of innocence, the right to “human dignity,” and by rules prohibiting defamation and insult.⁹

There does not appear to be any legal protection from online harassment specifically for journalists in France. However, French law contains several general protections against online harassment. These include laws against defamation, insults, breaches of privacy, threats, malicious messages, and other harassing behavior.

II. Defamation and Insults

The Law of 29 July 1881 on Freedom of the Press, which is still in force (although it has been amended numerous times since its original adoption), prohibits defamation and insults, both written and verbal. The Law of 29 July 1881 defines defamation as “any allegation or imputation of a fact which harms the honor or consideration of the person or group to which the fact is imputed.”¹⁰ The same provision defines insult as “any offensive expression, term of contempt, or invective which does not contain the imputation of any fact.”¹¹ The legislators have tried to find a balance between freedom of speech and the prohibitions against defamation and insult. Thus, speech may not be considered defamation if it can be shown to have been expressed in good faith, or if it is true – although the “exception of truth” is itself limited by the right to privacy, meaning that a true statement may still be considered defamatory if it concerns a person’s private life.¹²

⁶ Id. art. 11.

⁷ European Convention on Human Rights, art. 10.

⁸ Déclaration des Droits de l’Homme et du Citoyen de 1789, art. 4.

⁹ Patrick Wachsmann, *La liberté d’expression*, in *Libertés et droits fondamentaux* 496, 497 (Rémy Cabrillac ed., 2013), bibliographical reference at <https://lcn.loc.gov/2013479325>; Dupré de Boulois, *supra* note 1, at 363-66.

¹⁰ Loi du 29 juillet 1881 sur la liberté de la presse, art. 29, <https://perma.cc/SG4X-A4LJ>.

¹¹ Id.

¹² Wachsmann, *supra* note 9, at 498-99.

III. Privacy

A common means of online harassment is to broadcast private or personally identifiable information about the victim, such as her telephone number or email and home address.¹³ This practice, known as “doxing,” may constitute an infringement on the right to privacy, which is protected by the Penal Code,¹⁴ the Civil Code,¹⁵ and the European Convention on Human Rights.¹⁶ Article 226-1 of the Penal Code makes it illegal to intentionally broadcast, without the subject’s consent, words spoken in private or confidentially, or images of the subject in a private place.¹⁷ Such an act is punishable by a fine of up to €45,000 (approximately US\$49,700) and up to one year in jail.¹⁸ Furthermore, article 226-4-1 of the Penal Code provides that using identifying information “for the purpose of disturbing [the victim’s] peace of mind . . . or to damage his/her honor or respectability,” is punishable by up to one year of imprisonment and a fine of up to €15,000 (approximately US\$16,600).¹⁹

Additionally, the practice of “doxing” may possibly run afoul of the French Penal Code’s prohibition on the misuse of personal data. Indeed, using others’ personal data without respecting the European General Data Protection Regulation (GDPR) is punishable by up to five years in jail and a fine of up to €300,000 (approximately US\$330,700).²⁰ The same penalties apply to the offense of obtaining personal data via fraud or other illicit means,²¹ as well as the offense of unauthorized sharing private or embarrassing personal data to a third party.²²

IV. Anti-Harassment Laws

A. Threats and Malicious Messages

Several provisions of the Penal Code deal with threats and harassment. Article 222-16 prohibits harassment by email, text, or telephone messages. Making repeated malicious telephone calls or sending repeated electronic messages of a malicious nature in order to disturb the victim’s peace of mind is punishable by up to one year in jail and a fine of €15,000 (approximately US\$16,600).²³ Additionally, making threats against a person is illegal: threatening to commit a criminal offense

¹³ Jonathan McCully, *Legal Responses to Online Harassment and Abuse of Journalists: Perspectives from Finland, France and Ireland* 6 (OSCE & International Press Institute, Mar. 7, 2019), <https://perma.cc/GR9R-S2SD>.

¹⁴ Code pénal, arts. 226-1 to 226-2-1, <https://perma.cc/JX4B-9H8Q>.

¹⁵ Code civil, art. 9, <https://perma.cc/R2SB-TZJN>.

¹⁶ European Convention on Human Rights, art. 8.

¹⁷ C. pénal, art. 226-1.

¹⁸ Id.

¹⁹ Id. art. 226-4-1.

²⁰ Id. arts. 226-16 & 226-17.

²¹ Id. art. 226-18.

²² Id. art. 226-22.

²³ Id. art. 222-16.

against a person is punishable by up to six months in jail and a fine of up to €7,500 (approximately US\$8,300).²⁴ Death threats are punishable by up to three years in jails and a fine of up to €45,000 (about US\$49,600).²⁵ If the threat was verbal, then it needs to have been made more than once to be punishable.²⁶ If the threat was made in writing, or by means of a picture or an object (such as, for example, slipping a bullet in the victim's mailbox), then it need only have been made once to be punishable.²⁷

B. Sexual Harassment

The French Penal Code has included a section on sexual harassment since at least 1994, but it was initially aimed more towards workplace sexual harassment and abuse of authority.²⁸ Over the years, however, the legal concept of sexual harassment was expanded so that it is now defined as “the act of repeatedly imposing on a person remarks or behavior that have a sexual or sexist connotation, that either cause harm to his/her dignity because of their degrading or humiliating nature, or create an intimidating, hostile or offensive situation against him/her.”²⁹ While a single act is not enough to constitute sexual harassment, single acts committed successively by several perpetrators against the same victim qualifies as sexual harassment, even if each perpetrator only committed a single act.³⁰

The penalty for sexual harassment is two years in jail and a fine of up to €30,000 (about US\$33,000), but this is increased to three years in jail and a fine of €45,000 (about US\$49,600) if certain aggravating circumstances are present.³¹ These aggravating circumstances include when the victim is particularly vulnerable due to age, illness, injury, disability, or pregnancy; when the victim is economically or socially vulnerable; when the harassment was committed by several perpetrators; and when the harassment was committed online or through another electronic means of communication.³²

²⁴ Id. art. 222-17.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ C. pénal, art. 222-33 (March 1, 1994 to June 18, 1998), <https://perma.cc/LZH2-SBTB>.

²⁹ C. pénal, art. 222-33 (current).

³⁰ Id.

³¹ Id.

³² Id.

C. General Harassment

In 2014, French legislators inserted a new article in the Penal Code to address harassment in general.³³ This article defines harassment as “repeated remarks or behavior that have for purpose or for effect a deterioration of [the victim’s] living conditions leading to a change in his/her physical or mental health.”³⁴ As is the case for sexual harassment, the remarks or behavior must be repeated, so a single act is not enough to constitute harassment. However, also as with sexual harassment, single acts committed successively by several perpetrators against the same victim qualifies as harassment, even if each perpetrator only committed a single act.³⁵ The penalty for harassment is one year in jail and a fine of up to €15,000 (about US\$16,600), but some aggravating circumstances can increase the penalty to two years in jail and a fine of €30,000.³⁶ These aggravating circumstances include when the harassment caused the victim to be completely unable to work for more than eight days; when the victim is particularly vulnerable due to age, illness, disability, or pregnancy; and when the harassment was committed online or through another electronic means of communication.³⁷ If two aggravating circumstances exist, then the penalty is increased to three years in jail and a fine of €45,000 (approximately US\$49,700).³⁸

V. Notable Cases

A. Julie Hainaut

Julie Hainaut, a freelance journalist in the city of Lyon, received many insults and threats after she published an article alleging that the owners of a local bar had praised the colonial era.³⁹ She was also the victim of “doxing,” following which she reported that strangers waited in front of her home twice. Although it appears that she initially faced inaction on the part of law enforcement authorities, investigations were eventually opened for racially-based insults, racially-based defamation, and death threats.⁴⁰ As of April 2018, this case was still under investigation.⁴¹

³³ Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes, Aug. 4, 2014, art. 41, <https://perma.cc/7VVP-SC8N>.

³⁴ C. pénal, art. 222-33-2-2.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ Council of Europe, *Réponse à une alerte concernant la France sur la plateforme pour la protection et la sécurité des journalistes* (July 18, 2018), <https://perma.cc/4RBK-QD7G>.

⁴⁰ Id.

⁴¹ Dalya Daoud, *Le cyberharcèlement est aussi violent qu'un coup de poing*, Rue89Lyon (Apr. 4, 2018), <https://perma.cc/54Q3-5QBW>.

B. Nadia Daam

Nadia Daam, a journalist and radio broadcaster, became the victim of an intense harassment campaign after she had denounced members of an online forum for their harassment of two feminist activists.⁴² For a period of eight months, Daam was the target of pornographic postings, death threats, threats of rape, and hate speech.⁴³ Her employer, the radio station Europe 1, filed a complaint with the police and an investigation led to the identification of seven perpetrators.⁴⁴ Two perpetrators were tried in court, one on charges of making death threats, and the other on charges of threatening to commit rape. In July 2018, both were given six-month suspended prison sentences and fined €2,000 (approximately US\$2,200).⁴⁵

⁴² McCully, *supra* note 13, at 22.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 23.

Israel

Ruth Levush
Senior Foreign Law Specialist

SUMMARY Freedom of speech, including of the press, has been recognized by Israel’s Supreme Court as a fundamental right. In balancing freedom of speech against other principles recognized under the legal system, the courts have applied relevant balancing formulas. In addition, the Supreme Court recognized a “defense of responsible journalism” to protect journalists against defamation suits. The level of online attacks against journalists in Israel appears to be steadily increasing, particularly in the lead-up to the September 2019 national election. Although there are currently no specific provisions for protection of journalists from harassment, it appears that they may enjoy general protections such as those against incitement to violence, sexual harassment, violation of the right to privacy, and transmission of misleading information, as well as defamation.

I. Freedom of the Press

Israel’s Supreme Court has recognized that protection of speech extends to all forms of expression and all the content of such expression, and encompasses freedom of the press and of political speech. It therefore extends to publications on social media. Freedom of speech, however, is not absolute and may be restricted under limited circumstances where it conflicts with the right to human dignity, a right protected under Basic Law: Human Dignity and Freedom.¹ In addition, speech may be restricted based on statutory law containing prohibitions on incitement for racism, terrorism and violence, or denial of the Holocaust and praise for atrocities committed by the Nazis, or because it constitutes an insult to a public servant and defamation, among other limitations.²

In balancing freedom of speech against other principles recognized under the legal system, the courts have applied relevant balancing formulas. Recognizing the significance of protecting speech, the Supreme Court has applied a narrow interpretation to restrictions that may limit it, such as under the offense of insult to a public servant or defamation.³ Recognizing a “defense of responsible journalism” against defamation suits, for example, the Court extended the defense, under appropriate conditions enumerated by law, to circumstances where the challenged

¹ Basic Law: Human Dignity and Freedom, Sefer Ha-Hukkim [SH] [Book of Laws] (official gazette) 5752-1992 No. 1391, as amended, <https://perma.cc/9CP2-X8K7>.

² For additional information, see Ruth Levush, *Initiatives to Counter Fake News in Selected Countries: Israel* 41 (Law Library of Congress, Apr. 2019), <https://perma.cc/GPF9-RML4>; Ruth Levush, *Limits on Freedom of Expression: Israel* 39 (Law Library of Congress, July 2019), <https://perma.cc/UCL9-P23E>.

³ Additional Hearing, Crim 7383/08 Ungarfeld v. State of Israel (July 11, 2011) (in Hebrew), <https://perma.cc/67CR-HPND>.

publication was made in good faith, even if the information it contained ultimately turned out to be false.⁴

II. Harassment of Journalists

The level of online attacks against journalists in Israel appears to be steadily increasing, particularly in the lead-up to the September 17, 2019, national election. An article published by the Tel Aviv Journalists Association on September 5, 2019, twelve days before the election, reports on the findings of a “hate index against [Israeli] journalists on the web.”⁵ The index examined the extent of hate discourse directed at journalists and media people on social networks (Twitter, Facebook, Instagram, YouTube, forums and talkbacks) for the preceding three months. The index surveyed the extent of the hate discourse against 100 leading journalists and media figures in Israel, a country of about nine million residents,⁶ both in their personal pages as well as in cyberspace in general. According to the article, most of the discourse related to these journalists was newsworthy, around their publications, or held among journalists, while the hate discourse was directed at them by surfers. The article includes a table indicating a significant rise in hate discourse against journalists during the month of August 2019.⁷

Israel’s TV Channel 12 crime reporter, Guy Peleg, who was responsible for leaks from a corruption case in which Prime Minister (PM) Binyamin Netanyahu is allegedly implicated, appears to be the top target for hostile messages directed by the PM and his son, Yair Netanyahu.⁸ On August 30 and 31 alone, the PM’s Facebook page had at least three messages attacking Channel 12. One directly targeted Mr. Peleg, accompanied by a photo with the words “Fake News,” alluding to the leaks.⁹ A request for banning publication of the leaked information had been rejected on August 30 by the Central Electoral Commission.¹⁰

According to Israeli news reports, Channel 12 has attached a personal security guard to Mr. Peleg, following a slew of threats directed at him on his personal WhatsUp and other social networks, such as one accusing Mr. Peleg of inciting hatred against the PM and threatening that “God will make you pay.”¹¹

⁴ Additional Hearing, Civil 2121/12 Anonymous v. Ilana Dayan, 67(1) Piske Din [PD] 667 (Sept. 18, 2014) (in Hebrew), <https://perma.cc/87SA-FQ2Y>; see also Ruth Levush, *Limits on Freedom of Expression: Israel*, supra note 2, at 44-45.

⁵ Shahar Gur, *Avalanche in Hate Speech*, Tel Aviv Journalists Association (Sept. 5, 2019) (in Hebrew), <https://perma.cc/ECE4-JWPG>.

⁶ Israel’s Central Bureau of Statistics Homepage (in Hebrew), <https://perma.cc/F7VE-5NP4>.

⁷ Shahar Gur, supra note 5.

⁸ Itamar B’Z, *Continuation of the War in Other Ways*, Seventh Eye (Aug. 2, 2019) (in Hebrew), <https://perma.cc/8FHN-ZE73>.

⁹ *Israeli Reporter Hounded by Prime Minister Netanyahu*, Reporters without Borders (Sept. 6, 2019), <https://perma.cc/4DFZ-XCXD>.

¹⁰ Id.

¹¹ Raz Scanik, *A Security Guard Was Pinned to Legal Affairs Correspondent Guy Peleg*, Yediot Acharonot (Aug. 30, 2019) (in Hebrew), <https://perma.cc/L7EG-8PM4>.

In an interview with Christophe Deloire, secretary general of Reporters without Borders, he expressed concern about what he perceived as the “harsh public atmosphere against journalists” in Israel.¹² Among examples noted by Deloire was a giant ad with pictures of four journalists (including Guy Peleg) posted before the April 2019 election, with the caption “They will not decide.” Deloire noted that “the fact that Israeli media agencies have acted in the service of certain politicians is problematic,” hinting at two alleged corruption cases against the PM known as case 2000 and case 4000, and the existence of the freely distributed “Israel Today” newspaper, that had been known to support Netanyahu.¹³ Deloire noted, however, that Israel’s judiciary and law enforcement are independent and capable of investigating such corruption cases.¹⁴

III. Legal Protections against Online Harassment of Journalists

There are currently no special provisions for protection of journalists from online harassment. It appears that the following general prohibitions may be applied to acts of harassment of journalists by any means, including by online dissemination.

A. The Penal Law

The Penal Law 5737-1977 prohibits advertisement of calls to commit, praise, sympathize or encourage incitement to commit violence. The law imposes a penalty of five years’ imprisonment for publishing content that, under the circumstances, raises a real possibility of causing a violent act.¹⁵ In addition, threatening persons in any way to unlawfully harm their good names or livelihoods, with the intention of intimidating or teasing them, is punishable by three years’ imprisonment.¹⁶

B. The Prevention of Sexual Harassment Law

Under the Prevention of Sexual Harassment Law 5758-1998, making a statement that constitutes sexual harassment in writing, orally, or through visual or auditory presentation, including by computer or computer material, is punishable by two- to four-years’ imprisonment as well as a fine.¹⁷ For the purpose of the law, sexual harassment includes:

- (5) Defamatory or degrading treatment of a person in relation to his or her sexuality, including his sexual orientation; [as well as]

¹² *Shahar Samocha, CEO of "Journalists without Borders" Explains Why Hostility to Journalists in Israel Is a Slippery Slope*, *Globes* (June 9, 2019) (in Hebrew), <https://perma.cc/J6RE-R29P>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Penal Law, 5737-1977, §144D2(a), SH 5737 No. 864 p. 226, as amended.

¹⁶ *Id.* § 192.

¹⁷ Prevention of Sexual Harassment Law, 5758-1998, §§ 2-3 & 5-6, SH 5758 No. 1661 p. 166, as amended.

(5a) The publication of a photograph, film or recording of a person, which focuses on his sexuality, under the circumstances in which the publication may humiliate or despise the person, and his consent has not been given for publication.¹⁸

C. The Computers Law

The Computers Law, 5755-1995, imposes a penalty of five years' imprisonment on any person who

(1) [t]ransmits to another or stores on a computer false information or commits an act so that it results in false information or false output; or

(2) [w]rites, transfers or stores software on the computer so that the result of its use will be false information or output, or operates a computer while using such software.¹⁹

In this section, "false information" and "false output" means information or output which may be misleading, in accordance with its purposes.

D. The Defamation Law

The Defamation Law, 5725-1965, prohibits publication of content that might

(1) humiliate a person in the eyes of the people or make the person a target of hatred, contempt or ridicule;

(2) despise a person for acts, conduct or characteristics attributed to him;

(3) harm a person's position, whether in public office or in any other capacity, in his/her business, occupation or profession;

(4) despise a person for his race, origin, religion, place of residence, age, sex, sexual orientation or disability.²⁰

For the purpose of liability under the Defamation Law, "publication" includes advertisements made " . . . whether orally or in writing or in print, including painting, figure, movement, sound and any other means."²¹ The prohibition against publishing defamatory content includes a publication that

(1) . . . was intended for a person other than the injured person and has reached that person or another person other than the victim; [or]

¹⁸ Id. § 3.

¹⁹ Computers Law, 5755-1995, § 3(a), SH 5755 No. 1534 p. 366.

²⁰ Defamation Law, 5725-1965, § 1, SH 5725 No. 464 p. 240.

²¹ Id. § 2(a).

(2) was in writing and the writing could under the circumstances, reach a person other than the injured person.²²

Prohibited publication of defamatory content may constitute either a criminal offense or a civil tort, resulting in imprisonment or fines, depending on conditions enumerated by the law.²³

E. The Protection of Privacy Law

Online harassment of journalists may also qualify as a violation of the Protection of Privacy Law, 5741-1981.²⁴ Among other things, this law prohibits following persons in a way that may harass them, as well as making public a person's photograph under circumstances in which the publication may degrade him or her.²⁵ Additionally, the publication of a matter relating to a person's personal life, including the person's sexual past, health status, or conduct in private, is similarly prohibited.²⁶ The law defines "publication" in accordance with its definition under the Defamation Law, addressed above.²⁷ Intentional harming of a person's privacy is punishable by five years' imprisonment.²⁸

²² Id. § 2(b).

²³ Id. §§ 6-12.

²⁴ Protection of Privacy Law, 5741-1981, SH 5751 No. 1011 p. 128, as amended (Privacy Protection Authority unofficial translation), <https://perma.cc/LYF8-UNF9>.

²⁵ Id. § 2(1) & (4).

²⁶ Id. § 2(11).

²⁷ Id. § 3.

²⁸ Id. § 5.

Japan

Sayuri Umeda
Senior Foreign Law Specialist

SUMMARY The Constitution of Japan guarantees freedom of expression, but also limits it for the public welfare. There is no law that protect journalists specifically in response to internet harassment and disinformation campaigns. However, the crimes of defamation, insults, and threat under the Penal Code and torts under the Civil Code provide protection against online harassment and disinformation. The Internet Provider Liability Act facilitates removal of offensive online information, and obtaining information on the identity of the offender for later legal actions is made easier by limiting the providers' liability.

I. Freedom of Expression and Its Limit

The Constitution of Japan guarantees freedom of assembly and association as well as freedom of speech, the press, and all other forms of expression.¹ Freedom of expression relating to public matters is regarded “as a particularly important constitutional right in a democratic nation.”² However, the Constitution also states that people “shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.”³ For example, freedom of expression is limited by the penal code, which makes defaming another person a crime.

II. Protections From Online Harassment/Disinformation

There is no law that protects journalists specifically in response to internet harassment and disinformation campaigns. However, there are laws that protect persons in general from online harassment and disinformation.

A. Penal Code

1. *Defamation and Insults*

Defamation and insults are criminal offenses. A person who defames another by alleging facts in public can be punished by imprisonment for not more than three years or a fine of not more than 500,000 yen (approximately US\$ 4,600), regardless of whether such facts are true or false.⁴ However, if a public allegation is found to relate to matters of public interest and to have been

¹ Constitution of Japan (1946), art. 21, para. 1, <https://perma.cc/3Y8U-CL9S>.

² 1981 (O) 609, Sup. Ct. (June 11, 1986), 40 MINSHU 872 (summary in English) , <https://perma.cc/6YEG-R8T3>.

³ Constitution, *supra* note 1, art. 12.

⁴ Penal Code, Act No. 45 of 1907, amended by Act No. 72 of 2017, art. 230, para. 1 (tentative translation of the Code as amended by Act No. 49 of 2013), <https://perma.cc/8XK2-VZG3>.

conducted solely for the benefit of the public, and the alleged facts are proven to be true, the person is not punished.⁵ Even if the alleged facts are not proven to be true, if there was a substantial basis for the person to believe the alleged facts were true, he or she is not punished.⁶ Insulting another person in public, with or without alleging facts, is punishable by detention or a petty fine.⁷ Defamation and insults are prosecuted only upon a complaint by the victim.⁸

Courts have applied the law in cases of online defamation. On the Courts of Japan website, the earliest case of online defamation was decided by a district court in 2002.⁹ In the late 1990s, some experts stated that defamatory expressions may be tolerated more online because people generally do not take the online expressions of ordinary users very seriously, compared with expressions on other media. They also stated that the victims can rebut the expressions online to negate the defamatory expressions.¹⁰ In the first known acquittal, the Tokyo District Court acquitted a defendant of online defamation in 2008.¹¹ The District Court found that, although the defendant's statements were not proved as facts, he had made them in the public interest and did sufficient research for an individual internet user at the time.¹² Using reasoning similar to the experts writing in the 1990s, the District Court applied a different standard for the level of research required to avoid a finding of online defamation.¹³ On appeal, however, the Tokyo High Court in 2009 and the Supreme Court in 2010 rejected applying a different standard to online defamation. The Supreme Court said not all internet users take online opinions as less credible, the damage caused by defamation can be serious because countless internet users can view the expression in a short time, and there is no mechanism that can insure recovery of the victim's dignity.¹⁴

2. Threat

Intimidating another person by threatening the person's life, body, freedom, reputation or property is punishable by imprisonment for not more than two years or a fine of not more than

⁵ Id. art. 230-2, para. 1.

⁶ 1966(a)2472, Sup. Ct. (June 25, 1969) (in Japanese), http://www.courts.go.jp/app/hanrei_jp/detail2?id=50801 (for the text of the judgment, click on the characters beside the pdf icon at the bottom of the box).

⁷ Id. art. 231.

⁸ Id. art. 232.

⁹ 2002(wa) No. 651, Fukuoka Dist. Ct. (Nov. 12, 2002) (in Japanese), <https://perma.cc/U752-23PF>.

¹⁰ 小倉 一志 (Kazushi Ogura), インターネット・「コード」・表現内容規制 (Regulations of Internet, "Code," Expression), 208-9 (2017) (in Japanese), <https://lccn.loc.gov/2017435554>.

¹¹ Comment, Hanrei Jiho 2009, at 151 (2008).

¹² 2004(wa) 5630, Tokyo Dist. Ct. (Feb. 29, 2008), Hanrei Jiho 2009, at 151 (2008).

¹³ Comment, *supra* note 11.

¹⁴ 2009(a)360, Sup. Ct. (Mar. 15, 2009) (in Japanese), http://www.courts.go.jp/app/hanrei_jp/detail2?id=38704 (for the text of the judgment, click on the characters beside the pdf icon at the bottom of the box).

300,000 yen (approximately US\$2,800).¹⁵ According to a cybercrime report by the National Police Agency, suspects have been arrested for allegedly making online threats since at least 2010.¹⁶

3. Criminal Cases of “Net-Lynching”

It does not appear that there are cases where suspects were investigated for alleged internet harassment and disinformation campaigns against journalists.

There are many so-called “net-lynchings” in which victims are threatened, harassed, or defamed and their private information revealed online.¹⁷ A well-known instance involved a comedian whose harassers, beginning in 1999, accused him online of participating in an infamous rape and murder.¹⁸ The police initially did not take the matter seriously and did not investigate until 2008 when the comedian met a sympathetic detective. Some of the alleged harassers were identified and referred for prosecution.¹⁹ Prosecutors reportedly did not indict those accused because they said they regretted their actions and would apologize to the comedian. After the police investigated the case and the media reported it, however, online harassments decreased significantly.²⁰

B. Civil Code (Torts)

Under the Civil Code, a person who has intentionally or negligently infringed others’ rights or their legally protected interests is liable for any resulting damages.²¹ The protected rights include reputation and privacy.²² The victim can request the court to order the offender to take appropriate measures to restore the victim’s reputation in lieu of, or in addition to, damages.²³

There are many cases where courts have ordered persons who spread defamatory information online to pay damages, publicize their apology to the victims, or both. For example, in 1997, the Tokyo District Court ordered a forum user on a computer network who posted comments against

¹⁵ Penal Code art. 222.

¹⁶ 広報資料 (Public Relations Material): 平成 26 年中のサイバー空間をめぐる脅威の情勢について (Regarding Situation of Threats in Cyber Space During 2014), Table 6-1 (Mar. 12, 2015) (in Japanese), National Police Agency, <https://perma.cc/55ZU-HSZ4>.

¹⁷ ネットの“ぬれぎぬリンチ”深刻化 (Online “Lynching by False Accusation” Getting More Serious), Nishinippon Shimbun (Sept. 4, 2019) (in Japanese), <https://perma.cc/83FV-Y92H>.

¹⁸ 信原一貴 (Kazutaka Nobuhara), 「人殺しは死ね」デマと闘った 18 年 スマイリーキクチ (‘Die, Murderer’ 18 Years of Fights against False Rumor, Smiley Kikuchi), Asahi Shimbun (June 15, 2017) (in Japanese), <https://perma.cc/PP45-PPUP>.

¹⁹ Id.

²⁰ Id.

²¹ Civil Code, Act No. 89 of 1896, amended by Act No. 34 of 2019 (Reiwa 1), (unofficial translation as amended by Act No. 78 of 2006), <https://perma.cc/X6YN-ZX89>.

²² Id. art. 710.

²³ Id. art. 723.

another user to pay damages because the aggressor defamed and insulted the other user, among other things. The Tokyo High Court confirmed that part of the judgment in 2001.²⁴ The first decision finding defamation on the internet was rendered by the Tokyo District Court in 1999.²⁵

C. Anti-Stalking Act

Posting matters online that harm the targeted person's dignity is one of the patterns of "acts of haunting" under the Anti-Stalking Act.²⁶ If an act of haunting is repeated, the acts constitute stalking.²⁷ However, the Anti-Stalking Act applies only where the act was committed to satisfy a feeling of love or affection for a particular person or because of a grudge against the person caused by unfulfilled love or affection.²⁸ Therefore, the act usually would not apply to internet harassment and disinformation campaigns against journalists.

D. Act Related to Hate Speech

Japan has an anti-hate speech law, the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan.²⁹ The act declares that unfair, discriminatory speech and behavior against people who are legally residing in Japan and who are from or whose ancestors were from outside of Japan is not tolerated.³⁰ As the name of the act suggests, its application is limited to speech against persons born outside Japan or of a different ethnicity. In addition, the act does not have a penal provision.

E. Internet Provider Liability Law

When offensive information against a person is posted on the internet, the person may want to eliminate the postings and seek compensation from the offender. A statute limiting the liability of internet providers facilitates the process.³¹

The statute exempts internet providers from liability when they prevent distribution of information that infringes a person's rights. In cases where a provider has reasonable grounds to believe that a person's rights are infringed without due cause by distributing the information, the

²⁴ 1997(ne)2631, Tokyo High Ct. (Sept. 5, 2001), http://www.courts.go.jp/app/hanrei_jp/detail4?id=167 (for the text of the judgment, click the characters beside the pdf icon at the bottom of the box).

²⁵ 小倉, *supra* note 10, at 39.

²⁶ Anti-Stalking Act, Act No. 81 of 2000, amended by Act No. 102 of 2016 art. 2, para. 1, item 7.

²⁷ *Id.* art. 2, para. 3.

²⁸ *Id.* art. 2, para. 1.

²⁹ Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan, Act No. 68 of 2016.

³⁰ *Id.* preamble.

³¹ Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders, Act No. 137 of 2001, amended by Act No. 10 of 2013 (original Act No. 137 of 2001), <https://perma.cc/LB28-4ZM7>.

provider can block the information without liability to the person who sent it.³² In addition, when a person alleging that his or her rights are infringed by information distributed by an internet provider asks the provider to stop its transmission, the provider must ask the information sender whether the sender consents to that action. Where the provider has not received any notice from the sender indicating disagreement within seven days, the provider is not liable to the sender for any damages caused by preventing distribution of the information.³³

Persons alleging that their rights were infringed by distribution of information via the internet may demand that the service provider disclose the identity of the sender if there is evidence that the distribution resulted in infringement and if identifying the sender is necessary to pursue a claim for damages or there is another justifiable ground for obtaining the sender's identity.³⁴

When a service provider receives such a demand, it must let the information sender know and consider the sender's opinion, except where the provider is unable to contact the sender or under other special circumstances.³⁵

III. Discussion of Protection of Journalists from Online Harassment and Disinformation Campaigns

There have been no discussions regarding the need for development of legislation or policies to protect journalists from online harassment and disinformation campaigns.

³² Id. art. 3, para. 2, item 1.

³³ Id. art. 3, para. 2, item 2.

³⁴ Id. art. 4, para. 1.

³⁵ Id. art. 4, para. 2.

Singapore

Laney Zhang
Foreign Law Specialist

SUMMARY Although no law has been located specifically concerning the protection of journalists against online harassment in Singapore, harassment of various forms can be prosecuted under an anti-harassment law enacted 2014. The Protection from Harassment Act (POHA) provides for criminal and civil remedies against harassment, including online harassment, and includes a new offense of unlawful stalking. An offense under POHA is punishable by a fine and/or imprisonment.

A victim of harassment may also make an application to the court for issuance of a protection order against a harasser to stop the harassment or stalking. Where a false statement of fact has been published, the victim may apply for a court order to stop the publication.

The courts in Singapore have jurisdiction to try offenses committed outside Singapore and to grant a protection order or expedited protection order if the conditions under POHA are satisfied.

On May 7, 2019, the Parliament of Singapore passed the Protection from Harassment (Amendment) Act. The amendment criminalizes “doxxing,” which involves the publication of identity information in order to harass, threaten, or facilitate violence against the victim—and establishes a specialized court, the Protection from Harassment Court.

I. Introduction

A. Freedom of Expression

Article 14(1) of the Constitution of the Republic of Singapore guarantees to Singapore citizens the rights to freedom of speech and expression, peaceful assembly without arms, and association, subject to restrictions imposed by laws made by the Parliament of Singapore under article 14(2).¹ In terms of the right to freedom of speech and expression, the Parliament may impose “such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offense.”²

The Freedom House’s 2019 *Freedom in the World* report designates Singapore as “partly free.” According to the report, the country’s legal framework limits freedoms of expression, assembly,

¹ Constitution of the Republic of Singapore (1999 Reprint) art. 14, <https://perma.cc/3CHY-NK5L>.

² Id. art. 14(2).

and association. Domestic newspapers, radio stations, and television channels are all owned by companies linked to the government. Free speech on social media is deterred by the threat of defamation suits and related charges.³

B. Protection from Online Harassment of Journalists

No law or cases have been located specifically concerning the protection of journalists against online harassment. Nevertheless, in 2014, Singapore enacted the Protection from Harassment Act (POHA) amid a noted significant rise in bullying, cyber-bullying, and harassment of a general nature.⁴ The Act gives Singapore's netizens "a new legal weapon to defeat the 'trolls' of the Internet" by providing for criminal and civil remedies against harassment, including online harassment.⁵ The Act also includes a new offense of unlawful stalking.⁶

Before the enactment of POHA, harassment was a criminal offense under the Miscellaneous Offenses (Public Order and Nuisance) Act, but it was not clear whether online harassment was covered under that Act. POHA repealed and re-enacted certain provisions of the Miscellaneous Offenses (Public Order and Nuisance) Act and made it clear that harassment includes acts done online.⁷

Official statistics shows that POHA has been an important legislative tool in protecting victims of harassment by giving them effective redress. Since the Act came into force in 2014, more than 3,000 Magistrate's Complaints were filed under the Act; over 1,700 prosecutions have been brought; and about 900 convictions have been obtained. There have been 500 applications for protection orders filed under the Act, of which over 200 were granted.⁸

II. Criminal Offenses

A. Intentionally Causing Harassment, Alarm, and Distress

It is an offense under POHA to, with intent to harass or cause alarm or distress to another person, use threatening, abusive, or insulting words or behavior, or to make any threatening, abusive, or insulting communication, thereby harassing or causing alarm or distress to the victim.⁹ The offense is punishable by a fine of up to SG\$5,000 (about US\$3,612), imprisonment of up to six

³ Freedom House, *Freedom in the World 2019: Singapore Country Report*, <https://perma.cc/WHV6-8ER3>.

⁴ Protection from Harassment Act (POHA), ch. 256A (revised May 31, 2015), <https://perma.cc/CZ44-WBC7>; 8 *Halsbury's Laws of Singapore: Criminal Law* 574 (2018 Reissue).

⁵ Mong Palatino, *Singapore Criminalizes Cyber Bullying and Stalking*, *The Diplomat* (Mar. 24, 2014), <https://perma.cc/6T8J-A2Y2>.

⁶ Press Release, Singapore Ministry of Law, *A New Protection from Harassment Bill to Be Introduced to Strengthen the Laws Against Harassment* (Feb. 26, 2014), <https://perma.cc/M93K-FLPB> (scroll down for text).

⁷ *Halsbury's Laws of Singapore*, supra note 4.

⁸ Second Reading Speech by the Senior Minister of State for Law, Mr. Edwin Tong, on Protection from Harassment (Amendment) Bill (May 7, 2019), <https://perma.cc/6CZE-QMUX>.

⁹ POHA s 3(1).

months, or both.¹⁰ It is a defense if the accused person can prove that his or her conduct was reasonable.¹¹

“Communication” includes any words, image, message, expression, symbol, or other representation that can be heard, seen, or otherwise perceived by any person.¹²

B. Harassment, Alarm, or Distress

It is also an offense to use any threatening, abusive, or insulting words or behavior, or to make any threatening, abusive, or insulting communication, which is heard, seen, or otherwise perceived by any person and likely to harass or cause alarm or distress to that person.¹³ The offense is punishable by a fine of up to SG\$5,000.¹⁴ It is a defense if the accused person can prove either that he or she had no reason to believe that the words or behavior used, or the communication made, would be heard, seen, or otherwise perceived by the victim, or that his or her conduct was reasonable.¹⁵

C. Fear or Provocation of Violence

It is an offense to, by any means, use towards another person (the victim) any threatening, abusive, or insulting words or behavior, or make any threatening, abusive, or insulting communication to the victim, either

(a) with the intent –

(i) to cause the victim to believe that unlawful violence will be used by any person against the victim or any other person; or

(ii) to provoke the use of unlawful violence by the victim or another person against any other person; or

(b) whereby –

(i) the victim is likely to believe that such violence referred to in paragraph (a)(i) will be used; or

(ii) it is likely that such violence referred to in paragraph (a)(ii) will be provoked.¹⁶

The offense is punishable by a fine of up to SG\$5,000, imprisonment of up to twelve months, or both.¹⁷

¹⁰ Id. s 3(2).

¹¹ Id. s 3(3).

¹² Id. s 2.

¹³ Id. s 4(1).

¹⁴ Id. s 4(2).

¹⁵ Id. s 4(3).

¹⁶ Id. s 5(1).

¹⁷ Id. s 5(2).

D. Public Servant or Public Service Worker

The Act specifically prohibits harassment of government officials and public service workers. According to the Act, it is an offense to use any indecent, threatening, abusive, or insulting words or behavior, or make any indecent, threatening, abusive, or insulting communication to a public servant or public service worker (the victim) in relation to the execution of the victim's duty.¹⁸ Public service workers are individuals providing services that are essential to the well-being of the public or the proper functioning of Singapore, such as healthcare workers, educators, and transportation workers.¹⁹

To commit this offense, the person must know or ought reasonably to know that the victim was acting in his or her capacity as a public servant or public service worker.²⁰ The offense is punishable by a fine of up to SG\$5,000, imprisonment for up to twelve months, or both.²¹

E. Unlawful Stalking

Under POHA, unlawfully stalking another person is prohibited.²² The offense is punishable by a fine not exceeding SG\$5,000, imprisonment not exceeding twelve months, or both.²³

Unlawful stalking occurs when the accused person engages in a course of conduct that "involves acts or omissions associated with stalking"; harasses or causes alarm or distress to the victim; and intends to harass or cause alarm or distress, or knows (or reasonably should know) that the conduct is likely to harass or cause alarm or distress, to the victim.²⁴

POHA provides examples of acts or omissions associated with stalking, including but not limited to (1) attempting or making any communication to the victim or a related person, relating or purporting to relate to the victim or a related person, or purporting to originate from the victim or a related person; or (2) keeping the victim or a related person under surveillance.²⁵ The Act also includes the following specific illustrations of unlawful stalking:

¹⁸ Id. s 6(1).

¹⁹ Id. ss 6(5) & 6(6); Protection from Harassment (Public Service Worker) Order 2014 (Nov. 15, 2014), <https://perma.cc/9TCU-6Q9D>.

²⁰ POHA s 6(2).

²¹ Id. s 6(3).

²² Id. s 7(1).

²³ Id. s 7(6).

²⁴ Id. s 7(2).

²⁵ Id. s 7(3).

- (a) Y repeatedly sends emails to Y's subordinate (X) with suggestive comments about X's body.
- (b) Y sends flowers to X daily even though X has asked Y to stop doing so.
- (c) Y repeatedly circulates revealing photographs of a classmate (X) to other classmates.²⁶

F. Enhanced Penalties for Repeat Offenders

A person who has been convicted of the above offenses will face a fine of up to SG\$10,000 (about US\$7,224), imprisonment of up to two years, or both for a subsequent conviction.²⁷

III. Civil Remedies

A victim of harassment may make an application to the court for a protection order under POHA. The court may issue such an order if it is satisfied that there has been a contravention of the relevant provisions of the Act, the contravention is likely to continue, and a protection order is just and equitable considering all the circumstances.²⁸ Where the circumstances require an urgent intervention, the court may grant an expedited protection order.²⁹

Where a false statement of fact about any person (the subject) has been published, the subject may apply to the court for an order to stop the publication.³⁰ The court may make the order if it is satisfied on the balance of probabilities that the statement of fact is false and it is just and equitable to do so.³¹

IV. Offenders Outside Singapore

The courts in Singapore have jurisdiction to try offenses committed outside Singapore and to grant protection orders or expedited protection orders if the conditions under POHA are satisfied.³² For example, where the offender was outside Singapore when any of the acts or omissions associated with unlawful stalking occurred, the court has jurisdiction if the victim was in Singapore when any of those acts or omissions occurred and the offender knew or had reason to believe that the victim would be in Singapore at that time.³³

²⁶ Id.

²⁷ Id. s 8.

²⁸ Id. s 12.

²⁹ Id. s 13.

³⁰ Id. s 15(1) & (2).

³¹ Id. s 15(3).

³² Id. s 17.

³³ Id. s 17 (6).

V. New Developments

On May 7, 2019, the Parliament passed an amendment to POHA, the Protection from Harassment (Amendment) Act 2019 (Amendment Act).³⁴ The Amendment Act, among other things, targets online harassment, noting the “scourge of technology when not handled properly.”³⁵

A. Doxxing

The Amendment Act added a new offense of “doxxing” to the POHA. Doxxing involves the publication of identity information in order to harass, threaten, or facilitate violence against the victim.³⁶ Identity information means any information that, whether on its own or with other information, identifies or purports to identify an individual, including but not limited to (1) the individual’s name, residential address, email address, telephone number, date of birth, national registration identity card number, passport number, signature (whether handwritten or electronic), or password; (2) any photograph or video recording of the individual; or (3) any information about the individual’s family, employment or education.³⁷

According to the Amendment Act, an individual or entity must not, with the intent to harass or cause alarm or distress to another person (the target person), publish any identity information of the target person or a person related to the target person.³⁸ The Amendment Act adds the following illustrations to POHA:

(c) X and Y were formerly in a relationship which has since ended. X writes a post on a social media platform making abusive and insulting remarks about Y’s alleged sexual promiscuity. In a subsequent post, X includes Y’s photographs and personal mobile number, intending to cause Y harassment by facilitating the identification or contacting of Y by others. Y did not see the posts, but receives and is harassed by telephone calls and SMS messages from strangers (who have read the posts) propositioning Y for sex. X is guilty of an offence under section 3(2) in relation to each post.

(d) X records a video of Y driving recklessly in a car on the road. X posts the video on an online forum, where people share snippets of dangerous acts of driving on the road. X posts the video with the intent to warn people to drive defensively. X has not committed an offence under this section.³⁹

Furthermore, an individual or entity must not by any means publish any identity information of another person (the victim) or a person related to the victim, either intending, knowing, or having reasonable cause to believe that it is likely (1) to cause the victim to believe that unlawful violence will be used against him/her or any other person, or (2) to facilitate the use of unlawful violence

³⁴ Protection from Harassment (Amendment) Act 2019, No. 17 of 2019 (Amendment Act), <https://perma.cc/4KNC-KVZ8>.

³⁵ Second Reading Speech by the Senior Minister of State for Law, *supra* note 8.

³⁶ Amendment Act §§ 4(a) & 6(d).

³⁷ *Id.* § 3.

³⁸ *Id.* § 4(a).

³⁹ *Id.* § 4(e).

against the victim or any other person.⁴⁰ The Amendment Act provides the following illustrations:

(a) X and Y are classmates. X writes a post with threatening and abusive remarks against Y on a website accessible to all their classmates. X writes a subsequent post on the same website, stating Y's identity information and stating "Everyone, let's beat Y up!". X is guilty of an offence under this section in respect of the subsequent post.

(b) X writes a public post on a social media platform containing threats against Y. X publishes a subsequent public post stating A's home address and a message "I know where you live". X is guilty of an offence under this section relating to conduct mentioned in section 5(1A)(a)(i) if X intends the subsequent post to cause Y to believe that violence will be used against A, or an offence under this section relating to conduct mentioned in section 5(1A)(b)(i) if X knows that it is likely that Y will believe that violence will be used against Y as a result of X's subsequent post.

(c) X writes a post (on a social media platform to which Y does not have access) containing threats of violence against Y and calling others to "hunt him down and teach him a lesson". B posts Y's home address in reply to X's post. B is guilty of an offence under this section.

B. Other Changes

As a result of the Amendment Act, a specialized court, the Protection from Harassment Court, will be established, which will be dedicated to dealing with harassment matters, whether online or offline. The court will have oversight of all criminal and civil cases under POHA.⁴¹

Among other things, the Amendment Act also clarifies that entities can be liable in proceedings for harassment-related behavior, improves the protection order and expedited protection regime, and enhances the penalties for offenses against vulnerable persons and intimate partners.⁴²

⁴⁰ Id. § 6(d).

⁴¹ Second Reading Speech by the Senior Minister of State for Law, *supra* note 8.

⁴² Id.

Spain

Graciela Rodriguez-Ferrand
Senior Foreign Law Specialist

SUMMARY Freedom of expression is protected under the Spanish Constitution. This right may only be restricted as necessary to protect other recognized rights, such as the rights to honor, privacy, one's own image, and the protection of youth and childhood. Spain has no specific legal protection against the harassment of journalists. However, it does impose sanctions on cyberstalking or harassment in general, including when carried out online. Journalism organizations have voiced their concerns over the increase in the online harassment of journalists in Spain, especially female journalists. A code of conduct and best practices have been adopted at the news desks of a number of newspapers to protect the victims.

I. Freedom of Expression

The Spanish Constitution¹ (SC) protects the right of persons to freely express and disseminate thoughts, ideas, and opinions through words, in writing, or by any other means.² It further protects the right to freely communicate or receive truthful information by any means of dissemination whatsoever,³ provides for the regulation of means of mass communication under the control of the state or any public agency,⁴ and guarantees access to such means by relevant social and political groups, respecting the pluralism of society and the various languages of Spain.⁵

These freedoms may only be restricted as necessary to protect the rights recognized in the SC and the laws implementing such rights—especially the rights to honor, privacy, and one's own image, and the protection of youth and childhood.⁶ The Constitutional Court (CC) has established that freedom of expression and information may only be restricted when it includes expressions that are unquestionably insulting and bear no relationship to the ideas or opinions to be expressed.⁷ The CC has recognized that the right to freedom of expression does not protect the use of insulting expressions by the press that are unnecessary in fulfilling reporting activities.⁸

¹ Constitución Española[Spanish Constitution, SC], Boletín Oficial del Estado (B.O.E.), Dec. 29, 1978, <https://perma.cc/4C9F-RPT7>.

² Id. art. 20.1.a.

³ Id. art. 20.1.d.

⁴ Id. art. 20.3.

⁵ Id.

⁶ Id. art. 20.4.

⁷ Elena Marín de Espinosa Ceballos et al., *Lecciones de Derecho Penal, Parte Especial* 174-75 (Valencia, 2018).

⁸ Francisco Javier Eneriz Olaechea, *La Protección de los Derechos Fundamentales y las Libertades Públicas en la Constitución Española* 276-79 (Pamplona, 2007).

Freedom of expression may not be restricted by any form of prior censorship.⁹ The seizure of publications, recordings, and other means of information may only be carried out pursuant to a court order.¹⁰

II. General Protections from Online Harassment and Disinformation

Spain has no specific legal protection against the harassment of journalists whether they are employed or are freelance professionals.¹¹ However, the Penal Code imposes sanctions on harassment, including cyberstalking, with imprisonment of three months to two years, or a fine equivalent to six to twenty-four months' salary.¹² The crime of harassment is defined as carrying out, relentlessly and repeatedly, and without being legitimately authorized to do so, any of the following actions in a way that seriously alters the development of the victim's daily life:

- Watching, chasing, or seeking physical closeness to someone
- Establishing or attempting to establish contact with someone through any means of communication, or through third parties
- Acquiring products or merchandise, or hiring services, or having third parties contact a person through the improper use of the victim's personal data
- Attacks against the freedom or property of someone, or the freedom or property of another close person¹³

The penalties provided for in this article apply in addition to any other sanction deemed applicable for the perpetration of the underlying crimes in which the acts of harassment took place.¹⁴ The crimes of harassment and stalking apply to any form of communication, including through online means.¹⁵

No court decisions on the online harassment of journalists have been identified. It is a grave concern, however, and one especially voiced by female journalists who point to the lack of action on the part of authorities to investigate and prosecute the harassment of journalists.¹⁶ Many

⁹ SC. art. 20.2.

¹⁰ SC. art. 20.5.

¹¹ Plataforma en Defensa de la Libertad de Expresion et al., Informe Conjunto Presentado por la Plataforma en Defensa de la Libertad de Informacion (PDIL) et al., para su consideración en la 35ª Sesión del Grupo de Trabajo del Consejo de Derechos Humanos de Naciones Unidas para. 36, <https://perma.cc/5P9X-2YB7>.

¹² Código Penal, B.O.E., Nov. 24, 1995, <https://perma.cc/WAW7-7GJN>.

¹³ Id. art. 172 Ter.

¹⁴ Id.

¹⁵ Moisés Barrio Andrés, *Delitos 2.0* at 141 (Madrid, 2018).

¹⁶ International Press Institute (IPI) OntheLine Project, *El acoso digital a mujeres periodistas en España*, Vimeo (Apr. 25, 2018), <https://vimeo.com/291584195>.

organizations representing journalists and freedom of press are expressing concerns about online harassment, especially as it impacts female journalists.¹⁷

III. Discussions and Proposals for Legislation or Policies to Protect Journalists from Online Harassment and Disinformation Campaigns

A report by the international nongovernmental organization Reporters Without Borders (RWB) states that the Madrid Press Association (APM) and RWB have monitored closely cases of harassment to which a great number of journalists are subjected via social media networks by various parties and ideological currents in Spain.¹⁸

According to a report by the Instituto Internacional de Prensa (IPI), the hatred of journalists increased during the last decade, as events such as the economic crisis, numerous political corruption stories, and the 2017 Catalonia independence referendum polarized Spanish public opinion such that journalists have become targets of attacks on social media.¹⁹

The IPI report on Spain issues recommendations to stop the digital harassment of journalists, including protocols in newsrooms to effectively respond to harassment.²⁰ Successful strategies and best practices adopted in newsrooms in Spain include measures addressing the management of comments on websites.²¹ One recommended measure is to require users to register in order to be able to make comments, which reduces the number of aggressive comments against journalists. Another is to manage online comments through a two-step content filter, first with automatic filtering, and thereafter by making an editorial decision whether a comment is suitable for publication. An additional recommendation is to centralize the management of comments in the editorial desk itself.²²

In response to the measures adopted to block insults and threats in web forums, campaigns to harass and discredit journalists have taken to social media, the IPI report said. News organizations with a strong social media presence hide insulting or violent comments, whether addressed to journalists or other readers. The IPI considers this practice not to be censorship, since all criticism that is not violent or insulting is allowed.²³

Newspapers such as *La Vanguardia*, *El País*, and *Catalunya Radio* have similar protocols in place to address harassment via social media, whereby

¹⁷ *Los Periodistas, Víctimas de Acoso en las Redes Sociales por la Crispación Política*, Crónica Global (Aug. 8, 2018), <https://perma.cc/9BCW-AWEP>.

¹⁸ *RSF condena cualquier tipo de presión sobre los periodistas y anuncia el próximo lanzamiento de un informe sobre "ciberacoso"*, Reporteros sin Fronteras (Mar. 7, 2017), <https://perma.cc/Z2D8-HPKM>.

¹⁹ *El IPI Publica un Informe Pionero sobre el Acoso Digital contra Periodistas en España*, IPI (Aug. 8, 2018) (click on box at top right for English translation), <https://perma.cc/F5T3-4K5T>.

²⁰ *Id.*

²¹ IPI, *Online Attacks on Journalists in Spain* (2018), <https://perma.cc/GPY4-LQDJ>.

²² *Id.*

²³ *Id.*

- the journalist seeks the support and advice of the newspaper's social media team;
- the social media team assesses the seriousness of the case and seeks legal advice;
- if the case is serious, social media platforms are asked to withdraw the comment following protocols in place for this measure; and
- messages are saved and referred to legal counsel and human resources for the purpose of filing legal actions.²⁴

²⁴ Id.

Turkey

Kayahan Cantekin
Foreign Law Specialist

SUMMARY In Turkey, public discussions of the specific issue of online harassment of journalists appear to be subsumed under the more general problems relating to freedom of the press and the prosecution of journalists, which have been heavily commented upon by domestic and international observers. Under Turkish constitutional law, freedom of expression is protected and journalists, to the extent they may be considered public figures, are expected to tolerate more severe public criticism than private citizens. This expectation, however, is only relevant to criticism that contributes to a debate that is in the public interest. No specific legal framework exists for the protection of journalists from online harassment, but they may be protected under several generally applicable provisions in the Turkish Penal Code that bar various types of harassment via internet communications. In addition, Law No. 5651 provides a controversial and widely criticized process for the blocking of internet content that violates a complainant's personal rights, which would likely apply to cases of online harassment. Finally, journalists may use the general provisions of the Turkish Civil Code to ask a court to stop unlawful attacks on their personal rights.

I. Constitutional Freedom of Expression and the Duty to Tolerate Criticism

A. Protected Expression and the Public Figure Doctrine

Article 26 of the Constitution of Turkey enshrines “the freedom of expression and dissemination of thought.”¹ In determining the theoretical limits of this right, it appears that the Constitutional Court of Turkey (CCT) largely follows the jurisprudence of the European Court of Human Rights (ECtHR) regarding article 10 of the European Convention on Human Rights.² In light of the ECtHR's case law, the CCT has developed its doctrine of a “hierarchy” of protected expression that determines the scope of allowable interference with freedom of expression, taking into account the qualities of the “person who was the target of the expression and the content of the expression.”³ Echoing the ECtHR's jurisprudence, political expression is afforded the widest protection, followed by artistic and academic expression, and finally commercial expression, which is protected to a relatively lesser extent.⁴

In the context of interference with freedom of expression for the protection of the reputation and rights of the person at which an expression is aimed, the content of the expression and the social

¹ Constitution of Turkey of 1981, as amended, <https://perma.cc/HK5Q-ZYQC> (English translation published on the website of the Grand National Assembly of Turkey).

² Ulaş Karan, *Ifade Özgürlüğü, Anayasa Mahkemesine Bireysel Basvuru El Kitaplari Serisi – 2* at 8 (Council of Europe, 2018). Turkey ratified the European Convention of Human Rights on May 18, 1954.

³ *Id.* at 10.

⁴ *Id.*

role of the person targeted become significant. The CCT has developed a “public figure” doctrine in its case law,⁵ according to which expressions targeting persons who have become public figures, regarding whom society has a right to know about certain aspects of their lives due to the public duties they perform, enjoy a higher degree of protection than expressions targeting private citizens. While the paradigmatic example of a public figure is the politician,⁶ the CCT has found that journalists, to an extent relative to their fame, can be considered as public figures and thus must tolerate more severe criticism than private citizens.⁷

B. Hate Speech Relief

While public figures have a duty to tolerate more severe criticism, the scope of that duty appears to be relative to the contribution that the expression in question makes to a debate related to the public interest.⁸ For instance, it appears that in light of the recently developing jurisprudence of the CCT, an expression that includes hate speech may not be considered protectable criticism under article 26 of the Constitution.⁹

Although there are no explicit references to hate speech in the Constitution of Turkey, the CCT has found that the state has a positive obligation to provide relief against expression that includes hate speech.¹⁰ This obligation does not necessarily require ensuring criminal prosecution of the person making the expression, but can be satisfied also by ensuring the availability of civil law processes under which persons targeted by hate speech may seek relief. The CCT has found that hate speech must be directed to a particular individual or group, and the “hate” motive must be related to the target’s membership in a particular category or to a characteristic attributable to the target. Accordingly, the Court has found that expressions that incite hate against persons based on their racial background, religious beliefs, skin color, ethnic background, gender, sexual identity, sexual orientation, disability, political orientation, age, or status of refugee, immigrant, foreigner, or membership of other disadvantaged groups is actionable.¹¹

Thus, it appears that to the extent that an expression harassing a journalist falls under the CCT’s definition of hate speech, it is probable that the expression will not find protection under article 26 of the Constitution, but may give rise to a civil remedy in certain circumstances, as discussed below.

⁵ In developing this doctrine, the CCT appears to be generally following the ECtHR’s jurisprudence in *Axel Springer AG/Germany* - 39954/08 [2012] ECHR 227 (7 Feb. 2012), and *Von Hannover v. Germany* (No. 2) 40660/08 [2012] ECHR 228 (7 Feb. 2012). See, e.g., CCT, *Ali Kılık*, B. No. 2014/5552 (Judgment of Oct. 26, 2017), <https://perma.cc/MD6J-KYNA>.

⁶ CCT, *Nilgün Halloran*, B. No: 2012/1184 (Judgment of July 16, 2014), § 45, <https://perma.cc/SMM8-QWHF>.

⁷ CCT, *Emin Aydın*, B. No. 2013/2602 (Judgment of Jan. 23, 2014), § 49, <https://perma.cc/RV6W-69NU>.

⁸ *Ali Kılık*, § 26 (citing *Von Hannover v. Germany* (No. 2), *supra* note 5).

⁹ Karan, *supra* note 2, at 40.

¹⁰ *Id.*

¹¹ CCT, *Fetullah Gülen*, B. No. 2014/12225 (Judgment [GC] of July 14, 2015), §§ 38-40, <https://perma.cc/NA9P-73L9>.

II. Statutory Protection from Online Harassment

No substantial legislative, policy-making, research, or public information effort undertaken by the Turkish government or nongovernmental actors was identified that specifically focuses on the phenomenon of online harassment of journalists. However, the topic appears to be discussed under the more general matter of the harassment, intimidation, and prosecution of journalists, which appears to be an area of widespread contention and controversy among social and political groups in Turkey, and occupies a prominent place in public debate, attracting the attention of many international commentators.¹²

Under Turkish law, there are no protections in place specifically for journalists; rather, it appears that journalists may seek protection from online harassment under generally applicable laws. For example, internet communication aimed at harassing journalists appears to be potentially covered by several offenses provided in the Turkish Penal Code (TPC).¹³ Additionally, there exists a (controversial) procedure under the internet-specific Law No. 5651 that may be used by victims to have offending content blocked. Finally, journalists who are harassed online may also seek civil relief against attacks on their personal rights, as more fully explained below.

A. Criminal Offenses

The following three criminal offenses in Turkish criminal law may be directly relevant to harassment of journalists on the internet:

- Article 125 TPC (“insult”)
- Article 106 TPC (“threat”)
- Article 105 TPC (“sexual harassment”)

While the first two offenses do not include a typology specific to expressions made on the internet, the use of electronic communication media has been specifically proscribed as an aggravated type of the offense.

¹² *Yayıncılar Birliği'nden yazarlar ve gazetecilere yönelik saldırılara tepki: İfade özgürlüğü tehdit altında*, BirGün (May 28, 2019), <https://perma.cc/5ETF-SU8Z>; Mehveş Evin, *Dışarıdaki gazeteciler anlatıyor: Baskı, tehdit ve işsizlik*, Journo.com.tr (Feb. 10, 2017), <https://perma.cc/U5CF-CCSP>; see Reporters Without Borders 2019 Press Freedom Index, showing Turkey in 157th place, <https://perma.cc/C2BG-9RDC>; Council of Europe’s Platform to Promote the Protection of Journalism and Safety of Journalists, reporting 110 journalists in detention in Turkey, <https://perma.cc/3WYK-ULLQ>; Press Release, OSCE, OSCE Media Freedom Representative [Harlem Désir] Strongly Condemns Shooting of Journalist in Turkey, Calls for Thorough Investigation (Aug. 31, 2019), <https://perma.cc/SJ4A-EZUE>.

¹³ Turkish Penal Code (TPC), Law No. 5237 (published Oct. 12, 2004, relevant provisions effective June 1, 2005), <https://perma.cc/2JZN-7NHR>. All translations of the TPC provisions provided herein are quoted from the English translation published by the Venice Commission, CDL-REF(2016)011, <https://perma.cc/2JZN-7NHR>.

The offense of insulting someone has been pointed out as one of the most widespread offenses committed via expressions made via social media.¹⁴ Article 125 TPC, titled “insult,” states as follows:

- (1) Any person who attributes an act, or fact, to a person in a manner that may impugn that person’s honour, dignity or prestige, or attacks someone’s honour, dignity or prestige by swearing, shall be sentenced to a penalty of imprisonment for a term of three months to two years or a judicial fine. To be culpable for an insult made in the absence of the victim, the act should be committed in the presence of at least three further people.
- (2) Where the act is committed by means of an oral, written or visual medium message, addressing the victim, the penalty stated in the above paragraph shall be imposed.
- (3) Where the insult is committed:
 - ...
 - b) because of declaring, altering or disseminating, his religious, political, social or philosophical beliefs, thoughts, or convictions, or practising in accordance with the requirements and prohibitions of a religion he belongs to;
 - ...
 - the penalty to be imposed shall not be less than one year.
- (4) . . . Where the insult is committed in public, the penalty to be imposed shall be increased by one sixth.
- (5)

It appears that insulting messages transmitted or broadcast over the internet would fall under this offense by way of article 125(2).¹⁵ Postings made on social media platforms are likely to fall under the aggravated typology of the offense provided in article 125(4). The second sentence of article 125(1) has been interpreted by some commentators to require three “followers” for an expression written on a social media profile’s page to constitute the offense.¹⁶ Article 125(3) introduces an aggravated type of the offense, raising the minimum sentence to one year of imprisonment or an equivalent judicial fine.¹⁷

Another offense that applies to an expression published online and relevant to the case of online harassment of journalists is the offense of “threat,” found in article 106 of the TPC,¹⁸ which states as follows:

- (1) Any person who threatens another individual by stating that he will attack the individual’s, or his relative’s, life or physical or sexual immunity shall be subject to a penalty of imprisonment for a term of six months to two years. Where the threat relates to

¹⁴ Metin Turan, *Bilisim Hukuku* 256 (2016).

¹⁵ Ayfer Akdemir Çalışır & Kurtuluş Tayanç Çalışır, *Teoride ve Pratikte Hakaret Suçları* 117 (2013).

¹⁶ Emel Altay, *Üçten fazla takipçisi olanlar sosyal medyada ‘hakaret’ konusunda daha dikkatli davranmalı*, *Journo.com.tr* (July 1, 2019), <https://perma.cc/GY7X-8UM4>.

¹⁷ This provision has been pointed out as an example of anti-hate-crime legislation in Turkish law. Turkish law does not have a general framework against hate crimes but the TPC includes the specific targeting of victims based on certain attributes as an aggravating circumstance in some offenses, including those described in article 125. See Timur Demirbaş, *Nefret Söylemi ve Nefret Suçları*, 19 D.E.U. Hukuk Fakültesi Dergisi 2693, 2700 (2017), <https://perma.cc/B3WA-99FM>.

¹⁸ Turan, *supra* note 14, at 258.

causing extensive loss of economic assets or other related harms, there shall be a penalty of imprisonment for a term of up to six months or a judicial fine, upon the complaint of the victim.

(2) Where the threat is carried out:

...

b) while concealing his identity or with an unsigned letter or by using a particular symbol;

...

the offender shall be sentenced to a penalty of imprisonment for a term of two to five years.

While it appears likely that threatening communications sent from an anonymous or faked user profile could fall under the aggravated offense provided in article 106(2)(b) (“concealing his identity”), this point is not clear.¹⁹

The offense of sexual harassment may be relevant in cases where journalists are targeted by use of expression or content of a sexual nature. However, it has been argued that “sexual” expressions that aim to injure the honor and dignity of a person rather than to violate the sexual immunity of the victim should be assessed under the “insult” offense provided under article 125 TPC.²⁰ The same could be argued for the offense of “threat” under article 106(1), especially given that the definition of the offense includes an expressed intention to attack sexual immunity. Nevertheless, it might be difficult to draw a clear line between motives. Article 105 TPC, titled “sexual harassment,” states as follows:

(1) If a person is subject to sexual harassment by another person, the person performing such act is sentenced to a term of imprisonment from three months to two years or to a judicial fine

(2) . . . If the act of offence is committed:

...

d) by using the advantage provided by mail or electronic communication instruments, [or]

e) by the act of exposing,

the punishment to be imposed according to the above paragraph is increased by one half.

If the victim was obliged to quit his/her job or leave his/her school or family for this reason, the punishment to be imposed cannot be less than one year.

Article 105(2)(d) was specifically added to the description of the offense by an amending law in 2014 as an aggravated type of the offense to counter the fact that anonymous messaging and the communication of sexual content has become much easier with the advent of electronic communications, in particular social media.²¹

B. The Blocking Procedures of Law No. 5651

In 2007 Law No. 5651 “on regulation of publications on the internet and combating crimes committed by means of such publication” was passed. As amended in 2014 and 2015, the Law

¹⁹ Id.

²⁰ Eylem Baş, *Türk Hukukunda Cinsel Taciz Suçu*, 65 Ankara Hukuk Fak. Dergisi 1135, 1158 (2016).

²¹ Turan, *supra* note 14, at 259.

includes four separate procedures for the blocking of access to content placed on the internet, provided under articles 8, 8/A, 9, and 9/A of the Law.²²

The access-blocking procedures of Law No. 5651 have been used as a basis by Turkish authorities to block access to hundreds of thousands of websites and domain names,²³ sometimes including the wholesale blocking of platforms such as Twitter.com, YouTube.com, and Wikipedia.org—a practice that has faced widespread condemnation from domestic and international observers, including *inter alia*, the Organization for Security and Co-operation in Europe (OSCE) and Venice Commission.²⁴ Moreover, the CCT has found numerous times that the blocking practices of the Information Technologies and Communications Authority (Bilgi Teknolojileri ve İletişim Kurumu, BTK) and its predecessor the Telecommunication and Communication Presidency (Telekomünikasyon İletişim Başkanlığı, TIB) under Law No. 5641 are in violation of constitutional protections.²⁵

Nevertheless, in the context of online harassment of journalists, article 9 of Law No. 5651 provides a procedure that may provide effective relief. According to the article 9 procedure, a natural or legal person who claims that his or her “personal rights” were violated by content published on the internet may give notice to the content or hosting provider requesting that the content be removed.²⁶ The requester may also (without first giving notice to the content or hosting provider) directly petition the judge of the peace to block access to the content in question.²⁷ Upon receiving the request, the judge of the peace decides within twenty-four hours and without holding a hearing whether to block access to the content.²⁸ If the request to block access is granted, the judge will only order the blocking of access to the offending content, not to the whole website, but may also order the blocking of access to the whole website if it is not possible to block specific content.²⁹ The blocking measure is of indefinite duration. The decision of the judge of the peace may be reviewed by another judge of the peace upon objection; however, the decision cannot be appealed

²² Law on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publication, Law No. 5651 (published and effective May 23, 2007; art. 8 entered into force on Nov. 23, 2007 per art. 13 of the Law), <https://perma.cc/UAD4-CH4J>.

²³ According to a 2019 report published by the Freedom of Expression Association (Turkey), 229,671 websites and domain names were blocked in the period between 2007 and 2018 under the procedures of Law 5651. Yaman Akdeniz & Ozan Güven, *Engelli Web 2018* at 37 (2019) (in English), <https://perma.cc/9VDS-QDUY>.

²⁴ European Commission for Democracy through Law (Venice Commission), *Opinion on Law No. 5651 on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publication (“The Internet Law”)*, adopted by the Venice Commission at its 107th Plenary Session, Opinion No. 805/2015 CDL-AD(2016)011 (June 15, 2016), <https://perma.cc/XG4P-8RLG>.

²⁵ See, e.g., *Yaman Akdeniz ve diğ erleri*, B. No. 2014/3986 (Judgment of Apr. 2, 2014), <https://perma.cc/FW33-G9J7>; *You Tube LLC Corporation Service Company ve diğ erleri*, B. No. 2014/4705 (Judgment [GC] of May 29, 2014), <https://perma.cc/K4J5-PPR8>; *Medya Gündem Dijital Yayıncılık Ticaret A. Ş.*, B. No. 2013/2623 (Judgment [GC] of Nov. 11, 2015), <https://perma.cc/6TSD-LFCR>; and most recently, *Birgün İletişim ve Yayıncılık Ticaret A. Ş.*, B. No. 2015/18936 (Judgment [GC] of May 22, 2019), <https://perma.cc/K33C-5CAG>.

²⁶ Law no. 5651 art. 9(1).

²⁷ *Id.*

²⁸ *Id.* art. 9(3).

²⁹ *Id.* art. 9(4).

to the regional court or to the Court of Cassation.³⁰ Only an individual application before the Constitutional Court is available as a remedy against a refusal of the objection made to the authorized judge of the peace.³¹

The article 9 procedure has been severely criticized by the Council of Europe's Venice Commission on several grounds, of which the most notable are as follows:

- the procedure is not connected to any civil or criminal court process that was initiated with regard to the personal rights violation underlying the blocking of content request where a court closer to the facts of the case could assess the suitability of the measure;
- the procedure does not allow the judge of the peace to seek a more suitable measure (such as requiring the publisher to publish the complainant's response) that would be proportional to the potential damage sustained by the complainant and would not exceed what is strictly necessary for the protection of the complainant's rights;
- the procedure does not require notification of parties effected by the blocking; and
- an appeal to higher courts is not allowed, causing a lack of guiding jurisprudence, which in the Turkish system is (according to the Venice Commission) very important for the implementation of human rights standards in the lower courts.³²

The jurisprudence of the CCT appears to be wary of the practice of lower courts in relation to blocking orders issued under Law No. 5651. Indeed, the CCT has attributed special importance to social media and expressions made on social media, noting as follows:

The internet has an important instrumental value in enabling the enjoyment of fundamental rights and freedoms in modern democracies. Social media, which the internet has made possible, is indispensable for individuals for the expression of knowledge and thoughts, and their dissemination and mutual sharing with others. For this reason, it is clear that the state and the administration must be very careful in its actions and regulations concerning the internet and social media, which have become one of the most effective and prevalent methods of expression of thought in our time.³³

The CCT, in its judgment in the *Ali Kıldık* case (2017) has set guidelines for the application of the article 9 procedure. The Court, pointing to the nonadversarial and limited character of the assessment made by the judge of the peace upon a request for blocking under article 9, found that the procedure must be considered as an exceptional measure and interpreted to allow blocking only in cases where the violation is so conspicuous that the court can determine *prima facie* that

³⁰ Id. art. 9(6), by reference to art. 268(3) of the Criminal Procedure Code, Law No. 5271, as amended (published Dec. 4, 2004, effective June 1, 2015) (in Turkish), <https://perma.cc/R6X9-JW7Z>.

³¹ Venice Commission, *supra* note 24, § 50.

³² Id. §§ 56-75; Yaman Akdeniz, *Report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship* (Jan. 11, 2010), <https://perma.cc/6H8U-NDNV>.

³³ *Yaman Akdeniz ve diğerleri*, *supra* note 25, § 39 (author's translation).

the offending content is violating personal rights, without needing to collect evidence or hear the other party.³⁴ Nevertheless, a report by the Freedom of Expression Association stated that

“subsequent to the *Ali Kılık* judgment, none of the blocking orders issued in 2018, by criminal judge-ships of peace has referred to the *prima facie* principle nor applied *Ali Kılık* in their assessment and they systematically ignore this principle despite the principle being adopted in 10 Constitutional Court judgments.³⁵

C. Civil Relief

Under articles 24 and 25 of the Turkish Civil Code (TCC) a civil action can be brought against violations of personal rights:

1. Basic principle

ARTICLE 24-The person subject to assault on his/her personal rights may claim protection from the judge against the individuals who made the assault.

Each assault against personal rights is considered contrary to the laws unless the assent of the person whose personal right is damaged is based on any one of the reasons related to private or public interest and use of authorisation conferred upon by the laws.

2. Lawsuits

ARTICLE 25-The claimant may demand from the judge to take an action for prevention of assault, elimination of such threat and determination of unlawful consequences of the assault even though it is discontinued.³⁶

The CCT, while explaining the exceptional nature of the blocking procedure of Law No. 5651 in its *Ali Kılık* judgment, pointed at these general rules of the Civil Code and the actions to prevent or end conduct in violation of a personal right that can be brought under these rules as a primary method to obtain relief (besides any criminal process) from online attacks made against the fame and honor of complainants.³⁷ The civil court before which an action under article 25 TCC is brought may issue an injunction against the publication of the offending content if the court finds that inconvenience or serious damage may occur in the case of delay, in accordance with article 389 of the Code of Civil Procedure.³⁸

³⁴ *Ali Kılık*, supra note 5, §§ 62-63. Notably, Justice Serdar Özgüldür in his dissenting opinion argued that the process before the judgeship of the peace in the article 9 procedure was not as disadvantageous to the parties effected by the blocking decision as they could (and should, according to Özgüldür) seek to establish the legality of the content via obtaining a declaratory judgment or through an *actio negatoria* under civil law. Id. at 20.

³⁵ Akdeniz & Güven, supra note 23, at 38.

³⁶ Turkish Civil Code, Law No. 4721 (published Nov. 22, 2001, effective Jan. 1, 2002) arts. 24 & 25, <https://perma.cc/5DWK-JJ3S> (English translation by Argüs Ajansı).

³⁷ *Ali Kılık*, supra note 5, § 64.

³⁸ Code of Civil Procedure, Law No. 6100 (published Feb. 4, 2011, effective Oct. 1, 2011), <https://perma.cc/LW2B-6A3X>; Mustafa Göksu, *Civil Litigation and Dispute Resolution in Turkey* 171 (2016).