

1. Civil harassment and the Harassment Act 2017

1.1 Introduction

[The Harassment Act](#) was brought in to provide a remedy for people who are subject to obsessive behaviour by other persons and for whom no satisfactory legal remedies are otherwise available.

There are two parts to the [Harassment Act 2017](#) (HA): **civil restraining orders** and **criminal offences**. A person's behaviour can amount to both criminal and civil harassment. In those situations, the person being harassed can both complain to the police and apply to the court for a restraining order:

- If a person wishes to get a legal order to prevent harassment, they can apply for a restraining order from the court under [Part 3 HA](#). See "[Civil harassment](#)".
- Protection orders are also available from the Family Court where family members are involved. See "[Temporary protection orders](#)".

This section relates to **civil harassment**.

1.2 Purpose of the Harassment Act 2017 (HA)

s 7 HA.

The purpose of the Harassment Act is to:

- recognize that behaviour that may appear innocent or trivial when viewed on its own, may amount to harassment when viewed in context over time;
- provide adequate legal protection for all victims of harassment.

The Act aims to achieve this purpose by:

- making the most serious types of harassment criminal offences;
- providing civil restraining orders to protect victims of harassment;
- providing effective sanctions (penalties/punishments) for breaches of the criminal and civil law relating to harassment.

When you are applying the Act to a particular case before you, keep in mind the purpose of the Act.

1.3 Definition of harassment

ss ~~4~~⁵ HA.

A person harasses another person if they engage in a pattern of behaviour, which includes (s ~~4~~⁵ HA):

- any specified act; and
- is directed against that other person, on at least two separate occasions within a period of 12 months.

The two occasions can include the same or different specified acts, and these can be to the same person or to a different family member but directed against the same person: s ~~4~~⁵.

It also includes one continuing act carried out on one occasion over any period of time or over a long period. For example, where offensive material about a person is placed online and remains there for a long time.

Specified acts under s 5, are defined as the respondent:

- following someone;
- watching or loitering outside or near a building or place where a person resides, works, farms, fishes, carries on a business or studies, or any other place frequented by them;
- telephoning, text messaging, emailing, or using other technologically assisted means to contact someone, or inducing another person to contact that person;
- sending or delivering, or causing the delivery of letters, packages, or other objects to someone;
- entering or interfering with property in the person's possession without their express consent;
- keeping someone under surveillance;
- doing something that make a reasonable person fear for their safety.

1.4 Civil jurisdiction, standard of proof and evidence

s 30–32 HA.

You have jurisdiction (the power) to (s 30 HA):

- hear and determine an application for a restraining order (including for a direction under s 19 of the HA to extend the order to the associates of the alleged harasser);
- hear and determine an application to vary or discharge a restraining order;
- appoint a representative for the person being harassed under s 14 HA;
- make an order under s 34 of the HA (which concerns vexatious proceedings).

This is part of your **civil jurisdiction** and so the standard of proof is different from the standard required in criminal cases. Every question of fact arising in any proceedings under the HA (other than criminal proceedings) must be decided on the **balance of probabilities**: s 31 HA.

In any proceedings under the HA (other than criminal proceedings), you may receive any evidence that would not otherwise be admissible in a court of law, if you are satisfied that allowing this evidence is required in the interests of justice: s 32 HA. It is an overall question of fairness.

1.5 Applying for a restraining order

ss 10–16, 31 HA.

Any person (applicant) or their appointed representative who is being harassed by another person (respondent) can apply for a restraining order against the respondent, unless they are or have been in a domestic relationship with that other person: s 10 HA.

If the applicant is in a domestic relationship with the alleged harasser, they may apply instead for a protection order under [Part 6](#) of the Family Protection and Support Act 2017. See "[Temporary protection orders](#)".

The application must be made on notice, with a copy served on the respondent (associates of the respondent) and every person in respect of whom the restraining order applies: s [16](#) HA.

If the person eligible for a restraining order is unable or unwilling to apply given their circumstances (this could be due to physical incapacity or fear of harm or other sufficient cause), they can appoint a representative to apply on their behalf: s [10](#), [14](#) HA.

A minor can apply through their representative and any restraining order will be enforced, as if the minor were of full age: s [12](#) HA.

You may hear and determine more than one application for a restraining order where all the applications are made against the same person (whether or not any or all of those applications also relate to any other person): s [33](#) HA.

1.6 Appointing a representative to apply on behalf of the applicant

ss [14](#), [15](#) HA.

You or the registrar must, on an application without notice, appoint a person to be a representative of another person, if you are satisfied that all of the following requirements are met (s [14](#) HA):

- the representative is an adult and not under any disability and has consented in writing to the appointment (or a company);
- reasonable steps have been taken to find out the wishes of the applicant and they either do not object to the appointment or their objection is not freely made; and
- it is in the best interests of that person to make the appointment if they are unable to make the application personally; or if that person is unwilling to make the application personally, that it is appropriate to make the appointment; and
- there is unlikely to be any conflict between the interests of the proposed representative and the interests of the person in respect of whom the application is made.

A minor can still be heard in the application proceedings where a representative is appointed on their behalf. If they object to the application, you must be satisfied that the objection is not freely made, before allowing any further steps to be taken: s [15](#) HA.

1.7 Power to make restraining order

ss [17](#), [19](#) HA; Art [64\(1\)\(e\)](#), [\(2\)](#) Constitution.

You may make a restraining order against the respondent as long as you are satisfied that **all** of the following requirements are met (s [17](#) HA):

- the respondent has harassed, or is harassing, the applicant/victim;
- the behaviour causes the applicant distress or threatens to cause the applicant distress;

- the behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances;
- in all the circumstances, the degree of distress caused or threatened by the behaviour justifies the making of an order;
- the making of an order is necessary to protect the applicant from further harassment.

A respondent who encourages someone else to do a specified act will still be treated as if they committed this act personally.

An order may be made where the need for protection arises from the risk of the respondent doing, or encouraging another person to do, a specified act of a different type from the specified act that was found to have occurred in the application.

Likewise, you may give a direction that the restraining order applies to the respondent's associate(s), if the respondent is encouraging, or has encouraged, that other person to do any specified act to the applicant and the above conditions are met: s [19](#) HA.

The timing of the specified act by any of the respondent's associates, whether before or after the restraining order is granted against the respondent, is irrelevant.

You should consider the rights and freedoms guaranteed under the Constitution, and whether the restraining order would unreasonably limit the right of freedom of speech under Art [64\(1\)\(e\)](#).

However, also consider subject to Art [64\(2\)](#) any limits imposed by the law to protect others' rights and freedoms, in this case the applicant and any child.

New Zealand case law says that s [14](#) of the New Zealand Bill of Rights Act 1990 (which is similar to Art [64\(1\)\(e\)](#) in protecting freedom of expression) is relevant when deciding:

- whether or not to make a restraining order; and
- in all the circumstances whether the degree of distress justifies making the order; and
- whether making the order is "necessary" to protect the applicant from further harassment.

Relevant New Zealand cases:

- [Burrows v Thomson \[2018\] NZHC 2761](#).
- [Waxman v Crouch \[2016\] NZHC 2004](#).
- [Beadle v Allen \[2000\] NZFLR 639](#).

1.8 Defence that specified acts were done for a lawful purpose

s [18](#) HA.

The respondent has a defence to any alleged harassment if they can establish that the specified act was done for a lawful purpose.

1.9 Preventing vexatious proceedings that have no good cause

s [34](#) HA.

You may dismiss any civil harassment proceedings if you are satisfied that they are not serious (frivolous), totally without merit (vexatious proceedings) or an abuse of court procedures. In other words, proceedings are being brought without any good reason, other than to annoy or frustrate the respondent.

If you are satisfied that a person has persistently brought vexatious proceedings under this Act (whether against the same person or against different persons) you may make an order prohibiting that person from commencing any civil proceedings under this Act without your leave.

You must give the applicant the opportunity to be heard before making the order.

This does not apply to criminal proceedings.

1.10 Standard conditions

s [20](#) HA.

The standard conditions of a restraining order prevent the respondent and their associate(s) if any, from (s [20](#) HA):

- doing, or threatening to do, any specified act against the person protected by the order; or
- encouraging any person to do any specified act against the person protected by the order, where the specified act, if done by the respondent, would be in breach of the order.

It is a condition of every restraining order that applies to a continuing act that the respondent must take reasonable steps to prevent the specified act from continuing.

1.11 Length of restraining orders

s [22](#) HA.

You should always consider how long the restraining order should last for depending on the circumstances of the case before you. The question will be what duration you consider necessary to protect the applicant from further harassment. This is set against:

- any “relationship” between the respondent and the applicant;
- how serious and persistent the conduct is;
- how determined the respondent is and how vulnerable the applicant or victim is.

But in the absence of such a direction, the restraining order will expire 1 year after the date on which the order is made: s [22](#) HA.

As a matter of good practice, it may be sensible to include an express condition that the matter comes back before you for review at least 1 month before expiry or continuation of the restraining order.

1.12 Special conditions

s [21](#) HA.

You may impose such special conditions, and for any length of time, that you think are reasonably necessary to protect the person for whose protection the order is made, from further harassment by the respondent, their associate(s), or both.

If no time period is specified, any special condition has effect for the whole of the restraining order, unless sooner varied or discharged.

1.13 Variation or discharge of restraining orders

ss [23–25](#) HA.

Either the applicant, their appointed representative, or the respondent may apply for an order to:

- vary the duration of the order: s [23](#) HA;
- vary, discharge or impose any special condition(s): s [23](#) HA;
- discharge the restraining order: s [24](#) HA;
- vary the restraining order to apply against a particular person: s [23](#) HA;
- vary or discharge restraining orders on behalf of minors: s [25](#) HA.

You may make any of these orders as you think fit. However, you may only grant an extension if you are satisfied that it is necessary to protect the applicant from further harassment: s [23](#) HA.

An associate of the respondent can apply to discharge a restraining order: s [24](#) HA.

A representative of a minor can also defend any such application to vary or discharge a restraining order: s [25](#) HA.

1.14 Copies of orders to be sent to police

s [35](#) HA.

The registrar must ensure that a copy of the restraining order (or any variation) is made available, without delay, to the officer in charge of the police station nearest to where the person lives for whose protection the order was made. The order can be sent by post, email or other electronic means, for example, entering into a database accessible to the police, or in any other suitable manner.

1.15 Enforcement of restraining orders

s [26](#) HA.

It is an offence to either breach the restraining order or not meet any of the conditions, without any reasonable excuse. See "[Criminal harassment](#)" for more details.

1.16 If the applicant does not know the name and address of the harasser

s [27–29](#) HA.

Even if the applicant does not know the name or address of the person harassing them, they may make a complaint to the police with any information they have that could help the police find and identify the harasser.

If the police have reasonable grounds to believe this harassment has happened and that they have identified the harasser, the police can make them give their name and address.

If that person refuses or gives false information, they can be fined up to \$500, and arrested if they continue to refuse after the police have warned them.

The police will then give this information to the court registrar to help the applicant to complete the application.

See "[Criminal Harassment](#)".

1.17 Non-molestation orders

s [44](#) HA.

If a non-molestation order was in force prior to this Act then it remains in force as if it was a restraining order made under this Act and can be varied or discharged.

If the breach occurred before the Act came into force, the penalty is the lesser of:

- the penalty under the [Cook Islands Amendment Act 1994](#) before its repeal; or
- the penalty provided for in this Act.

If the breach was after the [Harassment Act 2017](#) came into force, then the penalty in the Harassment Act applies.

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