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September 2004

PROJECT 130

STALKING

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Introduction

The South African Law Reform Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are –

The Honourable Madam Justice Y Mokgoro (Chairperson)
The Honourable Madam Justice M L Mailula (Vice-Chairperson)
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The researcher allocated to this project is Ms DM Clark.

Preface

This Discussion Paper expands on some of the issues raised in the Issue Paper on stalking. It also presents an overview of the submissions received on the Issue Paper. It has been prepared under the guidance of the project leader Ms Z Seedat and reflects discussions held with an expert group constituted for the purpose of informing the direction of the Discussion Paper and to guide further deliberations on the topic of stalking.

The Discussion Paper, which includes draft legislation, aims to provide persons and bodies wishing to make comment or make suggestions for the reform of this particular area of the law with sufficient information to enable them to place focused submissions before the Commission. The comments of all persons are sought regarding the issues contained in the Discussion Paper and related issues which may need inclusion in the debate. Such comments are of vital importance to the Commission. The Commission wishes to express its gratitude to all of the respondents to the Issue Paper. The Commission is conscious of the fact that it took a great deal of courage for many of the respondents to expose the impact that stalking has had or still has on their lives. The Commission acknowledges the desperation and helplessness experienced by not being able to find adequate legal remedies to stop the stalking behaviour.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

Respondents are requested to submit written comment, representations or requests to the Commission no later than 15 November 2004. Any request for information and administrative enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, Ms DM Clark.

This document is also available on the Internet at: www.doj.gov.za/salrc/index.htm .

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INTRODUCTION AND BACKGROUND

Introduction

The South African Law Reform Commission's investigation into stalking is aimed at addressing the growing and complex problems relating to stalking with a view to defining stalking within the South African context and by introducing criminal and civil remedies in order to prevent or reduce violence in inter-personal relationships.

Jurisdictions across the globe are now beginning to take legal action against stalking behaviour, recognising it as a public problem which merits attention. The effects of stalking upon an individual may include behavioural, psychological and social aspects. Specific risks to the victim include a loss of personal safety, the loss of a job, sleeplessness, and a change in work or social habits. These effects have the potential to produce a drain on both criminal justice resources and the health care system, and it is therefore in the best interests of society to take swift action when cases are presented to them.¹

The Commission proposes changes to the civil and criminal law in order to provide effective legal protection to all victims of stalking by recognising that violence, in all its forms, is unacceptable behaviour.

Origin of the investigation

The Discussion Paper on Sexual Offences: the Substantive Law *inter alia* briefly explored the necessity of addressing the phenomenon of stalking and the topic of sexual harassment within the broader framework of sexual offences.² The Commission concluded that including stalking and/or harassment in legislation specifically aimed at criminalising specific sexual conduct would not afford all victims of stalking or harassment the protection that they deserve. In this paper the Commission recommended, that in keeping with numerous foreign jurisdictions,³ a

¹ [Http://www.crimelibrary.com/criminal_mind/psychology/cyberstalking/7.html?sect=19](http://www.crimelibrary.com/criminal_mind/psychology/cyberstalking/7.html?sect=19) as at 2003/12/10.

² South African Law Reform Commission **Discussion Paper 85 Sexual Offences: the Substantive Law** 1999.

³ Comprehensive 'anti-stalking' legislation has been enacted in most Australian

separate investigation be conducted to ascertain the need to enact comprehensive legislation prohibiting stalking.

This recommendation endorsed the finding made in the Commission's Research Paper on Domestic Violence that stalking is an identified form of abuse. However the Commission found that although stalking is often associated with domestic violence, it is a problem that is much broader than the domestic sphere.⁴ The Commission recommended that the inclusion of harassment in the definition of domestic violence would accommodate acts amounting to stalking. However, the Commission noted that an investigation into the criminal-law response to stalking fell outside the Commission's terms of reference.⁵

Based on the recommendation contained in the Discussion Paper on Sexual Offences: The Substantive Law, the Minister for Justice and Constitutional Development approved the inclusion of an investigation into stalking in the programme of the Commission on 21 January 2003.

Purpose of the Discussion Paper

The Issue Paper on Stalking was published in August 2003 with the aim of introducing the topic of stalking for legal debate. Its aim was to identify aspects relating to stalking in need of legal intervention or reform, and in turn to delineate the boundaries of the investigation.

The purpose of the Discussion Paper is to set out preliminary recommendations accompanied by draft legislation to address behaviour which constitutes stalking. The Discussion Paper takes cognisance of and reflects the manner in which select comparative jurisdictions address stalking behaviour. It also takes the substantial and valuable public response to the Issue Paper into account and aims to test public

jurisdictions, 49 states in the United States of America, including the District of Columbia, Canada and the United Kingdom.

⁴ South African Law Reform Commission **Research Paper on Domestic Violence** 1999.

⁵ South African Law Reform Commission **Discussion Paper 70 Domestic Violence** 1997.

opinion regarding solutions identified by the Commission.

The Commission's continuing working methodology

This Discussion Paper presents the current thinking and opinion of the Commission regarding the reform of the law in relation to stalking behaviour as it has been informed by research and consultation, as well as by the submissions received. However at this stage the proposals put forward are still tentative and may be influenced by the workshopping of the Discussion Paper, further consultation and submissions on the proposed reforms.

The Commission invites submissions and discussion on the proposals presented in this Discussion Paper and draft legislation. As stated, the views contained in this Discussion Paper are not the Commission's final views and the Discussion Paper is published precisely to elicit public comment with a view to compiling a final report and finalising the draft legislation. The Discussion Paper will be workshopped and interested parties are invited to avail themselves of the opportunity to influence the drafting of legislation at this early stage.

After submissions and input from the consultation process have been integrated into the proposals and draft legislation, a report will be prepared and submitted to the Minister for Justice and Constitutional Development for her consideration. The Commission expresses its gratitude to all those who made submissions in response to the Issue Paper, particularly those persons who are being subjected to this form of behaviour, for their invaluable contribution to this process.

Respondents are requested to respond as comprehensively as possible and are invited to raise additional issues that are not covered in the questions, should they wish to do so.

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LIST OF RESPONDENTS

Adv du Rand, Chief Director: Court Management, for Director-General: Justice and Constitutional Development.

Anonymous (1);

Anonymous (2);

Anonymous (3);

KZN Network on Violence Against Women Workshop;

Ms Bowers;

Ms Clark, Senior Public Prosecutor, National Prosecuting Authority;

Prof Davis, Ms Saffy, Ms Klopper and Ms Booyens of the Department of Criminology of the University of Pretoria;

Mrs Fourie;

Ms Kleynhans;

Mrs Lugtenburg;

Ms Palmer;

Ms Samantha Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust;

Mrs Van Heerden;

Ms Van Niekerk, the National Coordinator of Childline;

Ms Williams, Project Co-ordinator, Operation Bobbi Bear;

Mrs van Wyk;

National Prosecuting Authority's Sexual Offences and Community Affairs Unit;

Professor L Schlebusch, Department of Medically Applied Psychology, Nelson R Mandela School of Medicine, University of Natal;

Senior Superintendent JM Nkomo, South African Police Service, Legal Support: Crime Operations;

CHAPTER 1: THE AMBIT AND THE EXTENT OF THE PHENOMENON OF STALKING

WHAT IS UNDERSTOOD BY THE TERM 'STALKING'?

Introduction

1.1 In the Issue Paper on Stalking the Commission broadly defined stalking as “any type of harassing and intimidating conduct that causes a person to fear for his or her safety”. The Issue Paper explained that the concept of stalking seems to have evolved from its original meaning of prowling or pursuit of another to include the use of electronic and telephonic mechanisms to survey or harass a person.

Overview of comment received

1.2 Divergent submissions were received in response to the question how stalking should be defined within the South African legal context.

1.3 Although some respondents¹ endorsed the framework of the suggested definition in principle, all of the respondents argued for the inclusion of additional elements in the definition.

1.4 An anonymous respondent suggests that the emphasis should be on “any” in relation to the type of conduct and that the definition should be wide enough to include being stalked through another person, e.g. the stalker’s sister.

1.5 This anonymous respondent further suggests that the definition should include situations where the victim’s name, reputation and subsequently his or her ability to engage in activities or employment are also damaged or impeded, or the reasonable threat of such damage or impediment exists.²

¹ Ms Kleynhans; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority and Anonymous.

² Anonymous.

1.6 Ms Palmer submits that any form of harassment, if repeated over time, of a person or an organisation, by an individual or an organisation, that has as its main objectives the cause of fear or loss of freedom, particularly of movement and quality of life, should constitute stalking. In a similar vein Ms Williams³ argues that stalking should be defined as a series of acts directed at a specific person, which involves repeated visual or physical proximity, nonconsensual communication, or verbal, written or implied threats, that would cause a rational person to fear. Linda Davis, Jacky Saffy, Harriët Klopper and Karen Booyens⁴ agree that reference should be made in the definition of stalking to groups and institutes as possible victims, but that in so doing a clear distinction should be made between harassment and stalking.

1.7 The need to include the repetitive nature of the acts in a definition of stalking is also endorsed by Professor Schlebush.⁵ He subscribes to the definition coined by Mullen, Pathé & Purcell, which defines stalking as: “those repeated acts, experienced as unpleasantly intrusive, which create apprehension and can be understood by a reasonable fellow citizen (the ordinary man or woman) to be grounds for becoming fearful”.

1.8 An anonymous respondent states that the definition needs to reflect the basic idea of being hunted, haunted or entrapped; that the unwarranted invasion represents a process or series of individual acts that in itself may not be criminal, that the process serves the self-interest of the aggressor, as opposed to mutual benefits, regardless of intent; that the invasion, therefore, leaves the target(s) vulnerable to abuse; and that *the way* in which the situation is invaded, defined, reconstructed, or in which a person is entrapped, *per se*, may inflict harm (short- or long-term). The situation may affect more than one party or abstract matters, such as an event or cause.

1.9 An anonymous respondent argues in favour of a wider definition by stating that one needs to go beyond the traditional perception of stalking as a physical act involving

³ Project Co-ordinator, Operation Bobbi Bear.

⁴ Department of Criminology, University of Pretoria.

⁵ Department of Medically Applied Psychology, Nelson R Mandela School of Medicine, University of Natal.

two parties - there are many ways to invade a particular 'space', maintain an unwelcome presence and intentionally or unintentionally inflict harm. It is also suggested that the wording should make provision for indirect actions, a lack of action, or actions directed at aspects other than the victim per se. Aspects that in particular need to be covered are the manipulation of perceptions and information; institutionalised violence; and parties maintaining a presence through unresolved issues. Participants at the KZN Network on Violence Against Women Workshop also argue that the definition should not be restricted to physical harm only but that the fear experienced should be extended to include mental and or physical harm. The National Prosecuting Authority's Sexual Offences and Community Affairs Unit believes that fear of safety should be extended beyond the physical person to a threat towards the person's property.

1.10 Ms Clark⁶ states that many examples of stalking fall short of inspiring fear and may only make the person uncomfortable, as opposed to afraid. She believes that the concepts of 'nuisance' or 'irritation' should be incorporated into the definition.

1.11 Ms Van Niekerk⁷ submits that a neglected area of the stalking issue is the stalking of children and the setting of them up for (possibly) a sexual crime. She states that children, because of their youth and naivete are unable to protect themselves from this form of behaviour, may not understand the intent behind it and may even feel flattered by the attention of an adult. She consequently recommends that there should not be a qualification "done against the will of the person concerned": some persons, eg children, may not be mature enough to recognise the stalking behaviour for what it is. The National Prosecuting Authority's Sexual Offences and Community Affairs Unit shares this concern and states that one of the core elements in understanding the dynamics of sexual abuse of children and the cycle of the sex offender is that a paedophile often stalks his victim before he approaches him or her.

1.12 Ms Van Niekerk also raises the following ancillary questions, namely what the situation would be where a victim may in fact be unaware of the stalking behaviour; and what if others in the victim's world identify the behaviour as inappropriate and wish to

⁶ Senior Public Prosecutor, National Prosecuting Authority.

⁷ National Coordinator: Childline South Africa.

take some action on the victim's behalf?

Comparative overview

1.13 From the perspective of a comparative analysis it is clear that although there is a common purpose underlying anti-stalking legislation, there is little uniformity in how various jurisdictions or authors define this phenomenon.

Comparative definitions

1.14 Reid Meloy⁸ defines stalking as “the wilful, malicious, and repeated following and harassing of another person that threatens his or her safety”. Zona et al⁹ define stalking as “an abnormal or long term pattern of threat or harassment directed towards a specific individual”.

1.15 Brewster¹⁰ notes that “A person commits the crime of stalking when he engages in a course of conduct or repeatedly commits acts towards another person, including following the person without proper authority, under circumstances which demonstrate either of the following: an intent to place the person in reasonable fear of bodily injury; or an intent to cause substantial emotional distress to the person.”

1.16 The Women's Grants Office of the U.S. Department of Justice¹¹ define stalking as “a course of conduct directed at a specific person that involves repeated visual or physical proximity, non-consensual communication, or verbal, written or implied threats,

⁸ J.Reid Meloy, *The psychology of Stalking Behaviour*, in *The Psychology of Stalking: Clinical and Forensic Perspectives* 267, 276 (J.Reid Meloy ed., 1998) as cited in *Cal.Crim.L.Rev.1* (Oct 200) par 9 available at <http://www.boalt.org/CCLR/v3/v3royakkersnf.htm>.

⁹ Michael A. Zona et.al., *A Comparative Study of Erotomanic and Obsessional Subjects in a Forensic Sample*, 38 *J.Forensic Sci.* 894 (1993).

¹⁰ M.P. Brewster, National Inst. Of Justice, *An Exploration of the Experiences and Needs of Former Intimate Stalking Victims* (1997).

¹¹ Violence Against Women Grants Office, *Domestic Violence and Stalking. The Second Annual Report to Congress under the Violence Against Women Act*, U.S. Department of Justice (1997).

or a combination thereof, that would cause a reasonable person fear”.

1.17 Royakkers¹² identifies a flaw in the U.S Womens Grants Office legal definition of stalking. He argues that the requirement of an implicit or explicit threat that results in the victim’s reasonable fear for his or her safety leaves most victims of stalking – who are not threatened – unprotected. The Dutch anti-stalking statute covers these victims by including the violation of one’s private life as an element of the crime. Royakkers contends that the Dutch regulation, by focussing on the disruption of someone’s life, enhances the ability of law enforcement and prosecutors to intervene and protect stalking victims at the earliest time, before threats occur.

Element of threat

1.18 As highlighted by Royakkers initially many laws in the United States of America (USA) required the making of a “credible threat” as an element of the offence. Generally, this was defined as a threat made with the intent and apparent ability to carry out the threat. As understanding of stalking has grown, however, most states have modified or eliminated the credible-threat requirement. Stalkers often present an implied threat to their victims. For example, repeatedly following a person is generally perceived as threatening. The threat may not be expressed but may be implicit in the context of the case. Most states in the USA currently define stalking to include implied threats or specify that threats can be, but are not required to be, part of the pattern of harassing behaviour¹³

1.19 The two chief elements of most stalking statutes are threatening behaviour and criminal intent by the defendant. Fourteen states in the USA require that the perpetrator make a threat against the victim in order to be charged under the stalking code. Colorado and New Mexico require that the perpetrator make a threat and then engage in additional conduct in furtherance of the threat. Forty states in the USA and the District of

¹² The Dutch approach a remedy to the shortcomings of American stalking regulation? 2 Cal.Crim.L.Rev.1 (Oct 200) par 6 *available at* <http://www.boalt.org/CCLR/v3/v3royakkersnf.htm>.

¹³ U.S. Department of Justice Office of Justice Programs OVC ‘Strengthening Antistalking Statutes’ 2002 Legal Series 1 **Bulletin** pp2.

Columbia have provisions that encompass stalking actions that would cause a reasonable person to feel threatened even if there has been no verbal threat by the perpetrator. Eight states in the USA require that the defendant has the intent and/or the apparent ability to carry out the threat. Some states allow threats made against members of the victim's immediate family to be presented as evidence of stalking. Four states in the USA require that a threat be made to prove aggravated stalking, but not in relation to stalking. Statutes in Hawaii and Texas prohibit threats in conjunction with intent to damage property and threats in conjunction with intent to cause personal injury.¹⁴

Effect of the stalking

1.20 Stalking is defined in part by a victim's reaction. Typically stalking is conduct that "would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family" or "would cause a reasonable person to suffer substantial emotional distress" and does cause the victim to have such a reaction. In general, however, stalking statutes provide that the conduct must be of a nature that would cause a specified reaction on the part of the victim and in fact does cause the victim to have that reaction.¹⁵

Element of intent

1.21 Originally, most stalking statutes were "specific intent" crimes; they required proof that the stalker intended to cause the victim to fear death or personal injury or to have some other particular reaction to the stalker's actions. The subjective intent of a person, however, can be difficult to prove. Therefore, many states have revised their statutes to make stalking a "general intent" crime; rather than requiring proof that the defendant intended to cause a reaction on the part of the victim, many states simply require that the stalker intentionally committed prohibited acts. Other states require that in

¹⁴ Bureau of Justice Assistance Regional Seminar Series on Implementing Antistalking Codes (1996) **Monograph** pp18.

¹⁵ U.S. Department of Justice Office of Justice Programs OVC 'Strengthening Antistalking Statutes' pp2.

committing the acts, the defendant must know, or reasonably should know, that the acts would cause the victim to be placed in fear.¹⁶ One area of potential ambiguity is where the accused did not intend the victim to find out about the conduct in question, for example the stalker secretly keeps a victim under surveillance. Arguably, such activities may fall outside the scope of the offence, if they are not “likely” to cause fear. For this reason the Queensland legislation explicitly provides that it is immaterial whether the victim was aware of being stalked, or whether the accused intended to cause the fear or apprehension.¹⁷ Another area of ambiguity is where the behaviour is directed at more than one person. For example, if a person regularly follows different people about, and does not target the same victim more than once, does this constitute stalking?

1.22 To convict a person of stalking in most of the states in the USA, it must be shown that the defendant demonstrated criminal intent to cause fear in the victim. The course of conduct must be wilful, purposeful, intentional, or knowing. Seven states require that the prosecution prove that the defendant intended to cause alarm or annoyance. Sixteen states do not require such proof provided that the alleged stalker intended to do the act that resulted in fear. In these states, if the victim has reasonable cause to feel frightened, the intent element of the crime has been met. In Indiana and Missouri, if there is proof that the defendant intended to cause fear, the crime is elevated to aggravated stalking.¹⁸

Aggravated stalking

1.23 Many state codes in the USA include an offence of aggravated stalking or define stalking offences in the first and second degrees. Often the higher level offence is defined as stalking in violation of a protective order, stalking while armed with a deadly weapon, a second or subsequent conviction of stalking, or stalking a minor. Many states without a separately defined higher offence provide for enhanced punishment for

¹⁶ Ibid pp3.

¹⁷ Criminal Code Act 1899 (Qld) s 359C.

¹⁸ Bureau of Justice Assistance Regional Seminar Series on Implementing Antistalking Codes pp18.

stalking under such conditions.¹⁹

Course of conduct

1.24 Anti-stalking laws almost always require that the alleged stalker engage in a course of conduct, not just a single act, to fall under their provisions. Typically, a course of conduct is characterised as a series of acts over a period of time, however short, evidencing a continuity of purpose.

1.25 In the USA a few states specify how many acts must occur and during what period of time the conduct must take place in order to constitute stalking. Illinois refers to “acts done on at least two occasions. . .”; Michigan specifies a “series of two or more separate, non- continuous acts”; Oklahoma, “two or more separate acts”; and Colorado and North Carolina, “on more than one occasion.”²⁰

1.26 Royakkers²¹ suggests that an operational definition is necessary to provide victims effective recourse through the courts. He highlights definitional difficulties such as the reference to “course of conduct” and “repeated” actions. He questions what constitutes a series of acts or course of conduct, and how often actions need to be repeated to be defined as “repeated” actions. He suggests that the definition of stalking should require that a person be exposed to harassing acts carried out by another person for a period of at least six months, with a frequency of at least two times a week.

Evaluation and recommendation

1.27 In attempting to define stalking within the South African context it is appropriate to take cognisance of the manner in which our legislature has already addressed the

¹⁹ U.S. Department of Justice Office of Justice Programs OVC ‘Strengthening Antistalking Statutes’ pp3.

²⁰ Bureau of Justice Assistance Regional Seminar Series on Implementing Antistalking Codes pp19.

²¹ The Dutch approach a remedy to the shortcomings of American stalking regulation? 2 Cal.Crim.L.Rev.1 (Oct 200) par 6 *available at* <http://www.boalt.org/CCLR/v3/v3royakkersnf.htm>.

phenomenon of stalking, albeit only in relation to domestic relationships. In the Discussion Paper on Domestic Violence²² the Commission recommended that the inclusion of harassment in the definition of domestic violence would accommodate acts amounting to stalking within a domestic relationship.²³ The draft Bill which accompanied this Discussion Paper, however, did not define harassment or make mention of stalking. The parliamentary process brought about a number of changes to the draft Bill, including the definition of domestic violence. In so far as it is relevant to this Discussion Paper, the **Domestic Violence Act 116 of 1998** defines domestic violence in section 1 (viii) as follows:

“domestic violence” means –

- (a) . . .;
- (e) intimidation;
- (f) harassment;
- (g) stalking; . . .

1.28 In the context of domestic violence stalking is defined in section 1(xxiii) of the **Domestic Violence Act** as “repeatedly following, pursuing or accosting the complainant,” whereas “harassment” is defined in section 1 (xii) of the Act as “engaging in a pattern of conduct that induces the fear of harm to a complainant including –

- (a) repeatedly watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;

²² South African Law Reform Commission **Discussion Paper 70 Domestic Violence** 1997 at pp 107.

²³ “Domestic relationship” means a relationship between a complainant and a respondent in any of the following ways:
 they are or were married to each other, including marriage according to any law, custom or religion;
 they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
 they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
 they are family members related by consanguinity, affinity or adoption;
 they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
 they share or recently shared the same residence”

- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant whether or not conversation ensues;
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant”.

1.29 In terms of section 1(xiii), “intimidation” means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear.

1.30 In light of the submissions received, it is also pertinent to determine the powers granted to the court in relation to this Act and whether one would be able to apply for a protection order on behalf of someone else. The **Domestic Violence Act** gives the court the power to prohibit any act it deems needs to be prohibited.²⁴ Section 7 of the Act specifically lists a number of prohibitions, including a prohibition against enlisting the help of another person to commit any act.

1.31 Section 4 of the **Domestic Violence Act** explains the application process for a protection order. In summary, a complainant (person in a domestic relationship) may apply or the application “may be brought on behalf of the complainant by any other person, including a counsellor, health service provider, member of the South African Police Service, social worker or teacher, who has a material interest in the wellbeing of the complainant: Provided that the application must be brought with the written consent of the complainant, except in circumstances where the complainant is –

- (a) a minor;
- (b) mentally retarded;
- (c) unconscious; or
- (d) a person whom the court is satisfied is unable to provide the required consent.”²⁵

1.32 From the above exposition of the **Domestic Violence Act** it is clear that to prove

²⁴ “Domestic violence” is defined in the Act in an open-ended manner, referring to specific abuses or “any other controlling or abusive behaviour towards a complainant” (Section 1(viii)(j).

²⁵ Section 4(3).

harassment the conduct must be repeated, in other words more than once, must be regarded as abusive conduct and must induce the fear of harm. To prove intimidation one must also prove the induction of fear preceded by a threat. However, stalking may entail following, pursuing or accosting the complainant on one occasion without the proviso of induction of fear.

1.33 The general tendency in comparative jurisdictions is to include harassment and intimidation within the definition of stalking, in other words harassment and intimidation are viewed as some of the ways in which a person may be stalked. The inclusion of harassment under an umbrella definition of stalking was endorsed by an expert consultation meeting held on 20 January 2004 in Durban.

The Commission therefore recommends that harassment and intimidation be incorporated in the definition of stalking.

1.34 Furthermore a continuity of purpose is uniformly required, i.e a series of acts over a period of time, however short. This is commonly defined as a “course of conduct”. In the various submissions made, all require an element of repetition.

The Commission recommends that an element of repetition be included in a definition of stalking.

1.35 Developments in other jurisdictions have also seen a move from a specific intent requirement to a general intent. In order to address the scenario where the victim may be unaware that he or she is being kept under surveillance or where parents become aware that their child is being stalked (even where the child does not recognise the danger), the Queensland model explicitly provides that it is immaterial whether the victim was aware of being stalked, or whether the accused intended to cause the fear or apprehension. In other words, it has to be proved that a person intentionally committed prohibited acts and not that he or she intended for the victim to fear harm. By adopting this approach the behaviour becomes the defining factor, and not whether it was the intention of the perpetrator to cause the victim to experience the behaviour as fear-instilling or merely irritating or annoying. Submissions made to the Issue Paper support this view.

The Commission's preliminary opinion is that a definition of stalking should include the intent to commit certain acts and not the intent to cause a specific reaction in the person against whom the acts are directed. The Commission requests guidance on the approach to be followed.

1.36 Whilst particularly taking cognisance of the manner in which unlawful stalking is defined in the **Queensland Criminal Code**, having specific regard to the manner in which stalking is defined within the **Domestic Violence Act** and noting the concerns raised in the submissions, the Commission concludes that a definition of stalking within the South African legal context should be

1. ***repeated* conduct or a course of conduct which indicates it is not a single action, but a series of actions that are carried out with some regularity during a certain period;**
2. ***directed towards* a specific person or category of persons or a person's relatives, acquaintances, work colleagues or property;**
3. ***unwanted* conduct, which means that the victim does not welcome these actions and moreover that he/she has made this clear to the perpetrator (verbally, in writing, or through body language);**
4. ***disruptive* not only means that the victim finds the actions emotionally burdensome and detrimental (subjective element), but also that a reasonable person would experience the same thing in a similar situation (objective element); The intention of the perpetrator is irrelevant: even if he is not aware of the disruptiveness of his actions, the perpetrator can still be guilty of causing physical or mental anguish if the victim finds these actions as undesirable and disruptive to his or her social world and any normal person would do so in the same circumstances**
5. ***Intention* on the part of the perpetrator to engage or cause another person to engage in a course of conduct that includes the following:**

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

(a) making contact, including by telephone whether or not conversation ensues, or through the use of any technology;

(b) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant”;

(c) following, pursuing or accosting the complainant;

(d) uttering or conveying a threat, real or implied, or causing a complainant to receive a threat,

any other harassing and intimidating conduct.”

1.37 The Commission supports the concept contained in the **Domestic Violence Act** which provides that a person who has a material interest in the wellbeing of the victim is enabled to seek such remedy on that person’s behalf. This would for example enable a third person to seek relief on behalf of a child.

METHODS EMPLOYED BY STALKERS

Introduction

1.38 In the Issue Paper on Stalking the Commission enumerated various methods employed by stalkers. The Commission made note of the fact that in essence stalking generally comprises a sequence of legal and illegal actions aimed towards a specific person. Two questions were posed in this regard, namely whether the exposition contained in the Issue Paper accurately reflected the modus operandi of a stalker and whether other methods needed to be highlighted for the purpose of this investigation.

Overview of comment received

1.39 The majority of respondents²⁶ agreed that the methods explicated in the Issue

²⁶

KZN Network on Violence Against Women Workshop; Ms Kleynhans; Ms Williams, Project Co-ordinator, Operation Bobbi Bear; Ms Palmer; Ms Samantha Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust and Ms Clark, Senior Public Prosecutor,

Paper reflected the modus operandi of stalkers.

1.40 A number of respondents highlighted other methods used by stalkers. Some of these methods are:

- the following of the victim, spreading rumours and prying into the victim's finances;²⁷
- tapping of telephones and listening devices;²⁸
- accessing of the victim's e-mail and sending of correspondence to third parties with the aim of inciting harm against the victim and the making of anonymous telephone calls to the victim's employer causing the victim to lose employment and to fail to secure subsequent employment;²⁹
- gaining entrance to an individual's personal space repeatedly; eg: searching his or her bedroom or car or office and leaving enough evidence to make the intrusion obvious;³⁰
- the use of phone calls by other persons on the stalker's behalf and the use of SMS messages, openly following the victim; loitering outside her home; or watching her from a distance in public places;³¹
- where the perpetrator "accidentally" flashes or indecently exposes himself or herself leaving the victim uncertain of whether there is intention behind the activity;³²
- the simple presence of an individual, i.e open stalking without the stalking culminating in a violent act;³³

National Prosecuting Authority.

²⁷ Ms W Clark, Senior Public Prosecutor, National Prosecuting Authority.

²⁸ Ms Kleynhans.

²⁹ Anonymous.

³⁰ Ms Palmer.

³¹ Ms W Clark, Senior Public Prosecutor, National Prosecuting Authority.

³² Ms Van Niekerk, the National Coordinator of Childline.

³³ Ms's Davis, Saffy, Klopper and Booyens of the Department of Criminology of the

- the simple presence of an individual or an object, left as a “signature” becomes sufficient on its own to instill fear;³⁴
- secretly gaining access into the residence of the victim and either taking personal belongings to carry around or spend the night in the victim’s bed and wear the victims clothing;³⁵
- monitoring a person from afar by way of a video surveillance camera.³⁶

1.41 Ms Waterhouse³⁷ informs the Commission that perpetrators of sexual violence who are also members of gangs sometimes use the other members of the gang or friends to maintain surveillance over the victim. She states that at times this extends to intimidation of the victim. Where the victim lives in the same community as the gang, the presence of the other gang members is extremely frightening and silencing. Besides making excessive telephone calls, stalkers might also make obscene, threatening or silent calls. Ms Waterhouse is of the opinion that one telephone call in relation to other stalking behaviour can have a serious impact on the victim.

1.42 An anonymous respondent relates that her stalker used his knowledge of the law and legal loopholes to intimate her almost openly, to eavesdrop and to create false evidence against her. She explains that she was “followed” on known routes by a person driving in front of her who would deliberately drive slowly and try to draw attention to himself or the person would follow from behind and speed past only to follow again. In order to eavesdrop conversations legally and to obtain private information, the permission of the other person to the conversation was obtained. Some people close to her were injured and others who were harassed telephonically were led to believe that she was the source of the harassment. She further states that taped conversations were edited and used in court.

University of Pretoria.

³⁴ Anonymous.

³⁵ Senior Superintendent JM Nkomo, South African Police Service, Legal Support: Crime Operations.

³⁶ National Prosecuting Authority’s Sexual Offences and Community Affairs Unit.

³⁷ Advocacy Coordinator, Rape Crisis Cape Town Trust.

1.43 Professor Schlebusch³⁸ notes that, apart from explicit threats and the risk of violence against the victims, vandalism of property, killing of pets, spreading offensive material or gossip or threatening new partners or vandalizing their property can also form part of the stalker's behavioural repertoire.

1.44 An anonymous respondent points out that there will always be new methods or a shift in emphasis. This respondent notes that technology has opened up many new avenues for abuse, e.g the new cell phones with cameras have put very invasive technology in the hands of stalkers.

Comparative overview

Methods of stalking in England and Wales

1.45 Regarding the methods employed by stalkers in England and Wales, the British Crime Survey³⁹ determined that the most common experience was being forced into talking to the offender, with almost a half of all episodes (49%) involving this type of behaviour. Other relatively common experiences, reported in a third or more of episodes, were:

- silent phone calls (45%)
- being followed (39%)
- being touched or grabbed (34%)
- the offender waiting outside the victim's home (33%).

1.46 There were some differences between men and women. Among women, being forced into talking to the offender was the most common experience (52%), while among male victims silent phone calls were most common (44%). Overall, women were more

³⁸ Department of Medically Applied Psychology, Nelson R Mandela School of Medicine, University of Natal.

³⁹ Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate October 2000, pp 35.

likely to experience almost all of the stalking behaviours asked about. This was particularly so for obscene phone calls, being forced to talk to the offender, the offender refusing to take no for an answer, being followed and physical intimidation. Men were more likely to report that the offender had threatened to use or actually used force or violence.

Methods used in Canada

1.47 Some cases which have gone to court under section 264 of the **Canadian Criminal code** include:

- the accused made telephone calls and left threatening messages on the victim's answering machine;
- the accused visited the victim's work place for no legitimate reason and followed the victim on buses;
- the accused made rude or obscene gestures towards the victim.⁴⁰

Cyberstalking

1.48 The method of using computerized technology to stalk a person knows no territorial boundaries and cannot therefore be confined to one jurisdiction. Owing to the surreal dimension that this method of stalking lends to this phenomenon and the expanded ramifications of stalking via this medium, 'cyberstalking' has been singled out for further discussion within the framework of the comparative overview.

1.49 As people use the Internet every day, at work and home, a certain familiarity and comfortableness has been bred with this new medium. Electronic communications, with the lack of physical contact and confrontation, in the safety of a home or office, create a feeling of distance and security; a feeling which may be misplaced, as statistics suggest that more than 70% of women and 60% of men are stalked by people they know, and that online harassment and cyberstalking can lead to stalking in the real world.⁴¹

⁴⁰ [Http://wwlia.org/ca-stalk.htm](http://wwlia.org/ca-stalk.htm) as at 2003/12/10.

⁴¹ WHO@ Online Harassment Statistics, 2003 as quoted in Mc Call R Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada Concepts and Recommendations (2003) Victim Assistance Online Resources pp4.

1.50 The fact that cyberstalking does not involve physical contact may create the impression that it is more benign than physical stalking. This is not necessarily true. As the Internet becomes an ever more integral part of our personal and professional lives, stalkers can take advantage of the ease of communications as well as increased access to personal information. In addition, the ease of use and non-confrontational, impersonal, and sometimes anonymous nature of Internet communications may remove disincentives to cyberstalking. Put another way, whereas a potential stalker may be unwilling or unable to confront a victim in person or on the telephone, he or she may have little hesitation in sending harassing or threatening electronic communications to a victim. Finally, as with physical stalking, online harassment and threats may be a prelude to more serious behaviour including physical violence.⁴² For example, a chance encounter in a chat room regarding business led to a stalker moving to Ms Iber's town, renting a parking space next to hers and bombarding her daily with phone calls. Despite a restraining order in Munich, he continued to stalk her and she fled to Australia, but her stalker followed her there, even occasionally stalking her friends. El Bedewy was jailed in Warrnambool (Australia) for four months, with three months suspended, for stalking. He was to be deported upon release.⁴³

1.51 The feeling of distance and safety created by the apparent anonymity of the Internet may be one of its most dangerous illusions.

1.52 Online harassment can be divided into direct and indirect harassment. Direct harassment includes: threats, bullying, or intimidating messages sent directly to the victim via e-mail or other Internet communications media, and/or the use of technological means to interfere with a victim's use of the Internet – such as hacking or denial of services attacks. Indirect harassment includes – but is not limited to: spreading rumours about the victim in various Internet discussion forums; subscribing the victim to unwanted online services, positing information about the victim in online dating or sex

⁴² Cyberstalking: A New challenge for Law Enforcement and Industry, 1999 as quoted in Mc Call R Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada Concepts and Recommendations (2003) Victim Assistance Online Resources pp4.

⁴³ [Http://www.cyber-stalking.net/pschopathology4.htm](http://www.cyber-stalking.net/pschopathology4.htm).

services, or sending messages to others in the victim's name.⁴⁴

1.53 Online harassment can be seen as an element of cyberstalking, which has the additional factor of pursuit via electronic means. "The distinction between harassment and cyberstalking is that cyberstalking is characterized by pursuit and fear." Thus, generally speaking, online harassment becomes cyberstalking when repeated unwanted communications, whether direct or indirect, takes place over a period of time, via one or more mediums of Internet or electronic communications. The messages themselves must be unwanted, and the content can be – but is not limited to – threatening, sexually harassing, emotionally harassing or bullying, or general misinformation. Provided the messages create reasonable fear in the victim, they fit the definition for cyberstalking.⁴⁵

1.54 With regard to the prevalence of cyberstalking as a method of stalking WHOA, SafetyEd, and CyberAngels estimate receiving up to 400 requests for help each week from cyberstalking victims – over 20 000 reported cases each year. Furthermore the U.S. Department of Justice Cyberstalking Study; released in August 1999 estimates that there may be as many as 475,000 online victims each year. By 2003, NUA Internet Surveys estimates there will be 500 million people online. If even 1 percent become victims, it would be equivalent to 5 million victims.⁴⁶

1.55 Many stalking laws are broad enough to encompass stalking via e-mail or other electronic communication, defining the prohibited conduct in terms of "communication", "harassment", or "threats" without specifying the means of such behaviour. Others have specifically defined stalking via e-mail within their stalking or harassment statute.

1.56 For example, California recently amended its stalking law to include stalking via the Internet expressly.⁴⁷ Under California law, a person commits stalking if he or she

44 Mc Call R Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada Concepts and Recommendations (2003) Victim Assistance Online Resources pp3.

45 Ibid.

46 [Http://www.infotoday.com/lu/ju100/hitchcock.htm](http://www.infotoday.com/lu/ju100/hitchcock.htm).

47 Cal. Penal Code SS 646.9 (Deering 2001) as quoted in U.S. Department of Justice Office

“wilfully, maliciously, and repeatedly follows or harasses another person and . . . makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.” The term “credible threat” includes that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements.” “Electronic communication device” includes “telephones, cellular phones, computers, video recorders, fax machines, or pagers.”⁴⁸

1.57 Although the Internet and other forms of electronic communication offer new and exciting opportunities for children, they also expose children to new threats. For example, Federal law enforcement agencies have encountered numerous instances in which adult paedophiles have made contact with minors through online chat rooms, established a relationship with the child, and later made contact for the purpose of engaging in criminal sexual activities. Federal, state, and local law enforcement agencies have responded aggressively to protect children from online sexual predators. In 1995 the Federal Bureau of Investigation launched an undercover initiative, dubbed Innocent Images, to combat the exploitation of children via commercial online services. As of December 31, 1998, the initiative has resulted in 232 convictions. Under federal law⁴⁹ Internet Service Provider’s need to establish clear policies that prohibit online solicitation or exploitation of children and to take appropriate action when such incidents come to their attention.

1.58 In many cases the cyberstalker and the victim have had a prior relationship, and the cyberstalking begins when the victim attempts to break off the relationship. However, there have also been many instances of cyberstalking by strangers. Given the enormous amount of personal information available through the Internet, a cyberstalker can easily locate private information about a potential victim with a few mouse clicks or key strokes.

of Justice Programs OVC ‘Strengthening Antistalking Statutes’ 2002 Legal Series 1
Bulletin pp5.

⁴⁸ U.S. Department of Justice Office of Justice Programs OVC ‘Strengthening Antistalking Statutes’ 2002 Legal Series 1 **Bulletin** pp5.

⁴⁹ U.S.C. 13032.

1.59 Additionally electronic communications technologies make it much easier for a cyberstalker to encourage third parties to harass and/or threaten a victim (e.g. impersonating the victim and posting inflammatory messages to bulletin boards and in chat rooms, causing viewers of that message to send threatening messages back to the victim “author”.) The cyberstalker’s effort is minimal and the lack of direct contact between the cyberstalker and the victim can make it difficult for law enforcement to identify, locate, and arrest the offender.⁵⁰

1.60 In the USA under **18 U.S.C. 875(c)**, it is a federal crime, punishable by up to five years in prison and a fine of up to \$250,000, to transmit any communication in interstate or foreign commerce containing a threat to injure the person of another. Section 875 (c) applies to any communication actually transmitted in interstate or foreign commerce – thus it includes threats transmitted in interstate or foreign commerce via the telephone, e-mail, beepers, of the Internet. However it only applies to communications of actual threats. It would not apply in a situation where a cyberstalker engaged in a pattern of conduct intended to harass or annoy another (absent from threat). Also, it is not clear that it would apply to situations where a person harasses or terrorizes another by posting messages on a bulletin board or in a chat room encouraging others to harass or annoy another person.⁵¹

1.61 **The Interstate Stalking Act 1996** makes it a crime for any person to travel across state lines with the intent to injure or harass another person and, in the course thereof, places that person or a member of that person’s family in a reasonable fear of death or serious bodily injury.

1.62 **Statute, 18 U.S.C. 2425**, makes it a federal crime to use any means of interstate or foreign commerce (such as a telephone line or the Internet) to knowingly communicate with any person with intent to solicit or entice a child into unlawful sexual activity. While this new statute provides important protections for children, it does not reach harassing phone calls to minors that do not show intent to entice or solicit the child

⁵⁰ [Http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm](http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm) as at 2003/12/10.

⁵¹ [Ibid.](#)

for illicit sexual purposes.⁵²

Evaluation and recommendation

1.63 From the submissions received and the comparative overview above it is clear that there are many different methods of stalking, each capable of being adapted to suit the intentions of a stalker.

1.64 While the differences between physical and cyberstalking are acknowledged, cyberstalking, however surreal, fundamentally amounts to an extension of physical stalking. Seen in this light one should rather concentrate on the details, the uniqueness and complexity of a case rather than get caught up on typologies, terminology or the fact that we are dealing with a different medium. An assumption which is commonly made is that to become the victim of cyberstalking, that access to a personal computer and the Internet would be a requisite.

1.65 The following example, though, illustrates how these tools are not a requirement, and the inability to access either technology does not necessarily protect one from the reaches of the cyberstalker. The victim met the perpetrator at church, and continually rejected his romantic attempts. The perpetrator, a fifty-year-old security guard, retaliated by posting her personal details to the Internet. These included her physical description, address and telephone number. He posted false rape fantasies to on-line forums. On approximately half a dozen occasions, men arrived at the victim's home in the hope of "cashing in" on these supposed fantasies. As the victim posted messages to her door stating that these requests were false, the perpetrator posted messages on-line stating that these were simply tests to determine who was in fact 'worthy' of her fantasies. The victim's mother states that she had men coming to her door at all hours of the night, and that "she got dozens of calls by men who would leave filthy, disgusting messages". The victim was forced from her home, suffered from weight loss, lost her job, and developed a fear of going outside her home.⁵³

⁵² [ibid.](#)

⁵³ L.A. Times, Friday the 22nd of January, 1999 and Saturday the 23rd of January 1999 as quoted by http://www.crimelibrary.com/criminal_mind/psychology/cyberstalking/5.html?sect=19 as at

1.66 Clearly emphasis should not be placed on the methods used⁵⁴ as attempting to legislate for each situation would be a legal impossibility.

The Commission supports a broad definition of stalking so as to encompass stalking irrespective of the medium used.

One way of doing this would be to define the prohibited conduct in terms of “communication”, “harassment”, or “threats” without specifying the methods or defining stalking as including, but not restricted, to specified prohibited conduct.

WHO STALKS?

Introduction

1.67 A review of the literature on stalking reveals that there are at least five different categories of stalkers, namely delusional erotomanics, borderline erotomanics, “former intimate” stalkers, sociopathic stalkers, and stalkers with false victimisation syndromes.⁵⁵ In addition to the above categories the Commission made mention of disgruntled clients, clients of counselling staff, cyberstalkers and debt collectors under the broad heading of ‘other categories of stalkers’.

1.68 In this regard the Issue Paper posed the following questions, namely, does any other category of stalker exist; are the identified categories adequately dealt with in terms of existing law; and should this investigation include all the categories identified in the Issue Paper. The submissions received will be dealt with separately under each of the questions below.

2003/12/10.

⁵⁴ KZN Network on Violence Against Women Workshop.

⁵⁵ Issue Paper at pp5.

Overview of comment received

Does any other category of stalker exist?

1.69 Divergent opinions were elicited in response to the question whether any other category of stalker exists. Although one respondent⁵⁶ stated that all categories were addressed in the Issue Paper, other respondents were hesitant to exclude what seem on closer inspection to be permutations of the core categories. Stalking by an ex-girlfriend's sister⁵⁷ and stalking by a child of a parent and vice-versa⁵⁸ could be seen as a permutation of the category of former intimate stalkers as the stalker had a personal relationship with the victim; stalking of children⁵⁹ could be seen as a permutation of the categories of delusional erotomania, borderline erotomania or sociopathy.

1.70 Prof Davis, Ms Saffy, Ms Klopper and Ms Booyens⁶⁰ refer to six different types of stalking identified by Holmes,⁶¹ namely celebrity, lust, hit, scorned, domestic and political. They suggest that a clearer classification will be needed as it is not clear whether the categories are mutually exclusive or whether they build upon each other.

1.71 Professor L Schlebusch⁶² states that research shows that there are various sub-types of stalkers, such as, for example, those associated with: the mentally ill (which includes bizarre delusions), criminals, political assassins, jealous lovers, and non-bizarre

⁵⁶ Ms Kleynhans.

⁵⁷ Anonymous.

⁵⁸ Ms Palmer.

⁵⁹ Ms Joan van Niekerk, National Coordinator: Childline South Africa.

⁶⁰ Department of Criminology, University of Pretoria.

⁶¹ Reece and Holmes (1993) in Vito, G.F and Holmes, R.M (1994). *Criminology: Theory Research and policy*. Watsworth: Belmont CA.

⁶² Department of Medically Applied Psychology, Nelson R Mandela School of Medicine, University of Natal.

delusions (e.g. in delusional disorders). In addition, psychotherapists appear to be increasingly stalked by some of their patients. He concludes that in this sense stalking may be a new crime, but an old behaviour that has become a sizeable criminal justice and public health challenge. He cautions that particularly the erotomaniac, jealous and grandiose sub-types of delusional disorders that can result in stalking behaviour hold significant implications of danger for the victim.

1.72 Ms Williams⁶³ identifies victims of crime as a separate category. She believes that victims that have reported crimes done to them often become victims of stalking, as well as those who have not reported. The perpetrator of the crime sometimes uses the method of stalking to instill fear to ensure the victim's silence. This happens in a case where a child has been raped and the perpetrator does not want her to report him.⁶⁴ Ms Waterhouse⁶⁵ agrees that sex offenders may seek to intimidate their victim through stalking in order to maintain psychological control. In this way they prevent reporting of the incident to the authorities, or influence the complainant to withdraw the charges due to the fact that her/his safety cannot be guaranteed by the state. She explains that in some cases these offenders will operate in conjunction with their friends (especially when the perpetrator is a member of a gang), and in that way the group will watch the movements of the victim/complainant in order to control her.

1.73 An anonymous respondent states that the man on the street does not necessarily face the same attentions as a popular figure might, but may be equally subjected to surveillance by private investigators or ex-intelligence officers at the behest of people who are influential or have money. This respondent states that the covert nature of such surveillance makes the prosecution of such persons very difficult. The aim of this stalking is to de-mobilise a person psychologically. He states that the high unemployment rate and the surplus of intelligence officers post the democratisation

⁶³ Project Co-ordinator, OPERATION BOBBI BEAR.

⁶⁴ Advocacy Coordinator, Rape Crisis Cape Town Trust. This view is endorsed by the National Prosecuting Authority's Sexual Offences and Community Affairs Unit.

⁶⁵ Advocacy Coordinator, Rape Crisis Cape Town Trust.

process has given rise to 'hired guns' being available to perform surveillance duties in civil society for reward. He explains that this category which involves security firms, private investigators and intelligence people, has expert knowledge and state-of-the-art technology at its disposal. In his opinion they have been trained to stalk, lie etc. and their calculated interventions could actually be more disruptive and damaging than the average stalker acting alone. Further that:

“they normally have an excellent knowledge of the law, more than one person could be involved, adding to the intensity of the problem, and they cover up their tracks – making it very difficult for the target to obtain evidence or formulate a complaint. If members of the public and legal firms start taking advantage of the present oversupply of these people, as well as their techniques, as I suspect happened in our case, it could obscure justice and make life very difficult for the general public. There is enough stress in our society as is and it could become a threat to internal stability. One can only have empathy with people who have been subjected to these tactics in the past.”

1.74 Ms Clark⁶⁶ identifies people who harass out of anger, bitterness or jealousy as a separate category of stalker.

1.75 According to an anonymous respondent the choice of which categories to use and how to group them depend on the definition of stalking and what would be useful in Court. This respondent states that the following categories should be identified:

- Psychiatric cases, including sociopaths, copy cats and drug addicts - mainly with a poor prognosis and where serious harm could come to targets.
- The brain injured and retarded, who are very misunderstood in our society and might engage in inappropriate or attention-seeking behaviour that may not represent a sadistic game or pose the same threat as in the first instance.
- Cases involving financial or other gains, competition or the protection of self-interest, including the media, legal firms or institutions, debt collectors, marketing agents, competition in the sport or business world, maintenance

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Senior Public Prosecutor, National Prosecuting Authority.

and custody disputes, and criminal activity - with a focussed objective. Criminals, prominent people, radicals or former partners may also stalk, or arrange for other parties to stalk witnesses or people who could expose them, with the intent kill them.

- Stalking or nuisance behaviour involving frustrated ordinary people lacking interpersonal and problem-solving skills, credibility, insight or maturity, who experience relationship problems, be it personal or work related; or who have been through a traumatic event and overreact in their response. This could also include disgruntled clients or employees. Their behaviour might be of a temporary nature; and related to social exclusion, discrimination, unfinished business, provocation or retaliation. The relationship, including differences in how the situation is perceived, is the unit that needs to be addressed, rather than just one party. If issues are resolved timeously, the stalking might not escalate into violence. This kind of behaviour could also be symptomatic of a community that is under too much stress and where people who are experiencing hardships are met with ignorance, or do not have adequate means to voice their complaints, etc.
- Nuisance behaviour could involve the needy, lonely and opportunists. Poor social judgement, disadvantages, disconnectedness, social prejudice and exclusion, or simply want could play a role. People stalking counsellors might be part of this group. It constitutes mostly a social problem that could be precipitated by gender, professional or other attitudes, cultural practices and conflicting messages in society about what is appropriate – e.g. predator behaviour is often encouraged. There is also a deep divide between the wealthy and poor, professional ways and the rest of the community; and a great deal of insensitivity towards the poor social conditions in South Africa. The relationship between these aspects needs to be explored in the courtroom.
- Cases involving some form of political, cultural, ideological or religious agenda, including people involved in training and personal development courses or scams. Intolerance, the broadening of their power base or recruitment, secrecy and financial gain might be involved. Justification for their actions might come from a shared viewpoint, people could have been brainwashed to do things they otherwise would not do, or the intention might

be to influence the worldviews of others. A lack of knowledge or power to resist and the passive 'approval' of the community could play a role.

- Cases linked to the latest technology, or specialized knowledge, involving some form of intellectual challenge. It could include the invasion of computer, municipal, communication, transport, financial, legal and medical systems; or national security. Cyber stalkers could fall in this category. Specialised areas such as the biomedical field involving environmental health, food and the application of chemicals, medication or drugs without someone's consent could fall to this, the 'gain'; or the psychiatric category. For some reason some 'intellectual challenges' are not perceived as criminal acts, regardless of devastating consequences.
- Cases linked to sentiments, emotions or attitudes, such as fan clubs or, on the other end, people disapproving of a person, or what is happening in the media or society; the objectification of personalities, public figures, professionals or relationships and the perceptions that are created in the media, including in soap operas. In this instance a particular kind of high profile person and his attitude towards life, can evoke a reaction. It might not be the profession itself, e.g. counsellors, that is under fire, but the person. The power of group pressure, the manipulation of crowd behaviour, as well as the influence of the electronic media on cultures, values and expectations, are underestimated, especially in a society in transition, such as ours. It is difficult to balance all the economic, cultural and other extremes in our society and problems will show up. Policies, codes of conduct for the media, ethical rules, professional and important environmental controls (expertise and infrastructure is lacking), education, might be relevant in this instance.
- Combinations of the above.

1.76 An anonymous respondent suggests that it might be important to separate cases with a poor prognosis, such as habitual offenders, from the rest. They may require strict measures, as opposed to cases where other remedies could be applied, without the people involved ending up with inappropriate psychiatric labels or losing their jobs.

In your opinion are any of the above categories adequately dealt with in terms of existing law?

1.77 All of the respondents indicated that in their experience stalking is not dealt with adequately in terms of the law.⁶⁷ Although a few respondents confirmed that remedies were available, some stated that the remedy of a civil interdict was too expensive⁶⁸ and cumbersome,⁶⁹ and that the remedy of obtaining a domestic violence protection order was unavailable to persons who have not been in a domestic relationship,⁷⁰ for example the sister of an ex-girlfriend or the ex-wife of the respondent's fiancé.

1.78 In the words of Ms Van Niekerk, the National Coordinator of Childline South Africa:

“No they are not dealt with adequately in existing legislation – it would be useful to have procedural provisions that allow recourse to some form of legal intervention before a violent/sexual crime has been committed. As someone who has been the victim of stalking as a professional in a context in which one is working with sexual predators and knowing first hand the frustration of being unable to protect oneself and one's family from the psychological trauma of stalking and being told by the SAPS that there is nothing that can be done to trace the identity of the stalking and prevent the harassment, it is understandable how powerless victims of stalking without an adequate support system can feel – and how vulnerable they are.”

1.79 Ms Waterhouse⁷¹ believes that existing legislation does not adequately address stalking or stalking related matters. She specifically refers to bail legislation in relation to

⁶⁷ Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; Ms Kleynhans; Ms Palmer; Joan van Niekerk, National Coordinator: Childline South Africa; Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust; Ms Bowers.

⁶⁸ Ms Kleynhans, Anonymous (1), KZN Network on Violence Against Women Workshop, Anonymous (2).

⁶⁹ Anonymous.

⁷⁰ Anonymous.

⁷¹ Advocacy Coordinator, Rape Crisis Cape Town Trust.

sexual offences, where she states that the actions of friends or other gang members are seldom addressed by bail conditions. She explains that this gives rise to non-reporting of many crimes such as rape and assault perpetrated by gangs. In her view, current legislation has no impact on this and does not encourage reporting of gang related violence.

1.80 She also remarks that Rape Crisis has worked with women who have been told by the SAPS that nothing can be done in a particular situation because no crime has been committed. She states that the implication that the SAPS can only assist after the perpetrator rapes the woman is extremely frustrating and causes a feeling of utter helplessness and desperation in the woman.

Should this investigation include all of the above categories? Please elaborate.

1.81 For varying reasons a number of respondents agree⁷² that all of the categories, with the exception of legitimate debt collecting, should be included in this investigation. Ms Kleynhans states that she could recognise her stalker in more than one category. An anonymous respondent, endorsed by Ms Palmer, states that every category is potentially very dangerous and the suffering stalkers inflict is considerable, regardless of what category they fit into.

1.82 An anonymous respondent suggests that the investigation should be more inclusive, and in particular expose the lesser known categories. He avers that the full extent of the problem is unknown and that some of the proposed categories of stalking might even warrant a separate investigation – for example, stalking by way of a bombardment of legal action and the abuse of the legal system to institutionalise people who complain of being stalked.

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Anonymous (1), Ms Kleynhans, Ms Palmer, Ms van Niekerk, National Coordinator: Childline South Africa, Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust, Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR, Ms Clark, Senior Public Prosecutor, National Prosecuting Authority, KZN Network on Violence Against Women Workshop, Senior Superintendent JM Nkomo, South African Police Service, Legal Support: Crime Operations and Anonymous (2).

1.83 The category 'debt collectors' elicited considerable debate. While endorsing the inclusion of this category in the investigation, Ms van Niekerk⁷³ notes that it may be best dealt with by establishing a compulsory code of practice.

1.84 Ms Waterhouse⁷⁴ and Ms Clark⁷⁵ remark that debt collector's actions which may be perceived as annoying should not in itself constitute stalking. However, the point at which debt collecting behaviour becomes criminal should be addressed.

1.85 Ms Massyn of the Prosecutorial Section, Justice College, comments that the **Debt Collectors Act, 114 of 1998** regulates acts by debt collectors. She submits that this category should not be included in the investigation and in so doing refers to section 14 of the Act which states that a code of good conduct must be adopted; and section 15, in which various forms of improper conduct are described and contravention is subjected to certain forms of sanctions.

1.86 Ms Massyn questions the validity of the category regarding disgruntled clients of private organizations, or public bodies. She notes that we live in an era of bad service delivery and states that from time to time a frustrated client's only chance of obtaining any form of service delivery is to make repeated phone calls, or to institute repeated oral or written complaints. She notes her concern as to who is going to decide whether these complaints are on frivolous or vexatious matters. She also states that by including this category, organisations which do not render proper service would be capable of using this as a scapegoat to continue bad service delivery.

Evaluation and recommendation

1.87 A plethora of categories and sub-categories of stalkers were identified in the submissions, clearly illustrating that a stalker cannot be typified by his or her relationship or lack thereof with the victim. The motives of the identified stalkers are also divergent,

⁷³ National Coordinator: Childline South Africa.

⁷⁴ Advocacy Coordinator, Rape Crisis Cape Town Trust.

⁷⁵ Senior Public Prosecutor, National Prosecuting Authority.

ranging from a lovesick admirer to a cold-blooded killer. The common thread seems to be the sequence of behaviour which elicits fear, both physical and psychological, in the victim. In certain circumstances, though, the victim may be unaware of being stalked.

The Commission is of the opinion that in defining stalking reference to certain categories of stalkers would be restrictive, and that the focus should rather be on the behaviour and the effect of the behaviour on the victim.

1.88 The respondents unequivocally state that present legislative remedies are inadequate in dealing with stalking and stalking-related matters. Specific mention is made of the fact that the actions of friends and gang members are seldom taken into consideration during bail proceedings and the inability of the police to intervene when a person is being stalked prior to the person being physically harmed.

The Commission recommends the enactment of specific legislation addressing stalking, with the primary focus on interrupting the pattern of behaviour before physical harm ensues. Furthermore that stalking brought about through the actions of third parties should be addressed.

1.89 The respondents to the Issue Paper are uniformly of the opinion that all enumerated categories of stalkers should be included in the investigation with the exclusion of legitimate debt collectors. The common element linking behaviour to stalking is once again the instilling of fear of harm, whether this harm is physical or psychological.

The Commission agrees that certain behaviour, for example numerous phone calls requesting repayment of a debt or persistence in having a client complaint addressed, constitutes behaviour which in itself is perfectly legal and hardly constitutes stalking.

1.90 A creditor may use reasonable means to collect his accounts. There is hardly an invasion of privacy in simply knocking at a debtor's door or calling him or her on the telephone on two or three occasions to demand payment of a debt. Although debt collection is a lawful business, debt collection agencies often exert pressure on debtors

in order to obtain payment of their debts. Under existing law, so long as the creditors or their representatives do not employ illegal means to collect debts, they may resort to any device to obtain payment. Similarly, a client who has received bad service is entitled to pursue the matter.

However, where a client exceeds the bounds for obtaining reasonable redress the Commission is of the opinion that he or she should be included in the category of stalkers. The emphasis remains on the conduct of the person.

IMPACT OF STALKING BEHAVIOUR ON VICTIMS

Introduction

1.91 Various international studies have shown that stalking has a significant impact on the lives of victims and their daily functioning.⁷⁶ In order to determine the prevalence and the impact of stalking within the South African context, the Issue Paper posed three questions with regard to the impact of stalking behaviour on victims. The questions posed are firstly, whether stalking has an impact on the victim's psychological, interpersonal and/or occupational functioning; secondly, whether stalking affects the victim's activities or social interaction, or whether the victims of stalking should be more resilient in dealing with nuisance behaviour; and finally, whether the actions that constitute stalking necessarily invade a person's privacy.

Overview of comment received

Does stalking have an impact on the victim's psychological, interpersonal and/or occupational functioning?

1.92 The response to the question whether stalking has an impact on the victim's

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Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate October 2000; National Institute of Justice Research Report 'Domestic Violence, Stalking, and Antistalking Legislation' An Annual Report to Congress under the Violence Against Women Act April 1996.

psychological, interpersonal and or occupational functioning was answered with a resounding “yes”.⁷⁷ Ms Kleynhans relates the impact on her life as follows:

“I am still scared to get home after dark, I am scared to use my home phone (“my” stalker knows about everything I discuss), my family members are worried about my safety. The stalking caused most of the fights that my fiancée and I had. I battle to sleep because it feels as if somebody is watching me the whole time. I am now taking sleeping tablets for that. I lock the cupboards in my bedroom at night ,as well as when I am not home to make sure my personal stuff, like clothes, but more important my jewellery would be safe. Also whenever I leave home, I make sure I insert a “policeman” into the locks of my 2 safety gates after I locked up. The list is endless.”

1.93 Another anonymous respondent relates:

“I wake up every morning, wondering if this is the day I will die at the hands of my stalker. I spend the day looking over my shoulder for him. I jump every time the phone rings. I can’t sleep at night from worrying, and when I do sleep, I have nightmares of him. I can’t escape him, not even for a minute. I never have a moment’s peace, awake or asleep.”

1.94 Ms van Niekerk⁷⁸ explains that stalking can have a marked impact on family life contributing to entire families having to adjust their day-to-day routines and activities.

1.95 Prof Davis, Ms Saffy, Ms Klopper and Ms Booyens of the Department of Criminology, University of Pretoria jointly believe that stalking leaves the victim feeling invaded and exploited. They postulate that the fear and horror and uncertainty surrounding this crime are traumatic, irrespective of whether it culminates in violence.

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Ms Kleynhans, Ms Palmer, Anonymous, Joan van Niekerk, National Coordinator: Childline South Africa, Senior Public Prosecutor, National Prosecuting Authority, Ms’s Davis, Saffy, Klopper, Booyens: Department of Criminology, University of Pretoria, Professor L Schlebusch, Department of Medically Applied Psychology, Nelson R Mandela School of Medicine, University of Natal, Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust, Mrs Fourie, Mrs van Wyk, Mrs Van Heerden, Anonymous (1), Anonymous (2), Anonymous (3), Mrs Lugtenburg, Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR, KZN Network on Violence Against Women Workshop, Senior Superintendent JM Nkomo, South African Police Service, Legal Support: Crime Operations.

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National Coordinator: Childline South Africa.

1.96 Professor L Schlebusch⁷⁹ comments that severe stress reactions as a result of stalking are reported. He states that the deleterious effects of inordinate stress are well-known.

1.97 Ms Waterhouse⁸⁰ notes that stalking undoubtedly affects the victim's psychological, interpersonal and occupational functioning. She comments that living in a country with the high rate of violent crime means that the majority of women live in awareness of, and in some cases fear of, sexual violence. Stalking will exacerbate this fear. Fear influences the daily functioning of any individual.

1.98 An anonymous respondent illustrated the severe impact of stalking on her life by informing the Commission that her partner had committed suicide following the relentless stalking of them both by his ex-wife.

1.99 Mrs Fourie relates her fear and anxiety as a result of SMS stalking. Her home, work and social life have been detrimentally affected. Her self-image has also been adversely affected by the repetitive, abusive and invasive SMS messages. She comments that the stalking is made all the worse as she has been unable to find a remedy to stop it from happening.

1.100 Mrs van Wyk relates that the stalking of her daughter included repetitive damage to her car and necessitated her moving overseas as she feared for her life.

1.101 Mrs Lugtenburg, a pensioner living in a retirement village, explains her feelings of helplessness coupled with disturbed sleeping patterns as a result of stalking by a fellow pensioner.

1.102 Mrs Bower relates the impact on her life as follows: "I will never forget how afraid and helpless the stalker made me feel and that no one could help me, not the church, not the police and not the court. Up until now there has been no law against stalking

⁷⁹ Department of Medically Applied Psychology, Nelson R Mandela School of Medicine, University of Natal.

⁸⁰ Advocacy Coordinator, Rape Crisis Cape Town Trust.

someone else and I of all people would like to see that changed because no person should be violated in any way.”

1.103 Ms Williams⁸¹ comments that besides the emotional insecurity that results from stalking, the person may also have had to restrict his or her social contact to avoid the stalker. The victim may have incurred extra expense by installing added security measures as a direct result of the stalking. She states that some people may even have had to change their place of employment.

1.104 The KZN Network on Violence Against Women Workshop recommend that employers should be educated in relation to the impact which stalking may have on occupational functioning, as absenteeism may be an indicator.

1.105 Senior Superintendent JM Nkomo⁸² explains that stalkers may threaten to harm the families or partners of their victims, if they think it might force the victims to behave in a certain way. In order to protect themselves, loved ones may disassociate with the victim or the victim may disassociate from loved ones for fear of their safety. Interpersonal functioning is clearly affected by such stalking behaviour.

1.106 An anonymous respondent notes that the impact may be more severe where the victim is a male, as he may be more hesitant than a woman to report acts of stalking. Further, the stalking does not just impact on the intended victim, but family and friends suffer as well.

1.107 Another anonymous respondent states that stalking definitely has a serious impact on a person’s psychological, interpersonal and occupational functioning, as already indicated in past sections. He likens stalking behaviour to Pavlov’s dogs and explains that the dogs the behaviourist, Pavlov, used in his research eventually went crazy when they were faced with inconsistent punishments and rewards over a period of time in a situation they could not leave. He continues that:

⁸¹ Project Co-ordinator, OPERATION BOBBI BEAR.

⁸² South African Police Service, Legal Support: Crime Operations.

“Likewise, any kind of controlling, unpredictable, invasive behaviour can have a profound effect on a person or group that feel trapped in the situation. Even the most resilient person suffers when his options become restricted, unless it is possible for him to regain control of his life, or step out the situation all together. The situation can also be compared with someone that is being interrogated and is constantly faced with no-win choices. The more serious cases represent a living nightmare and affect all aspects of a person’s life.

A prolonged, unpredictable situation involving **seemingly insignificant, but strange and disruptive events**, can do more emotional damage than something serious that is clearly defined and over quickly.

A professional that is being blackmailed cannot complain or share his experience, without losing everything. People in general have a poor understanding of the problem and one is discouraged to share the experience. Victims complaining about seemingly insignificant events, could even risk being regarded as psychiatric cases themselves, as happened to me. This dilemma, whereby the system or available remedies could become an instrument of control, as well as the victim’s loss of credibility and the fact that the culprit can get away with it, could be part of the intended harm / entrapment, especially in cases involving intelligent criminals, sociopaths, legal firms or intelligence agencies. It is a terrible experience.

In our case both me and my son has lost our sense of humour, enjoyment of life and tend to act despondent, distrustful and aggressive most of the time. We have lost a sense of purpose and live one day at a time. I do not even have the energy to deal with the legal system. My misled father died shortly after the incarceration incident and the fact that we could not resolve our differences in time, left me devastated – I loved him very much and he did not deserve the mess. I have not been capable of any spiritual life ever since and often burst out in tears without reason.”

And further:

“People who have studied a victim’s movements, habits, preferences and what is important in his/her life, can come up with that one fatal blow. Being framed as a psychological case when you have done a masters in psychology yourself and thrown into an institution when you have organised workshops for advanced therapeutic training **to in fact avoid such actions**, had been the fatal blow in my case. I fell though the roof of a professional career and became a recluse. The situation represents a ‘pause’ in the film that constitutes our lives – one cannot get on with it.”

Does stalking affect the victim’s activities or social interaction, or should the victims of stalking be more resilient in dealing with nuisance behaviour?

1.108 Numerous examples were given with regard to the effect on the victim’s activities or social interaction. Ms van Heerden has *inter alia* been forced to acquire and use a

tumble drier as she can no longer hang her washing out to dry pursuant to a person watching her and stealing items of her underclothes from the washing line. An anonymous respondent relates that her brother had to rotate the places he slept at every night for fear of his safety. Mrs Bowers relates that she would make a point of driving different routes or coming home at different times to avoid seeing the stalker, as he always made sure he was within her eye range when she came home. The stalking escalated to such a degree that she eventually moved during the night. Ansie comments that she has become a recluse, only leaving home to go to work and collect her child from school as she fears for their lives. She says that she has incurred numerous costs as a result of the stalking, for example acquisition of a ID call telephone and the costs of an aftercare centre for her child (whereas the child was comfortable to be at home in the afternoons prior to the stalking); and extra petrol costs, as she now collects her child in her lunch hour and personally takes him to aftercare.

1.109 Ms Kleynhans explains that it took over her whole life. In her own words: “you keep on wondering what will happen next. Then you become cross over the audacity and cheek and you anticipate the next incident. Nobody should be allowed to do that to somebody else.”

1.110 Senior Superintendent Nkomo⁸³ explains that stalking victims will obviously be afraid to move as freely as before, they might not go out as they used to and stay behind locked doors. A victim might even shy away from relationships for fear of endangering others. An anonymous respondent relays that in his case, where social humiliation is one of the key elements, he has lost his confidence and interest in social activities.

1.111 Ms Clark⁸⁴ is of the belief that the stalking would only impact on a victim’s functioning in so far as the victim perceived the behaviour to be stalking or harassment. This point illustrates the difficulty in determining when stalking actually commences and at which point one should intervene to stop the behaviour, and how this should be done. Ms Palmer agrees that if the invasive behaviour has no effect on the recipient, the situation would then not be classified as stalking, but rather a mere nuisance, either to

⁸³ South African Police Service, Legal Support: Crime Operations.

⁸⁴ Senior Public Prosecutor, National Prosecuting Authority.

be endured or ignored.

1.112 Ms Williams⁸⁵ submits that a person who is not very secure may sometimes feel victimized without reasonable cause. However, in her opinion if any activity of another is causing a reasonable person to feel insecure and threatened, and the person is being affected psychologically, the person's fear should be taken seriously.

1.113 Ms Waterhouse the Advocacy Coordinator, Rape Crisis Cape Town Trust submits as follows:

“. . . stalking may impact on the social decisions made by the person being stalked to the point that the person may not feel safe on her/his own and constantly need to have someone 'safe' present for protection and support. It can influence the person's desire to go out socially. It can affect the person in that s/he is unwilling to answer the telephone.”

1.114 Although the KZN Network on Violence Against Women Workshop state that one should be as resilient as possible, Ms Waterhouse cautions that:

“In a society in which there are many criminals who display absolutely no fear of the law or of the consequences of criminal behaviour it can at times be extremely unsafe for the victim to show resilience. Many women (in abusive relationships or being stalked by a potential rapist) display a reluctance to acknowledge the potential danger of the situation and instead display resilience. This very often serves to effectively isolate the victim to the extent that after a dangerous attack she is asked the question "but why did you not report this behaviour sooner?" (This is to be seen in connection with the fact that the SAPS often turn people away because the stalker has not 'committed any crime').

An information campaign highlighting stalking behaviours and the best manner in which to deal with these behaviours would assist people in correctly identifying the behaviour and developing the most effective strategy to address it.”

1.115 Ms Van Niekerk⁸⁶ states that resilience in the face of death threats or persistent invasions into one's privacy is difficult to maintain – and perhaps more difficult to deal

⁸⁵ Project Co-ordinator, OPERATION BOBBI BEAR.

⁸⁶ National Coordinator: Childline South Africa.

with when the stalker has no known face or identity. She questions why the victim should be blamed for not being more resilient where the stalker may be extremely sophisticated in the methods used and the victim may be vulnerable or immature. Ms Clark⁸⁷ agrees and comments that she believes that it is intrinsically unfair to a victim to have to tolerate conduct which either frightens or at the very least makes her feel uncomfortable.

1.116 An anonymous respondent submits that some forms of nuisance behaviour, as specified in the proposed categories, need to be better understood and handled wisely. People need to be more accepting when it comes to the brain injured, retarded and needy people, and help them to address their problems, rather than reject them. He states that these people are the way they are and the public needs to be more accommodating. He comments that other forms of irritating behaviour require assertiveness, or simply to be ignored.

1.117 This respondent further submits that problems involving a lack of social skills, provocation, or inadequacies in maintaining relationships, needs intervention other than just legal intervention. He states that a distinction should also be made between unacceptable behaviour and the people involved. The behaviour cannot be approved of or tolerated, but the people would behave better if they were treated better, e.g. receive more support and understanding. These mostly ordinary people should be coached and assisted, rather than be demonised. A greater awareness of human rights might eventually improve the situation. He concludes that education, improved counselling and mediation services, or better procedures could be helpful in these cases.

1.118 However, this respondent is of the opinion that any action that threatens people's family environments or stability needs the strictest measures. He emphatically states that one cannot exist and do what you have to do if your home environment is under threat or disrupted. One should also not be tolerant of unacceptable behaviour or any form of abuse that is persistent, including institutionalised violence. There should be no tolerance for sociopathic behaviour, people abusing their specialized knowledge, positions of power or available technology purely for selfish reasons; or the more serious

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Senior Public Prosecutor, National Prosecuting Authority.

cases. He recommends that attention be given to the role of professionals in maintaining such problems, including the ineffectiveness of services and institutionalised violence.

Do the actions that constitute stalking necessarily invade a person's privacy?

1.119 A number of respondents submit that stalking does invade a person's privacy.⁸⁸ An anonymous respondent adds that the stalker not only invades the victim's privacy directly but indirectly too, in that in order to obtain support or security from family or loved ones the victim has to divulge facts about his or her personal life to put the incidents of stalking in context. In an attempt to ensure the victim's well-being the family and friends may monitor the victim in a manner akin to the stalking.

1.120 Ms van Niekerk⁸⁹ is of the belief that there is an invasion of privacy even where the victim may not be aware of the intrusion. She substantiates her response by explaining that observing or following a person in the street and making telephone calls does indeed give a stalker access to personal information such as address, habits or places frequented.

1.121 Ms Samantha Waterhouse⁹⁰ agrees that the right to privacy may be infringed upon in numerous ways by the activities described in the Issue Paper as stalking. She states that even though surveillance or telephone calls do not render personal information as such to the stalker, they invade the realm of privacy of an individual (watching the victim shower, knowing the activities of the victim and gaining information about her/his life through this). The KZN Network on Violence Against Women Workshop is of the belief that the invasion of a person's privacy takes place on a mental as well as physical level.

⁸⁸ Ms P A Palmer, Ms Kleynhans, Joan van Niekerk, National Coordinator: Childline South Africa, Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust, Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR, KZN Network on Violence Against Women Workshop.

⁸⁹ National Coordinator: Childline South Africa.

⁹⁰ Advocacy Coordinator, Rape Crisis Cape Town Trust.

1.122 Some respondents are of the opinion that not all stalking invades a person's privacy. Ms Clark⁹¹ states that it would not invade a person's privacy to walk/drive past his or her home or to follow him or her at a distance in public places. Senior Superintendent Nkomo⁹² agrees that not all stalking invades a person's privacy, but states that actions of "peeping Toms", interception of a person's mail and entering of a private residence will invade privacy.

1.123 Ms Brook submits that the invasion of privacy and stalking play a meaningful role in the right context for the right reasons. She reasons that invasion of privacy by means of stalking is an essential part of finding credit defaulters, criminals and unfaithful spouses. She labels the actions of debt collectors, private investigators and the police as necessary stalking. She further endorses James Curtis of the reality TV programme where he once said to a debtor "you forfeit your right not to be 'stalked' and to privacy whilst you have debt and are running and hiding from it".

1.124 An anonymous respondent submits that stalking can invade one's personal space directly or indirectly and at any point - not only at home - e.g. if medical information is obtained from computer systems or through the legal system and then abused. He supports the broader application of the term 'private space' as discussed in the Issue Paper.⁹³ He notes though that a person's privacy may be 'invaded' legally and that the security in medical rooms and Government departments is inadequate as far as personal information is concerned. He relates that shortly after he was diagnosed as a bleeder he was stalked while buying food and thereafter a piece of glass was found in his food.

1.125 He further relates that:

"the other scenario we encountered was people who obtained entry into our private lives under false pretences, or with partial consent. One cannot prosecute them, as you gave consent. Had one known what their agenda is, one would have refused.

⁹¹ Senior Public Prosecutor, National Prosecuting Authority.

⁹² South African Police Service, Legal Support: Crime Operations.

⁹³ At pp 11.

If the 'stalker' is an official and the culprit is someone who obtains the information under false pretences from this 'stalker', who might have a legitimate agenda, the legal technicalities become very complicated. There is at present no means to act against a process within a process scenario and the culprit can get away."

Comparative overview

England and Wales

1.126 According to the British Crime Survey⁹⁴ on the extent and nature of stalking, 92% of victims said they were annoyed or irritated. 70% were very annoyed or irritated, with a further 21% feeling fairly annoyed or irritated. Levels of distress or upset were lower, but still three-quarters had found the experience distressing or upsetting.

1.127 The BCS findings refer to Pathe and Mullen (1997) who found in a clinical sample of 100 victims that 83% experienced increased levels of anxiety, 55% intrusive recollections and flashbacks, and 24% had considered suicide. Nightmares, appetite disturbances and depression were also "commonly reported". To date there have been no long-term studies of the effects of stalking. There is, however, some evidence linking stalking victims with Post Traumatic Stress Disorder (PTSD).

1.128 The BCS further found that 71% of those who had been the subject of persistent and unwanted attention said they had changed their behaviour by at least avoiding certain places or people, going out less often or taking extra security measures.

Colorado

1.129 In an attempt to ameliorate the devastating impact and consequences of stalking the Colorado legislators enacted a new law requiring an employer with fifty or more employees to permit an employee who is the victim of domestic abuse, stalking, sexual assault, or other crimes involving domestic violence to take three days of leave in a

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Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate pp 43.

twelve-month period to seek protection for him- or herself. An employee may use the leave time to pursue a civil restraining order, obtain medical care or mental health counselling for self or children, secure his or her home from the perpetrator of the crime, seek legal assistance, or to prepare for and attend court proceedings. In order to qualify for this leave time, the employee must have been employed for twelve months or more, and must give the employer appropriate advance notice of the need for such leave time except when there is imminent danger to the employee's health or safety. This law authorizes a judge or magistrate to issue a civil restraining order to a business entity in order to protect employees of the business upon finding that an imminent danger exists.⁹⁵

Evaluation and recommendation

1.130 The submissions received regarding the impact of stalking behaviour on victims confirms the experience of victims of stalking in various international studies. Stalking behaviour has a significant impact on the lives of victims, their families and their daily functioning. Intervention is clearly needed to address the devastating impact and consequences of stalking.

THE EXTENT OF THE PROBLEM

Introduction

1.131 The Commission noted in the Issue Paper that it was unaware of any study which focuses on the extent to which stalking is a problem in South Africa. In an attempt to identify the extent of the problem in South Africa, the Commission referred to the Department of Justice and Constitutional Development's statistics with regard to domestic violence applications. These reflect that 15 931 applications for domestic violence protection orders were made in 2001, of which 4 464 were not granted, 1157 set aside and 998 amended. The Issue Paper then posed the question whether there were any empirical or other studies available to demonstrate the existence or the extent

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[Http://www.ncvc.org/src/Legislation/updates/summer2002.html](http://www.ncvc.org/src/Legislation/updates/summer2002.html) as at 2003/02/12.

of stalking in South Africa.

Overview of comment received

Are there any empirical or other studies available to demonstrate the existence or the extent of stalking in South Africa?

1.132 Despite the absence of empirical research, the general opinion is held that stalking is prevalent in South Africa and that data could be obtained through either conducting a survey⁹⁶ among professionals who are involved in any form of domestic violence work or by surveying the actual domestic violence protection orders which are granted.⁹⁷ (None of the respondents is aware of any empirical or other specific studies to demonstrate the existence or the extent of stalking in South Africa).⁹⁸

1.133 One of the respondents⁹⁹ notes that the high number of domestic violence protection orders, ie. 15 931 granted per year is indicative that stalking as part of the phenomenon of harassment is prevalent in South Africa.

1.134 Senior Superintendent Cloete¹⁰⁰ comments that from experience stalking is prevalent and a real problem within the West Metropole in Cape Town. He relates that during August 2001 a child was stalked for some time in the Grassy Park police precinct and that numerous complaints to this effect were laid at the police station. He explains

⁹⁶ Ms Van Niekerk, National Coordinator: Childline South Africa.

⁹⁷ Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR.

⁹⁸ Ms Kleynhans, Anonymous (1), Ms Palmer, Joan van Niekerk, National Coordinator: Childline South Africa, Linda Davis, Jacky Saffy, Harriët Klopper, Karen Booyens: Department of Criminology, University of Pretoria, Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust, Ashleigh Williams, Project Co-ordinator, OPERATION BOBBI BEAR, Ms Clark, Senior Public Prosecutor, National Prosecuting Authority, KZN Network on Violence Against Women Workshop and Anonymous (2).

⁹⁹ Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR.

¹⁰⁰ SAPS, West Metropole, Cape Town.

that owing to the fact that the conduct of the stalker in most instances did not amount to a specific criminal offence, the complainant was turned away. He further relates that during July 2003 a male person stalked three girls on their way from the Lentegeur Library in Mitchells Plain. They also complained to the police and were turned away, since the conduct of the stalker did not amount to any criminal offence. Following the increase in 'stalking' incidences, he informs the Commission that his office was instructed to issue guidelines to the police stations with regard to dealing with similar cases.

1.135 Professor Schlebusch¹⁰¹ states that although "prevalence data" on stalkers remains elusive in South Africa, clinical studies reveal that stalking in South Africa is more common than thought. He comments that as for elsewhere in the world, the implicated rates of stalking-related violence co-vary with different risk factors such as the type of stalker, the nature of the relationship between the stalker and the victim, the efficacy of preventing the stalking, the presence of a psychological disorder or a personality disorder in the stalker, and if treated, the outcome of psychological intervention in the stalker as a patient.

1.136 Professor Schlebusch continues by referring to a study by Meloy published in 1998 which shows that in the USA: (a) 2% of adult females and 8% of adult males have been stalked in their lifetime (lifetime risk); (b) one million adult females and nearly half a million adult males are stalked annually; (c) 50% of victims report their stalking to the police of which a quarter result in arrest; and (d) approximately 12% of stalking behaviour results in criminal prosecution.¹⁰² He concludes by stating that studies suggest that delusional disorders account for 1% - 2% of admissions to inpatient mental health facilities, and that the best estimate is that around 0,03% of the general population suffer from them. Although he admits that no known research regarding the prevalence data of delusional disorders is available for South Africa he is of the opinion that there is no reason to assume that our figures are different from those reported elsewhere.

¹⁰¹ Department of Medically Applied Psychology, Nelson R Mandela School of Medicine, University of Natal.

¹⁰² Stalking is a crime throughout the United States of America.

Comparative overview

Extent of Stalking in England and Wales

1.137 The British Crime Survey (BCS) is a large, nationally representative survey of adults aged 16 and over living in private households in England and Wales. The 1998 British Crime Survey included a self-completion module on stalking. Respondents aged 16 to 59 were requested to complete the module. Respondents were asked whether, since the age of 16, they had ever been subject to 'persistent and unwanted attention', either from somebody they knew or a stranger. The BCS definition of stalking depends on only two elements: first, that the behaviours experienced were not desired by the victim; and second, that they recurred over an unspecified period of time. Experience of fear was not required. Persistent and unwanted attention was described to respondents at the beginning of the questionnaire in the following way:

“People may sometimes be pestered or harassed either by someone they know or a stranger. This person might do things like phoning or writing, following them or waiting outside their home or workplace.”¹⁰³

1.138 Overall, just over one in ten (11.8%) adults aged 16 to 59 recalled being the subject of persistent and unwanted attention on at least one occasion since the age of 16. Three-quarters of all those identified as being subject to persistent and unwanted attention were women.¹⁰⁴

1.139 The BCS estimates that in 1998 there were 3.53 million adults aged 16 to 59 in England and Wales who had experienced persistent and unwanted attention at some time since the age of 16.¹⁰⁵

¹⁰³ Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate pp 6.

¹⁰⁴ Ibid pp 9.

¹⁰⁵ Ibid pp 12.

1.140 Risk of victimisation was highest among those who described their marital status as single, never married (6.7%), followed by those who described themselves as separated (5.1%) or divorced (4.2%). Figures were lowest for those who were married (1.2%) or widowed (1.6%).¹⁰⁶

1.141 In the majority of episodes (79%) reported to the survey the stalking was carried out by one person alone. Nine per cent of episodes involved two people, four per cent three people and eight per cent four or more. Interestingly, men were less likely to be victims of single offender incidents (66%) than women (84%).¹⁰⁷

Extent of stalking in Canada

1.142 In 1996, approximately 80% of the 4450 stalking victims in Canada were women. Eighty-eight percent of the persons accused in these cases were male. Fifty-seven percent of stalkers are intimate partners or ex-partners of their victims and most victims know their stalkers. Stalking cases which emerge from domestic violence situations constitute the most common and potentially lethal class of stalking cases. Twenty-eight percent of stalkers are friends or co-workers. Seven percent of the victims never returned to work with those remaining employed, missing an average of 11 days from work.

1.143 Since the introduction of the criminal harassment legislation in 1993 in Canada, the number of reported incidents has increased for both family and non-family members. It cannot be determined whether this is due to a natural increase following new legislation, an increased willingness of victims to report, and/or a change in the way police record these incidents.¹⁰⁸

¹⁰⁶ Ibid pp 18.

¹⁰⁷ Ibid pp 25.

¹⁰⁸ [Http://www.metrac.org/new/stat_sta.htm](http://www.metrac.org/new/stat_sta.htm) as at 2003/12/10.

Extent of stalking in the United States

1.144 Tjaden and Thoennes¹⁰⁹ hold that based on U.S. Census estimates of the number of women and men in the country, approximately 1 million women and 371 000 men are stalked annually in the USA. However, because these figures exclude cases involving victims less than 18 years old, as well as victims who are homeless or living in institutions, group facilities, or households without telephones, they probably underestimate the true number of Americans who are stalked each year.

1.145 Results from the survey show that stalking is not a crime that is commonly perpetrated against minors (below the age of 18). Less than 1 percent of women surveyed and 0.2 percent of men surveyed reported they were stalked before age 18.¹¹⁰

1.146 Results from the survey confirm previous reports that violence against women is predominantly intimate partner violence: 64% of the women who were raped, physically assaulted and/or stalked since age 18 were victimized by a current or former husband, cohabiting partner, boyfriend, or date; 16.4% were victimized by an acquaintance; 14.6% were victimized by a stranger; and 6.4% were victimized by a relative other than a husband.¹¹¹

1.147 The National Violence Against Women Survey in the United States employed the following definition, which closely follows the definition adopted in the 'model' anti-stalking code:

“a course of conduct directed at a specific person that involves repeated visual or physical proximity, non consensual communication, or verbal, written or implied threats, or a combination thereof, that would cause a reasonable person to fear”¹¹²

¹⁰⁹ Tjaden and Thoennes Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women (2000) National Institute of Justice and the Centers for Disease Control and Prevention **Research Report** pp21.

¹¹⁰ Ibid pp34.

¹¹¹ Ibid pp37.

¹¹² Home Office Research Study 210 The extent and nature of stalking: findings from the

1.148 This definition does not require perpetrators to have made a credible threat of violence against the victim, but does require victims to either have been very frightened or to have feared bodily harm.¹¹³ This survey found that:

- 8% of women and 2% of men in the USA have been stalked at some point in their lives. In other words, 1 out of every 12 American women (8.2 million) and 1 out of every 45 American men (2 million) have been stalking victims.
- An estimated 1,006,970 women and 370,990 men are stalked annually in the United States.
- 74% of victims were between the ages of 18 – 39.
- About 12% of cases result in criminal prosecution.
- 38% of female victims were stalked by a spouse or ex-spouse. 43% of the time this occurs after the relationship has ended.
- 36% of male victims were stalked by a stranger.
- 87% of stalkers identified by victims were male.¹¹⁴

Evaluation and recommendation

1.149 The Commission agrees with the submission made by Professor Schlebusch that although no known research regarding the prevalence data of delusional disorders or stalking is available for South Africa, there is no reason to assume that our figures are different from those reported elsewhere. However, the Commission wishes to note that as statistics on the number of domestic violence protection orders do not indicate which conduct is prohibited it would be presumptuous to state that these statistics are indicative that stalking, as part of the phenomenon of harassment, is prevalent in South Africa. The Commission is also cognisant of the fact that surveys or empirical research on the prevalence of stalking in the broader population of South Africa would be of

1998 British Crime Survey Home Office Research, Development and Statistics Directorate pp 2.

¹¹³ Ibid pp 3.

¹¹⁴ [Http://www.ndcaws.org/stalkingharassment/stalkinglaws.asp](http://www.ndcaws.org/stalkingharassment/stalkinglaws.asp) as at 2004/01/22.

limited value where the concept of stalking has not been defined in a South African context, and where many divergent opinions exist on what it is. A common understanding of what stalking is would be imperative to a meaningful survey.

CHAPTER 2: SOUTH AFRICAN LEGAL RESPONSE TO THE PHENOMENON OF STALKING OR PREDATORY BEHAVIOUR

2.1 The Issue Paper¹¹⁵ states that depending on the actions of the stalker, a person may have recourse to civil law or criminal law remedies. Within each of these branches of the law different remedies are available.

THE CIVIL LAW

Introduction

2.2 The Issue Paper identifies delictual claims and High Court interdicts, constitutional applications, a binding over of persons to keep the peace, a domestic violence protection order and various remedies in terms of labour legislation as civil remedies available to someone being stalked.¹¹⁶

2.3 However, in its evaluation of the civil law response towards stalking behaviour the Commission concedes that relying solely on civil remedies to address stalking has its limitations.¹¹⁷ In summary the Commission finds that the process of obtaining a High Court interdict is cumbersome, expensive and less appropriate where urgent protection is required, and that a binding over of persons to keep the peace had largely fallen into a state of disuse owing to the impractical nature of the sanction provided for. With regard to the procedure followed and the accessibility of domestic violence protection orders, the Commission finds that it is a reasonably simple and non expensive remedy. However the Commission notes that the scope of the **Domestic Violence Act** elicited concern in that these protection orders are only available to persons in a domestic relationship, and that peace officers may arrest a person at the scene of an incident of domestic violence, without a warrant, only if he or she reasonably suspects the person of

¹¹⁵ At pp 14.

¹¹⁶ Pages 14 - 16.

¹¹⁷ At pp 16.

having committed an offence containing an element of violence against a complainant. Stalking and harassment usually precede violence and for this reason a stalker would not be liable for arrest for stalking where there is no violence.

2.4 The Commission posed five questions in this regard, namely:

1. Do you regard the existing civil remedies appropriate and sufficient to deal with the phenomenon or results of stalking?
2. Are victims who are stalked faced with practical problems when they seek to address the problem of stalking in terms of the existing civil law?
3. If the majority of cases of stalking are by former intimate partners is the option of a protection order in terms of the **Domestic Violence Act** effective?
4. Do domestic violence protection orders prevent future conduct?
5. Does the small percentage of other stalkers warrant another form of intervention?

Overview of comment received

Do you regard the existing civil remedies as appropriate and sufficient to deal with the phenomenon or results of stalking?

2.5 Most respondents¹¹⁸ found the existing civil remedies to be lacking in response to the phenomenon or results of stalking.

2.6 One respondent¹¹⁹ comments that the civil course of action would have been after the fact, since for there to be quantifiable damages the harm must have already occurred. The main deterrent is the cost and time that it takes to obtain a civil resolution to the problem. In her words, “the stalking takes place now and needs to be resolved

¹¹⁸ Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust; Ashleigh Williams, Project Co-ordinator, OPERATION BOBBI BEAR; Ms Kleynhans; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; KZN Network on Violence Against Women Workshop; Ms Van Niekerk, National Coordinator: Childline South Africa; Anonymous (2); Ms’s Davis, Saffy, Klopper, Booyens: Department of Criminology, University of Pretoria.

¹¹⁹ Anonymous (1).

now.”

2.7 Another respondent¹²⁰ is of the belief that the binding over of persons to keep the peace (peace order) is often not enforced and the consequences when enforced are often not enough to deter stalkers from continuing their behaviour. She also comments that interdicts are slow to process and expensive, and that the **Domestic Violence Act** does not include those persons who are being stalked by strangers. Prof Davis, Ms Saffy, Ms Klopper and Ms Booyens¹²¹ agree that the **Domestic Violence Act** is exclusionary and comment that in their opinion the domestic violence protection order does not prevent future conduct.

2.8 Ms Kleynhans responds that she threatened her stalker (her fiancé's ex-wife) with an interdict but that it had no deterrent effect. As she was not and had not been in a domestic relationship with her fiancé's ex-wife, she was unable to obtain a domestic violence protection order. She has resorted to taking the matter up with the stalker's employer.

2.9 Ms Clark¹²² remarks that it is too expensive to get a High Court injunction and that it would be effective only if the stalker has the means to be ordered to pay for the legal proceedings. She also notes that this process is time-consuming and is not helpful in an emergency.

2.10 The participants at the KZN Network on Violence Against Women Workshop observe that because a delictual claim is a sophisticated claim which is not linked to legal aid, many people are denied justice. Senior Superintendent Nkomo¹²³ and Ms Van

¹²⁰ Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR.

¹²¹ Department of Criminology, University of Pretoria.

¹²² Senior Public Prosecutor, National Prosecuting Authority.

¹²³ South African Police Service, Legal Support: Crime Operations.

Niekerk¹²⁴ agree. They state that although existing civil remedies are sufficient they are not appropriate, as they create financial burdens on the victims that have an effect of excluding those with limited financial means from the full ambit of the protection offered.

2.11 The Workshop participants state that domestic violence protection orders are underutilized – in their opinion a large number of the people who do apply for protection orders are stalked. They further reason that although the remedy of obtaining a peace order is cheaper and easier to obtain, it has proven to be ineffective.

Are victims who are stalked faced with practical problems when they seek to address the problem of stalking in terms of the existing civil law?

2.12 All of the respondents indicate that victims of stalkers are faced with numerous practical problems when they seek to address the problem.¹²⁵ Most respondents identify the financial cost of the civil remedies as being prohibitive. Ms van Niekerk¹²⁶ adds that the civil courts are inaccessible to the average South African.

2.13 Ms Waterhouse¹²⁷ remarks that very often victims are told that there is nothing that can be done for them. Ms Williams¹²⁸ agrees that the police will not assist the victim in identifying the stalker, and thus an order or interdict cannot be served in cases where the stalker is unknown to the victim. She is of the belief that if stalking were to be made

¹²⁴ National Coordinator: Childline South Africa.

¹²⁵ Anonymous (1), Ms van Niekerk, National Coordinator: Childline South Africa, Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust, Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR, Ms Kleynhans, MsClark, Senior Public Prosecutor, National Prosecuting Authority, KZN Network on Violence Against Women Workshop, Senior Superintendent Nkomo, South African Police Service, Legal Support: Crime Operations and Anonymous (2).

¹²⁶ National Coordinator: Childline South Africa.

¹²⁷ Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹²⁸ Project Co-ordinator, OPERATION BOBBI BEAR.

a criminal offence, it would be the duty of the police to determine the identity of the stalker. Senior Superintendent Nkomo¹²⁹ endorses the comment made by Ms Williams and adds that the victim is forced to spend money to hire an investigator to gather information on the stalker in order to be able to serve a notice on the stalker.

2.14 Another obstacle identified by a respondent¹³⁰ is that fear of the stalker may prevent the victim from seeking assistance, particularly if there was pre-existing violence or intimidation.

2.15 An anonymous respondent relates that the tendency to view the act of stalking as separate acts and not as a continuous act causes the authorities, and sometimes the victim, to minimise the seriousness of the situation. The authorities may be loath to intervene and the victim may be hesitant to seek redress owing to the time, expense and fuss of instituting civil action.

2.16 Ms Clark¹³¹ states that peace orders are under-utilised and not taken seriously when breached.

2.17 Participants at the KZN Network on Violence Against Women Workshop explain that unemployment and rising inter-personal crime has increased the prevalence of child stalkers. These participants identify the reluctance of teachers at schools to getting involved as an obstacle for children wanting to obtain relief from being stalked.

2.18 An anonymous respondent¹³² states that the service provided by the police and

¹²⁹ South African Police Service, Legal Support: Crime Operations.

¹³⁰ Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹³¹ Senior Public Prosecutor, National Prosecuting Authority.

courts in the Western Cape was excellent. He identifies the limitations as legislation, fragmentation in services or lack of services, the issue of proof and the cost involved, the lack of understanding of more complicated or sophisticated problems and junior administrative people that are not well trained. He also draws the Commission's attention to the level of manipulation involved in cases of stalking. In his own words: "You can buy any kind of proof and protection if you have money and influence. If you don't have money, it is a different matter."

2.19 The same respondent states that the issue of proof and the specialized professional input required in cases involving psychological abuse, as opposed to physical violence, remain a problem. In some instances, swift action is required, but these pre-trial reports, e.g. a criminology and psychology report, could take weeks to compile. The case may be thrown out before it is completed and then one has to repeat the process.

If the majority of cases of stalking are by former intimate partners, is the option of a protection order in terms of the Domestic Violence Act effective?

2.20 An anonymous respondent states that former intimate partners involved in stalking are very volatile and vacillate between a desire for reconciliation and a desire for revenge. Based on this finding she questions the effectiveness of the protection order.

2.21 Ms Van Niekerk¹³³ disputes the finding that the majority of stalkers are former intimate partners. She believes that the recording of domestic violence complaints may create this impression, but she is convinced that persons other than former intimate partners are responsible for the majority of stalking incidents.

2.22 Ms Waterhouse¹³⁴ comments that although protection orders do assist former

¹³² Anonymous (2).

¹³³ National Coordinator: Childline South Africa.

¹³⁴ Advocacy Coordinator, Rape Crisis Cape Town Trust.

intimate partners, they do not provide victims with immediate intervention. Ms Williams, the Project Co-ordinator of OPERATION BOBBI BEAR, concurs with this view and reiterates that there is no immediate protection if there is no imminent threat of violence, and that only once the protection order has been contravened can there be any charges laid.

2.23 Ms Waterhouse¹³⁵ and Ms Clark¹³⁶ relate that former partners may circumvent the obtaining of a protection order by engaging other people (friends, family or professional people) to intimidate the victim. Different methods to those prohibited in the protection order may be instituted once a protection order is granted. Ms Kleynhans agrees. She states that a protection order may prove adequate for the previous intimate partner, but not for the new person in his/her life.

2.24 Senior Superintendent Cloete¹³⁷ is of the belief that a domestic violence protection order is adequate with regard to stalking emanating from or within a domestic relationship. In this regard he refers to specific guidelines published on how police members should deal with complaints where children are stalked. The KZN Network on Violence Against Women Workshop agree that these protection orders are effective, but only in so far as there is proper implementation. Ms Clark¹³⁸ states that practical problems are created by inadequately worded protection orders caused by inexperienced court personnel and/or uninformed applicants.

2.25 An anonymous respondent comments that protection orders alone are insufficient. He states that the underlying problems resulting in the stalking need to be resolved and that there is not enough support or help available for the public in this regard. He states that existing services are limited, inaccessible, too expensive, or ineffective.

¹³⁵ Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹³⁶ Senior Public Prosecutor, National Prosecuting Authority.

¹³⁷ Sr Supt Cloete, SAPS, West Metropole, Cape Town.

¹³⁸ Senior Public Prosecutor, National Prosecuting Authority.

Do domestic violence protection orders prevent future conduct?

2.26 A number of respondents¹³⁹ are of the belief that domestic violence orders do not prevent future conduct of this nature. Ms Clark¹⁴⁰ confirms that there are numerous breaches of protection orders on the court roll every day.

2.27 The KZN Network on Violence Against Women Workshop participants comment that without psychological treatment or counselling, the perpetrator becomes more aggressive after a protection order is obtained. Similarly, Ms Waterhouse¹⁴¹ states that although a protection order may prevent future conduct in some cases, there are other cases in which a protection order causes an escalation in the stalking or violent behaviour of the perpetrator.

2.28 An anonymous respondent states that a protection order may not prevent future conduct as people act impulsively, irrationally and very emotionally under these circumstances. He notes that people with a violent inclination might not care much about the consequences at a particular point. He suggests that to prevent future conduct one would need to intervene prior to the deterioration of the situation. He comments that intervention could be by way of education and training on how to deal with conflict resolution and assistance.

2.29 Prof Davis, Ms Saffy, Ms Klopper and Ms Booyens¹⁴² are of the belief that civil remedies such as the domestic violence protection order do not form enough of a buffer to prevent a person from becoming violent. They argue that stalking requires serious

¹³⁹ Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR; Ms Kleynhans; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; KZN Network on Violence Against Women Workshop; Anonymous (2).

¹⁴⁰ Ms Clark, Senior Public Prosecutor, National Prosecuting Authority.

¹⁴¹ Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹⁴² Department of Criminology, University of Pretoria.

intervention and the penalty needs to be severe enough to act as a deterrent to future similar behaviour.

2.30 In relation to preventing future harm, an anonymous respondent states that the absence of physical or visible harm may cause a peace officer called out as a result of a breach to classify the situation as trivial despite the psychological torment and the fear of future harm that the victim may be subjected to. The effect would be that the peace officer's discretion regarding the offender's detention may be influenced by the absence of physical harm.

Does the small percentage of other stalkers warrant another form of intervention?

2.31 All of the respondents agree that another form of intervention is warranted to address stalking by persons who have not been in a domestic relationship with the person whom is being stalked.¹⁴³ Ms Waterhouse¹⁴⁴ comments that the 'small percentage' of 'other' stalkers may be larger than portrayed, especially in relation to a gang context. She comments that further intervention is necessary and that this should fall within the realm of the criminal law. Ms Clark¹⁴⁵ agrees and argues that in her opinion the percentage of non-intimate stalking is not so small.

2.32 Ms Williams¹⁴⁶ endorses specific intervention. She states that statistics in the USA show that 90% of women murdered were in fact stalked prior to death.

2.33 Participants of the KZN Network on Violence Against Women Workshop state

¹⁴³ Anonymous (1); Anonymous (2); Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust; Ms's Davis, Saffy, Klopper, Booyens: Department of Criminology, University of Pretoria; Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR; Ms Kleynhans; MsClark, Senior Public Prosecutor, National Prosecuting Authority; KZN Network on Violence Against Women Workshop.

¹⁴⁴ Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹⁴⁵ Senior Public Prosecutor, National Prosecuting Authority.

¹⁴⁶ Project Co-ordinator, OPERATION BOBBI BEAR.

that other remedies are needed.

2.34 Senior Superintendent JM Nkomo¹⁴⁷ argues in favour of specific criminal law intervention in that she is of the opinion that some victims of stalking have no recourse to the criminal law despite the psychological and interpersonal impact the stalking has on them. She says that the existing criminal law is appropriate in dealing with stalking only when it amounts to criminal conduct like trespassing, assault and rape.

Comparative overview

2.35 The enactment of a plethora of specific anti-stalking laws in comparative jurisdictions reflects the absence of adequate remedies prior to the enactment of legislation. Given the recent enactment of many of these laws, very few surveys have been conducted to determine their efficacy or that of the remedies they provide. It is resoundingly clear though that measures aimed at domestic relationships are inadequate to deal with the full extent of this behaviour and the persons targeted. The assumption that the majority of cases of stalking are by former intimate partners is dispelled by The British Crime Survey (BCS),¹⁴⁸ which determines that two-thirds of stalking incidents involve a perpetrator previously known to the victim in some way. Twenty-nine per cent of incidents were committed by someone who was in an intimate relationship (defined as spouse, partner, boyfriend/girlfriend or date) with the victim at the start of the episode of persistent and unwanted attention, or by a former intimate. A further third (32%) were committed by an acquaintance of the victim (including 9% involving a manager/colleague at work or member of the public contracted through work). A third (34%) of the incidents were committed by someone the victim did not know in any way prior to the incident. Women were significantly more likely to have been victims of stranger incidents than men. In other words over two-thirds of stalkers are not intimate or former intimate partners.

¹⁴⁷ South African Police Service, Legal Support: Crime Operations.

¹⁴⁸ Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate pp 27.

Evaluation and recommendation

2.36 In the light of the above submissions and the position in numerous foreign jurisdictions it is clear that existing civil remedies have been found wanting as far as remedies to address the phenomenon and results of stalking are concerned. The conclusion that persons who are stalked experience obstacles and practical problems as a result of not having adequate recourse to the law is also drawn from the submissions received. The Commission concedes that the assumption made in the Issue Paper that the majority of stalking is committed by former intimate partners does not reflect the experience of other jurisdictions or the experience of the majority of respondents to the Issue Paper.

THE CRIMINAL LAW

Introduction

2.37 In its overview of the criminal law in relation to stalking the Issue Paper made reference to the fact that existing criminal law focuses primarily on the punishment of specific prohibited acts whereas stalking behaviour involves a series of discrete and often seemingly unrelated acts.¹⁴⁹ The criminal law invariably treats stalking as a precursor to a crime or as evidence of its *mens rea* instead of a crime in its own right. The Issue Paper contains a brief exposition of the criminal remedies which are available to a person being stalked.¹⁵⁰ At criminal law violations of reputation and dignity are respectively prosecuted as defamation and *crimen injuria*. The violation of the interest of the physical person is prosecuted as assault. The crime of malicious injury to property is committed where a person unlawfully and intentionally damages the property of another. The Commission also makes mention of legislation criminalising trespassing, loitering and public nuisance.

2.38 In evaluating the criminal law response to stalking the Commission found that although existing criminal laws cover some aspects of stalking behaviour, they do not

¹⁴⁹ Ibid pp 18.

¹⁵⁰ Ibid pp 19.

address stalking as an independent phenomenon where the whole is worse than the sum of the parts of any individual act. The Commission concludes that little can be done to deter or punish a stalker until he or she actually causes or threatens to cause direct harm to an individual or an individual's property.¹⁵¹

2.39 The Issue Paper posed two questions pertaining to the efficacy of the criminal law in relation to stalking behaviour. The first question posed was whether the existing criminal law remedies are appropriate and sufficient to deal with the phenomenon or results of stalking. The second was whether victims who are stalked are faced with practical problems when they seek to address the problem of stalking in terms of the existing criminal law.¹⁵²

Overview of comment received

Do you regard the existing criminal law remedies appropriate and sufficient to deal with the phenomenon or results of stalking?

2.40 Ms Clark¹⁵³ responds that the existing criminal law remedies are generally not appropriate or sufficient to deal with some forms of stalking. She explains that one can only charge a person with *crimen injuria* where the dignity of the victim is impaired and that there is nothing to prevent behaviour such as loitering in a public place or following a person.

2.41 Senior Superintendent JM Nkomo¹⁵⁴ agrees that the existing criminal law remedies are not appropriate or sufficient to deal with stalking. She makes the remark that the existing criminal law is only appropriate to deal with stalking when it amounts to

¹⁵¹ Ibid pp 23.

¹⁵² Ibid pp 24.

¹⁵³ Senior Public Prosecutor, National Prosecuting Authority. This opinion is endorsed by the KZN Network on Violence Against Women Workshop and Anonymous (2).

¹⁵⁴ South African Police Service, Legal Support: Crime Operations.

criminal conduct like trespassing, assault and rape, etc. She explains that in cases where the conduct does not satisfy the elements of the crime, but still amounts to stalking and has psychological and or interpersonal impact, the victim's recourse to the criminal law will not be effective.

2.42 Ms van Niekerk¹⁵⁵ agrees with the Issue Paper that the criminal law tends to view each "minor" crime in a discrete fashion rather than seeing them as a pattern that makes up a concerning trend in behaviour. She notes that if such behaviour is looked at in discrete units it is trivialised and not regarded as serious. In her opinion these crimes are just not seen as serious enough to warrant intervention and protection of the victim. Ms van Niekerk particularly raises her concern that stalking of children is not recognised as such or taken seriously. Ms Waterhouse¹⁵⁶ concurs that individual instances of stalking would not be seen as being particularly serious in isolation. She argues that the seriousness of the situation only comes to light when the pattern of behaviour is viewed as a whole.

2.43 Senior Superintendent Cloete¹⁵⁷ submits that guidelines for police members. entitled 'Guidelines: Dealing with Complaints where Children are Stalked' and circulated on 22nd September 2003, attempt to address the difficulties with which the police are faced when approached by a member of the public who has been stalked and where no visible crime has been committed. He argues that if the conduct of the stalker is such that it insults or molests the complainant, or that it was calculated to upset or to instil fear, a case of *crimen injuria* could be made out. He cautions however that the facts of each case should be dealt with on its own merits and that this does not mean that each and every instance of alleged stalking would amount to *crimen injuria*. He concludes that the existing criminal law remedies are not sufficient or always appropriate to deal with the phenomenon or results of stalking.

¹⁵⁵ National Coordinator: Childline South Africa.

¹⁵⁶ Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹⁵⁷ SAPS, West Metropole, Cape Town.

Are victims who are stalked faced with practical problems when they seek to address the problem of stalking in terms of the existing criminal law?

2.44 A number of respondents¹⁵⁸ identified the fact that acts of stalking are seen and dealt with by the authorities individually and not as a pattern of behaviour as an obstacle to obtaining redress in terms of the criminal law. An anonymous respondent adds that when faced with the list of transgressions item by item the stalking victim also has the tendency to trivialise the acts against him.

2.45 An anonymous respondent comments that the burden of proof in a criminal case i.e. “beyond a reasonable doubt,” is considerable. She comments that if the stalker is clever he or she will try to make sure that he or she skates on the outskirts of illegal conduct, making the victim’s criminal case very difficult to prove. Another anonymous respondent states that the legal technicalities concerning proof beyond reasonable doubt, what constitutes an invasion of privacy, and what would constitute duress, harm in cases involving abstract and indirect methods and effects of stalking, still needs more debate. He states that owing to his stalker’s excellent knowledge of the law, it is impossible to prosecute the case as is.

2.46 Ms van Niekerk¹⁵⁹ refers to the trivialising of patterns of behaviour by the police and the courts as problematic. Ms Waterhouse¹⁶⁰ endorses this viewpoint and comments that the police seldom take seriously threats of assault made to the victim. She continues that the majority of women with whom her organization works are told that nothing can be done about threats until the perpetrator does something. She explains that this is usually in relation to potential rapists or accused rapists who are out on bail. She states that the provisions of the bail legislation aimed at preventing intimidation and interference with witnesses are seldom taken seriously. Participants at the KZN Network

¹⁵⁸ Ms van Niekerk, National Coordinator: Childline South Africa; Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority.

¹⁵⁹ National Coordinator: Childline South Africa.

¹⁶⁰ Advocacy Coordinator, Rape Crisis Cape Town Trust.

on Violence Against Women Workshop are of the belief that the response of the whole criminal justice process is problematic, stating that the police laugh from the time of reporting.

2.47 Ms Kleynhans explains that nobody was able to tell her where to go or what to do. She also says that she thinks that people thought that she was exaggerating and that the situation was not as serious as she was making it out to be. Ms Williams¹⁶¹ confirms that many acts used by stalkers are not viewed as 'seriously impairing the dignity' of the victim.

2.48 Ms Clark¹⁶² confirms that some forms of conduct do not amount to a criminal offence. She states that isolated incidents do not form the whole picture and might be regarded as too trivial to prosecute (*de minimus non curat lex*), yet when seen in context are alarming or frightening and would definitely constitute stalking.

Evaluation and recommendation

2.49 The Commission concludes that existing civil and criminal law remedies are insufficient or inadequate to deal with what is understood to constitute stalking in the broader sense and as legislated for in comparative jurisdictions.

¹⁶¹ Project Co-ordinator, OPERATION BOBBI BEAR.

¹⁶² Senior Public Prosecutor, National Prosecuting Authority.

CHAPTER 3: THE WAY FORWARD: POSSIBLE OPTIONS FOR REFORM

Introduction

3.1 Whilst proposing three options for reform of the law in relation to stalking the Commission stated in the Issue Paper on Stalking that these options should not be seen as reflecting the only ways in which stalking could be addressed. The three options are to expand or enact similar legislation to the **Domestic Violence Act 116 of 1998**; to amend and adapt section 384 of the **Criminal Procedure Act 56 of 1955**, which provides for peace orders; or to enact independent legislation criminalising stalking.

3.2 With regard to the first option of expanding or enacting similar legislation to the **Domestic Violence Act** the Commission finds that the most accessible recourse to a civil remedy seems to be in terms of the **Domestic Violence Act**. The Commission suggests that combining the two concepts in a central legislative base for protection orders, both domestic and personal, would provide a central legislative basis for protection orders and would reflect the importance of protection orders as a means of combating violence, abuse and harassment. However the Commission cautions that the perception could be created that protection orders have been “sidelined” from more serious issues and crimes. Additionally the unique nature of the **Domestic Violence Act** could also militate against the inclusion of personal protection orders as domestic disputes involve issues of financial dependence, physical and emotional power and control and shared emotional history, which sets it apart from non-domestic abuse.¹⁶³ One of the benefits of a system of restraining or protection orders is that the burden of proof, a balance of probabilities, is less onerous than at criminal law. Although such an order may not prevent future conduct, it may buy the complainant some time in which he or she can reassess the situation and decide on what to do.

3.3 The second proposal is the amendment and adaptation of section 384 of the

¹⁶³ Issue Paper, pp 23.

Criminal Procedure Act, 1955 which regulates the binding over of the peace orders. The Commission explains in the Issue Paper that this procedure is informal, inexpensive and provides a summary way of gaining access to a magistrate's court. This process does not necessitate service of the order, fixing of a return date or filing of opposing affidavits etcetera. The Commission proposed that on a finding of guilt the presiding officer be empowered to issue a restraining order or impose a sentence, which sentence may be postponed or wholly or partly suspended on condition for example that the respondent submits to psychological treatment, anger management or counselling.¹⁶⁴

3.4 Thirdly, the Commission proposed enacting independent legislation criminalising stalking. The Commission stated in the Issue Paper that it could be argued that a different conceptual and legal framework is needed for separate acts of harassment which constitute stalking by treating a "series" of these acts as a more serious crime, rather than a stream of unrelated minor offences.¹⁶⁵ In this regard the Commission referred to the widespread enactment of anti-stalking legislation internationally in a response to the perceived need to address stalking behaviour.

3.5 The Issue Paper poses seven questions with regard to the viability of the various options. They are:

1. Does stalking present a problem which deserves intervention? If so, should this intervention be legislative?
2. Indicate which of the options described would in your opinion be the most suitable to address the phenomenon of stalking.
3. Do other legislative or non-legislative options exist which would be more appropriate to address the phenomenon of stalking?
4. Persistent unwanted attention may have a significant impact on a person's life, although no fear of harm is caused. What should the threshold be? In other words, should one exclude behaviour which is merely irritating or annoying?

¹⁶⁴ Issue Paper, pp 27.

¹⁶⁵ Issue Paper, pp 27.

5. Some jurisdictions include behaviour causing detriment in legislation. In Queensland “detriment” includes prevention or hindrance from doing an act a person is lawfully entitled to do, for example changing a bus route or form of transport from that which he or she would ordinarily use to travel to work. Should an offence of stalking or intimidation cover behaviour causing detriment or distress, or should it remain limited to behaviour causing fear?
6. If in your opinion the criminal law option is the appropriate response, how would you define stalking and should exception be made for freedom of the press regarding news gathering and news reporting activities? In other words, should news organisations be exempted by way of a specific defence?
7. Is it necessary to provide for defences and exclusions, for example that stalking does not include acts done for a legal purpose, or does this state the obvious?

3.6 The comment received will be dealt with below in the same order in which the questions were posed.

Overview of comment received

Does stalking present a problem which deserves intervention? If so, should this intervention be legislative?

3.7 All of the respondents indicate that stalking presents a problem which deserves intervention;¹⁶⁶ the majority of the respondents agree that this intervention should be legislative¹⁶⁷ in nature. Ms van Niekerk¹⁶⁸ states that such legislative intervention should

¹⁶⁶ Anonymous (1); Ms van Niekerk, National Coordinator: Childline South Africa; Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust; Senior Superintendent Cloete, SAPS, West Metropole, Cape Town; Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR; Ms Kleynhans; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; KZN Network on Violence Against Women Workshop; Senior Superintendent JM Nkomo, South African Police Service, Legal Support: Crime Operations and Anonymous (2).

¹⁶⁷ Ms van Niekerk, National Coordinator: Childline South Africa; Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust; Senior Superintendent Cloete, SAPS, West Metropole, Cape Town; Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR;

provide a victim of stalking with protection and prevention of possible future harm.

3.8 In addition to the legislative intervention, Ms Williams¹⁶⁹ and an anonymous respondent comment that mandatory psychological treatment is essential. Ms Williams states that this would ensure that the perpetrator does not resume his activities once released. An anonymous respondent is of the opinion that in less serious matters better results may be achieved if both parties are referred to counselling, mediation or an interest group at the first contact with the legal system. The anonymous respondent further states that as far as serious cases are concerned, and where a person might be traumatised, it would be inappropriate and stricter measures and separation might apply.

3.9 Whilst endorsing legislative intervention the participants at the KZN Network on Violence Against Women Workshop request that the intervention address those instances where a 'victim' is suffering from schizophrenia or may have paranoid delusions of being stalked.

Indicate which of the options described would in your opinion be the most suitable to address the phenomenon of stalking.

3.10 A number of respondents¹⁷⁰ opt for the third option of reform listed in the Issue

Ms Kleynhans; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; KZN Network on Violence Against Women Workshop; Senior Superintendent JM Nkomo, South African Police Service, Legal Support: Crime Operations; National Prosecuting Authority's Sexual Offences and Community Affairs Unit and Anonymous (2).

¹⁶⁸ National Coordinator: Childline South Africa.

¹⁶⁹ Project Co-ordinator, OPERATION BOBBI BEAR.

¹⁷⁰ Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; Senior Superintendent Nkomo, South African Police Service, Legal Support: Crime Operations; Ms Kleynhans; Anonymous (2); Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust; KZN Network on Violence Against Women Workshop; Adv du Rand, Chief Director: Court Management, for Director-General: Justice and Constitutional Development.

Paper, namely to enact independent legislation criminalising stalking. Ms Clark¹⁷¹ comments that in her opinion an offence should be created with broadly defined forms of offensive conduct. Senior Superintendent Nkomo¹⁷² argues that such an offence should contain provisions treating a series of stalking acts as serious crime, instead of treating each act as an individual action which might not amount to crime. Ms Waterhouse¹⁷³ requests that a criminal offence of stalking should incorporate intimidation.

3.11 An anonymous respondent endorses section 562 of the **New South Wales Crime Act** owing to the considerable punishment imposed for stalking and the acknowledgment of the mental as well as the physical harm that is inflicted on a victim of stalking. Another anonymous respondent agrees that the mental harm that is inflicted should be acknowledged, as she states that a large part of the assault takes place on (not “in”) the victim’s mind.

3.12 Despite commenting that his office has not always received a positive response from complainants who made use of peace orders, Senior Superintendent Cloete¹⁷⁴ argues in favour of the second option of reform listed in the Issue Paper, namely to amend and adapt section 384 of the **Criminal Procedure Act, 1955**. He explains that it has become practice for Magistrates to issue two or three warning letters before the perpetrator is ordered to appear the Magistrate. He states that such conduct renders the provisions of the section ineffective.

3.13 Senior Superintendent Cloete recommends that the provisions of section 384 be amended to provide for an informal/simple procedure such as provided for in the **Domestic Violence Act, 1998**, in order to obtain an order similar to a protection order to prevent the conduct of the stalker. He believes that most of the complainants are

¹⁷¹ Senior Public Prosecutor, National Prosecuting Authority.

¹⁷² South African Police Service, Legal Support: Crime Operations.

¹⁷³ Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹⁷⁴ Sr Supt Cloete, SAPS, West Metropole, Cape Town.

ignorant of the law and are normally not able to afford expensive legal interventions such as interdicts. He further recommends that failure to comply with an order issued in terms of this section should also amount to an offence similar to the provisions of section 17 of the **Domestic Violence Act, 1998**. In his opinion the provisions of this section can be used to great effect where the conduct of the stalker borders on a crime such as assault, indecent assault or crimen injuria. Ms Williams¹⁷⁵ suggests that the consequences attached to section 384 should be increased. She notes that the benefit of using this procedure is that the burden of proof is lighter.

3.14 Ms van Niekerk¹⁷⁶ suggests that the options sketched in the Issue Paper should not be seen as mutually exclusive. She argues that the civil remedy is essential as police investigations into alleged crimes may take a considerable period of time and that recourse to a civil court is more immediate. However, she further states that the criminal sanction should also exist in order to strongly label the behaviour as inappropriate and damaging to the victim. This would ensure that some form of punishment and rehabilitation options could be applied. Adv du Rand, the Chief Director: Court Management responding on behalf of the Director-General: Justice and Constitutional Development agrees that separate legislation seems to be necessary to prohibit stalking and the provision of protection and restraining orders as well as related matters.

3.15 The expert consultation group also agree that a two-pronged approach should be followed, ensuring a civil and criminal remedy. The expert group suggest that where either remedy is sought that the presiding officer should consider a psychological evaluation of the stalker before making a finding and where a person clearly needs mental health intervention this should be made part of the protection order or part of a partially or wholly suspended sentence. By following a dual approach, the victim would be granted access to the court to prevent further stalking behaviour and the stalker would be granted access to behavioural change where appropriate. Furthermore the civil remedy should be accompanied by an order prohibiting the stalker from acquiring or having firearms in his or her possession, and when considering a bail application in

¹⁷⁵ Project Co-ordinator, OPERATION BOBBI BEAR.

¹⁷⁶ National Coordinator: Childline South Africa.

terms of the criminal option that specific attention be given to the eliciting of third persons to continue or commence with stalking behaviour towards the complainant or anyone associated with him or her.

3.16 Ms Williams¹⁷⁷ suggests an additional option by enquiring whether it would be possible to allow harassment to include stalking, so that the law that defines harassment as a crime could be used to convict stalkers.

Do other legislative or non-legislative options exist which would be more appropriate to address the phenomenon of stalking?

3.17 Although no recommendations were received regarding additional legislative measures, a number of respondents identify or refer to non-legislative measures aimed to address the phenomenon of stalking. Respondents identify education,¹⁷⁸ community awareness,¹⁷⁹ mediation about the problem where appropriate and between parties who would be comfortable with this and training of the authorities.¹⁸⁰

3.18 Senior Superintendent Cloete¹⁸¹ refers to the SAPS Guidelines under the title: “Dealing with Complaints where Children are Stalked” in which a police member attending to the complaint must make an entry in the Occurrence Book with regard to the particulars of the specific case in all instances of such complaints, irrespective of whether the police are empowered to assist. These entries would assist with record-keeping of the events and provide evidence of the impact on the complainant.

¹⁷⁷ Project Co-ordinator, OPERATION BOBBI BEAR.

¹⁷⁸ KZN Network on Violence Against Women Workshop.

¹⁷⁹ Ms Clark, Senior Public Prosecutor, National Prosecuting Authority.

¹⁸⁰ Ms Clark, Senior Public Prosecutor, National Prosecuting Authority.

¹⁸¹ West Metropole, Cape Town.

3.19 Ms Waterhouse¹⁸² suggests that the existing bail legislation must be looked at in order to provide greater protection to complainants, particularly in light of the methodology where the accused uses other people to stalk the complainant. However she is of the opinion that this should be in addition to creating separate legislation.

3.20 An anonymous respondent notes her concern regarding alternatives to the legal avenues available to a victim of stalking. She states that if access to the law is too expensive or cumbersome, the victim could very well reach the point of desperation and decide to deal with the matter themselves. She is of the belief that in the same way that there are organisations that investigate child welfare problems there should be some sort of organisation that assists victims in deciding how to go about bringing an end to the problem. She states that this would alleviate the time that the police and court would otherwise spend on a stalking case, and it would also encourage the victim to get help or advice before the problem got out of hand.

3.21 Professor Labuschagne of the University of Pretoria states that legislative intervention is unnecessary. He argues that the common-law definition of assault in South Africa is dynamic enough to apply to incidents of tele-terrorism,¹⁸³ including silent telephone calls where fear is instilled in the recipient.¹⁸⁴ He contends that the protection of the bio-psychological autonomy of a person should form the foundation upon which punishment is based. He avers that the English courts seem to be moving in a similar direction in relation to the crime of assault. He states that tele-terrorism and the development of psychiatry necessitates an adaptation or extension of the application of the crime of assault. He also notes that as a result of such an extension, the crime of indecent assault could be perpetrated over a telephone. This would in turn have the effect that the content of the current form of the crime indecent assault would be

182 Advocacy Coordinator, Rape Crisis Cape Town Trust.

183 He defines tele-terrorism as the invasion and terrorising of another persons privacy and bio-psychological integrity by way of a telephone or another method of distance-connection, such as facsimiles, television or computers.

184 Labuschagne JMT 'Teleterrorisme, psigiatriese besering en die organiese aard van die misdaad aanranding' (1998) **Obiter** 175.

absorbed into the crime of assault.

3.22 Professor Labuschagne¹⁸⁵ further refers to the Court of Appeal in *R v Chan-Fook* ([1994] 2 ALL ER 552) where Thomas J found that:

“It has been recognised for many centuries that putting a person in fear may amount to assault. The early cases pre-date the invention of the telephone. We must apply the law to conditions as they are in the twentieth century”.

3.23 The court concluded that repeated intimidating telephone calls could instil a fear of immediate and unlawful physical force.

3.24 Professor Labuschagne¹⁸⁶ reasons that the fact that a person in this present day and age is capable of invading and terrorising another person’s privacy and bio-psychological integrity by way of a telephone or another method of distance-connection, such as facsimiles, television or computers ought to have an effect on the interpretation or reinterpretation of the content of certain crimes, and particularly the crime of assault.

3.25 Professor Labuschagne¹⁸⁷ quotes Lord Steyn where he states that the private law has acknowledged that a clear distinction between body and mind does not exist. In *Bourhill v Young* ([1942] 2 All ER 396 4020) Lord Macmillan explains that:

“The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one.”

185 *Ibid.*

186 *Ibid.*

187 *Ibid.*

3.26 Lord Steyn is of the opinion that this development in the private law is relevant to the criminal law by way of analogy. He finds that “the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury”.

3.27 In determining whether an assault can be committed verbally, he states that:

“The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence, eg a man accosting a women in a dark alley saying ‘come with me or I will stab you.’ I would, therefore, reject the proposition that an assault can never be committed by words.”

3.28 He concludes that if a silent caller instils fear in a person that immediate personal force will be used against her, the caller can be found guilty of assault. In his own words:

“The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller’s arrival at her door may be imminent. She may fear the possibility of immediate personal violence. As a matter of law the caller may be guilty of an assault: whether he is or not will depend on the circumstance and in particular on the impact of the caller’s potentially menacing call or calls on the victim”.¹⁸⁸

Persistent unwanted attention may have a significant impact on a person’s life, although no fear of harm is caused. What should the threshold be? In other words, should one exclude behaviour which is merely irritating or annoying?

3.29 The Commission states in its Issue Paper that the widespread enactment of anti-stalking legislation internationally aimed to fill a perceived gap in the law. Previously, people who were subjected to persistent unwanted attention had no legal remedy if the behaviour in question was not in itself criminal.¹⁸⁹

¹⁸⁸ Ibid.

¹⁸⁹ See pp29.

3.30 In response to the question about which behaviour should be addressed, a number of the respondents argue for the inclusion of irritating or annoying behaviour.¹⁹⁰

3.31 Ms Van Niekerk¹⁹¹ acknowledges that the degree of annoyance may vary from person to person. She argues however, that it is essential that the protection be effective and comprehensive. In her opinion, excluding “merely irritating or annoying behaviour” leaves the legislation open to varying and subjective interpretation, and therefore legislation will contribute little or nothing to the psychological safety of victims of stalking. Ms Clark¹⁹² agrees that irritating or annoying conduct should not be excluded. She states that these would (usually) be seen as less serious but that such conduct could escalate to something more serious and should be “nipped in the bud”. The National Prosecuting Authority’s Sexual Offences and Community Affairs Unit suggests that a distinction should not be drawn between types of behaviour, as what is nuisance to one person could be devastating to another. An anonymous respondent states that the court should be given the discretion to include or exclude certain conduct. He acknowledges that once-off, minor incidents may not be worth the legal time or effort, but that minor incidents can collectively and over a long period of time have a profound impact on a person. The National Prosecuting Authority’s Sexual Offences and Community Affairs Unit endorses this view. Ms Kleynhans comments that nobody has the right to keep on irritating somebody and that this conduct should be dealt with.

3.32 An anonymous respondent emphasises that the persistence of the stalker forms the basis of the psychological aspect of stalking, and that there should therefore be some criteria for persistence. However, she states that if the conduct is merely irritating or annoying it can be ignored.

3.33 Ms Waterhouse¹⁹³ comments that when the irritation is such that it affects the

¹⁹⁰ Ms van Niekerk, National Coordinator: Childline South Africa; Ms Kleynhans; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; and Anonymous (2).

¹⁹¹ National Coordinator: Childline South Africa.

¹⁹² Senior Public Prosecutor, National Prosecuting Authority.

¹⁹³ Advocacy Coordinator, Rape Crisis Cape Town Trust.

behaviour of the victim or starts costing the victim money, there must be a remedy. She submits that if the impact is significant, it has gone beyond being irritating or annoying.

3.34 Ms Williams¹⁹⁴ states that persistent unwanted attention that causes one to fear or which causes emotional distress, should be the point at which mere communication becomes criminal behaviour. She argues that it is more the effect and the nature of the communication, than the number of phone calls, etc, which should define the parameters of stalking. Participants at the KZN Network on Violence Against Women Workshop agree that the conduct must instill fear in the victim.

Some jurisdictions include behaviour causing detriment. In Queensland “detriment” includes prevention or hindrance from doing an act a person is lawfully entitled to do, for example changing a bus route or form of transport that he or she would ordinarily use to travel to work. Should an offence of stalking or intimidation cover behaviour causing detriment or distress, or should it be limited to behaviour causing fear?

3.35 A number of respondents agree that an offence of stalking should include behaviour causing detriment and distress, and not be restricted to behaviour causing fear.¹⁹⁵ Ms Waterhouse¹⁹⁶ comments that in many cases the fear will be the cause of the detriment. Ms Williams¹⁹⁷ emphasises that such an offence should include all measures one has to take in avoiding the stalker, as well as those taken because of reactions of fear.

3.36 An anonymous respondent makes the following remark:

“Everyone has the right to move freely. If the State were to take that right away from somebody, they would have to have good reason to do so. Why should some

¹⁹⁴ Project Co-ordinator, OPERATION BOBBI BEAR.

¹⁹⁵ Ms van Niekerk, National Coordinator: Childline South Africa; Anonymous (1); Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust; Ms Williams, Project Co-ordinator, OPERATION BOBBI BEAR; Ms Kleynhans; Ms Clark, Senior Public Prosecutor, National Prosecuting Authority; and Anonymous (2).

¹⁹⁶ Advocacy Coordinator, Rape Crisis Cape Town Trust.

¹⁹⁷ Project Co-ordinator, OPERATION BOBBI BEAR.

sick person have the right to deny a person their freedom if the State does not even have that right?"

3.37 Participants at the KZN Network on Violence Against Women Workshop argue that the behaviour must instil fear. They note their concern that the behaviour must be looked at objectively to determine whether the person is in real danger or is being in their words, "paranoid".

If in your opinion the criminal law option is the appropriate response, how would you define stalking?

3.38 In the Issue Paper on Stalking¹⁹⁸ the Commission broadly defined stalking as "any type of harassing and intimidating conduct that causes a person to fear for his or her safety". Ms Clark¹⁹⁹ is of the belief that the concepts of 'nuisance' or 'irritation' should be incorporated into this definition. She further notes that being made to feel uncomfortable (as opposed to afraid) is also an area of concern. Senior Superintendent Cloete²⁰⁰ submits that telephone harassment must be included in the definition.

3.39 Ms Van Niekerk²⁰¹ submits that the definition of stalking should also cover situations where the direct victim of stalking does not necessarily know that he or she is being stalked but this has been noted and observed by, for example, a caretaker, parent or a bodyguard.

3.40 Ms Waterhouse²⁰² comments that the key issue must be the impact of the behaviour on the decisions of the victim. She states that the following behaviour should be covered in the definition: watching, loitering near, interfering with property, causing that person to be kept under surveillance by a third person, making telephone calls or

¹⁹⁸ See pp1.

¹⁹⁹ Senior Public Prosecutor, National Prosecuting Authority.

²⁰⁰ SAPS, West Metropole, Cape Town.

²⁰¹ National Coordinator: Childline South Africa.

²⁰² Advocacy Coordinator, Rape Crisis Cape Town Trust.

using other electronic media, harassing, intimidating, threatening, causing another person to change his or her habits and behaviour, and causing other people to interfere with that person.

3.41 Ms Kleynhans suggests that the definition should include: loitering near, watching or approaching another person or their place of work, residence or where he or she visits, telephones, interferes with property, gives or leaves offensive material, harassing, intimidating, or threatening another person, interception of e-mail, investigating a victim's medical history or other personal information, telephone tapping and the use of listening devices.

3.42 Related to the question how stalking should be defined in a criminal law context is the question whether it is inevitable that a description of stalking as an offence will contain an element of vagueness. In this regard the question was asked whether the respondents foresaw any difficulty in terms of the legal requirement that a law should reflect with certainty which actions constitute a criminal offence, failing which no crime exists?

3.43 Scant comment was received in response to this question. An anonymous respondent comments that a pattern of behaviour should be legislated for instead of listing the actions which constitute a criminal offence. Ms Kleynhans states that she not only envisages an element of vagueness in relation to the list of actions but also the resultant harm to the victim, as the harm may range from fear or distress to a general invasion of privacy.

Should an exception be made for freedom of the press regarding news-gathering and news-reporting activities? In other words, should news organisations be exempted by way of a specific defence?

3.44 Most respondents are of the opinion that news organisations should not be provided with a blanket exemption from the reach of the law in relation to the crime of stalking. On the one hand, Ms van Niekerk²⁰³ argues that there should be no special

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National Coordinator: Childline South Africa.

defence for the press – she submits that perhaps penalties should be higher, as their code of conduct should preclude activities falling within the ambit of stalking. Ms Clark²⁰⁴ agrees. She says that news gathering should not be excluded as overseas examples of celebrities being hounded by the ‘paparazzi’ have often shown. On the other hand, an anonymous respondent believes that the circumstances of the case would have to be considered before exemption is granted. Another anonymous respondent adds that news agencies should only be exempted under specific conditions and within the context of strict policies and ethical rules. He states that the harm the media can inflict is underestimated, it is irreversible even if an apology or correction is applied. Furthermore, ordinary people do not have the financial means to take the media to court.

3.45 An anonymous respondent is of the belief that many South Africans have been exposed to stalking as a result of the political situation, be it for the purpose of security clearance, or being regarded as a threat to security at one point or another. He explains that the normal business of running a country is not a problem if one is not doing anything wrong and have faith that the people involved are professional and ethical. He emphasizes that the present over supply of ex-intelligence people and their re-deployment in the private sector, as well as the fact that his generation is still battling with the aftermath of the apartheid-era, be it fears with regard to past happenings, sub-group differences, resentment, or mentalities that no longer have a place, is something that needs to be addressed. He avers that their methods are now applied to the man on the street which is a matter of deep concern. He explains that trained professionals have been used to stalk him and his family.

3.46 The discussion above has concentrated on what the parameters should be for “legal stalking” (for lack of a better description). However, another side to the coin is the existence of legitimate measures and the abuse thereof by persons in military, ex-military or related professions.

3.47 An anonymous respondent avers that she is being stalked through the use of electromagnetic radiation. She contends that behaviour altering electromagnetic weapons created for use by the military as mind control weapons are being used to

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Senior Public Prosecutor, National Prosecuting Authority.

create electromagnetic frequencies which control what people think. The effect on this respondent has been profound. Her experience and that of numerous other individuals is explicated on an internet website.²⁰⁵

3.48 The Pretoria Magistrate's court confirms that at least four applications for domestic violence protection orders this year have been brought about by high ranking police officials stalking their victims by way of harassment, watching from afar and in one case the use of a video surveillance camera. An anonymous respondent identifies her stalker as a high ranking police woman who has gained access to her residence, tapped her telephones and used her position to access privileged information such as financial statements.

Is it necessary to provide for defences and exclusions, for example that stalking does not include acts done for a legal purpose, or does this state the obvious?

3.49 The general opinion of the respondents is that when one does something in the pursuance of a legal purpose one will have a defence irrespective of whether such defence is embodied in legislation and that the courts will need to weigh the merits of each case.²⁰⁶ Ms Clark is of the view that providing for exclusions based on 'legal purpose' in legislation, would open the use of such exclusions to abuse and create a debate as to what should constitute 'legal purpose'. The belief is also held that due to the broad range of activities that can constitute stalking behaviour, it would not be wise to create specific defences.²⁰⁷

Comparative overview

3.50 Stalking has only been recognised as a criminal offence relatively recently. All Australian jurisdictions enacted anti-stalking legislation between 1993 and 1996,²⁰⁸ and

²⁰⁵ www.mindjustice.org/7.htm.

²⁰⁶ Anonymous(1); Anonymous (2); Ms van Niekerk, National Coordinator: Childline South Africa; Ms Kleynhans; KZN Network on Violence Against Women Workshop.

²⁰⁷ Ms Waterhouse, Advocacy Coordinator, Rape Crisis Cape Town Trust.

²⁰⁸ See Crimes Act 1900 (ACT) s 34A; Criminal Code Act (NT) s189; Crimes Act 1900 (NSW)

there is similar legislation in the United States,²⁰⁹ the United Kingdom, Ireland, Canada and New Zealand.²¹⁰

3.51 Foreign stalking laws deal with the problem of stalking in a variety of ways. Invariably stalking is defined by a list of prohibited activities and there is usually a requirement that the stalkers activities should present a credible threat and not merely be harassing. It is also common for stalking to be considered as 'aggravated' and to attract a heavier sentence when the stalker is acting in breach of any form of court order.²¹¹

Australia²¹²

3.52 In Australia, stalking is most commonly an extension of domestic violence legislation and has only recently been recognised as a criminal offence. All Australian jurisdictions have kept enacted anti-stalking legislation under review.²¹³ An overview of stalking legislation in Queensland, New South Wales, Victoria and South Australia

s562AB; Criminal Code Act 1899 (Qld) s 359A; Criminal Law Consolidation Act 1935 (SA) s 19AA; Criminal Code Act 1924 (Tas) s 192; Crimes Act 1958 (Vic) s 21A; Criminal Code Compliance Act 1913 (WA) s 338D and s 338E as quoted in New South Wales Law Reform Commission Discussion Paper 45 ***Apprehended Violence Orders: Part 15A of the Crimes Act*** November 2002, at pp 134.

²⁰⁹ Stalking was first criminalised in the United States in California in 1990. Similar legislation has now been enacted in every other state and a Model Anti-Stalking Code has been developed by the National Institute of Justice as quoted in the New South Wales Law Reform Commission Discussion Paper 45 ***Apprehended Violence Orders: Part 15A of the Crimes Act*** November 2002, at pp 134.

²¹⁰ See the Protection from Harassment Act 1997 (UK); Non-Fatal Offences Against the Person Act 1997 (Ireland) s 10; Criminal Code, RSC 1985, cl C-46 (Canada) s 264; Harassment Act 1997 (NZ) as quoted in New South Wales Law Reform Commission Discussion Paper 45 ***Apprehended Violence Orders: Part 15A of the Crimes Act*** November 2002, at pp 134.

²¹¹ [Http://www.harassmentlaw.pwp.blueyonder.co.uk/stalk.htm](http://www.harassmentlaw.pwp.blueyonder.co.uk/stalk.htm) as at 2003/12/10.

²¹² The Law Reform Commission of Hong Kong Report on ***Stalking*** October 2000 pp 79.

²¹³ See Crimes Act 1900 (ACT) s 34A; Criminal Code Act (NT) s189; Crimes Act 1900 (NSW) s562AB; Criminal Code Act 1899 (Qld) s 359A; Criminal Law Consolidation Act 1935 (SA) s 19AA; Criminal Code Act 1924 (Tas) s 192; Crimes Act 1958 (Vic) s 21A; Criminal Code Compliance Act 1913 (WA) s 338D and s 338E as quoted in New South Wales Law Reform Commission Discussion Paper 45 ***Apprehended Violence Orders: Part 15A of the Crimes Act*** November 2002, at pp 134.

follows below:

Queensland

3.53 The stalking law in Queensland has recently been reviewed and essentially protects against intentionally directed conduct that occurs on one occasion (if protracted), or (otherwise) on more than one occasion that, reasonably in the circumstances, would cause apprehension or fear or causes detriment.

3.54 The new s 359A of the **Criminal Code (Qld)** provides definitions for the key words and phrases used: 'circumstances', 'detriment', 'property', 'stalked person', 'unlawful stalking', and 'violence' are all defined.

3.55 The newly coined term 'detriment' has been given an inclusive definition and is cast in terms of the consequences of the stalking behaviour:

'**detriment**' includes the following –

- (a) apprehension of fear or violence to, or against the property of, the stalked person or another person;
- (b) serious mental, psychological or emotional harm;
- (c) prevention or hindrance from doing an act a person is lawfully entitled to do;
- (d) compulsion to do an act a person is lawfully entitled to abstain from doing.

Section 359B sets out the elements of 'unlawful stalking' as follows:

359B 'Unlawful stalking' is conduct-

- (a) intentionally directed at a person; and
- (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and
- (c) consisting of 1 or more acts of the following, or a similar, type-
 - (i) following, loitering near, watching or approaching a person;
 - (ii) contacting a person in any way, including, for example, by telephone, mail, fax, e-mail or through the use of any technology;
 - (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
 - (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
 - (v) giving offensive material to a person, directly or indirectly;
 - (vi) an intimidating, harassing or threatening act against a person whether or not involving violence or a threat of violence;
 - (vii) an act of violence, or threat of violence, against, or against property of,

- anyone, including the defendant; and
- (d) that-
- (i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or
 - (ii) causes detriment reasonably arising in all the circumstances, to the stalked person or another person.

3.56 Sub-section 359C(2) makes it clear that it is immaterial whether conduct directed at the victim is actually carried out in relation to another person or another's property (for example, persons such as the victim's relatives, friends, work colleagues).

3.57 Section 359E designates unlawful stalking a crime and sets the maximum penalty at five years imprisonment, increasing to seven years with a circumstance of aggravation.

3.58 Section 359F empowers the Court, when it considers it 'desirable' on the hearing of a charge of unlawful stalking, to make a restraining order against the person charged 'whether the person is found guilty or not guilty or the prosecution ends in another way'. Should the Court start a 'restraining order proceeding' under s359F(2), the proceeding is not a criminal one and any question of fact must be decided on a balance of probabilities, having regard to the evidence given at the hearing of the stalking charge, any application made and 'any further evidence the court may admit'. This power to make a restraining order, regardless of whether the offender is convicted or not, for the purpose of prohibiting particular conduct including, for example, contact with any person (the victim or another) or any property, is extremely valuable. In the absence of domestic violence laws that extend to cover non-spousal violence and apart from the limited protection provided by the **Peace and Good Behaviour Act (1982) (Qld)**, this is the only effective mechanism available to the victims of this type of frightening behaviour to protect themselves against continued unwelcome contact.²¹⁴

New South Wales

3.59 The stalking and intimidation offence was inserted into the **Crimes Act** in 1993

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Kift S 'Stalking in Queensland: From the Nineties to Y2K' (1999) 11 **Bond LR** 144.

by way of the **Crimes (Domestic Violence) Act 1993 (NSW)**. It originally only applied to people who were in a domestic relationship in the context of domestic violence. In 1994 this limitation was removed by way of the **Crimes (Threats and Stalking) Amendment Act 1994 (NSW)**, recognising that stalking and intimidation can occur regardless of whether or not the parties are in a domestic relationship. In 1999, the offence was expanded again. Previously, the offender had to cause fear of “personal injury”, which failed to recognise that stalking, as an expression of power and control, may not aim to arouse fear of physical violence. As amended, it is an offence to cause fear of “physical or mental harm”.²¹⁵

3.60 Section 562 of the **New South Wales Crimes Act**²¹⁶ provides that it is an offence to stalk or intimidate another person:

A person who stalks or intimidates another person with the intention of causing the person to fear physical or mental harm is liable to imprisonment for 5 years, or to a fine of 50 penalty units or both.

3.61 In New South Wales, Apprehended Violence Orders are available to apprehend or prevent existing or potentially violent situations from escalating. These orders which are intended to act as a circuit breaker are contained in Part 15A of the **Crimes Act 1900 (NSW)**.²¹⁷ Apprehended Violence Orders originated as a means of preventing domestic violence. They are now able to be sought generally, regardless of whether the applicant and defendant are in a domestic relationship. The legislation governing Apprehended Violence Orders is currently under review by the New South Wales Law Reform Commission.

3.62 In addition to laying criminal charges in cases of violence and abuse the Apprehended Violence Order remains the primary legal means by which people may seek protection against threatened acts of personal violence. Under Part 15A, any person may apply to the local court for an order against another person if he or she

²¹⁵ New South Wales Law Reform Commission Discussion Paper 45 **Apprehended Violence Orders: Part 15A of the Crimes Act** November 2002, at pp 135.

²¹⁶ Ibid pp 134.

²¹⁷ Ibid pp 2.

suspects that some form of personal violence, or other abuse, harassment or intimidation, is occurring or is imminent. A police officer *may* apply for an Apprehended Violence Order on behalf of an applicant, and *must* apply for an order where the officer suspects that a domestic violence offence or a stalking offence²¹⁸ has been, or is likely to be, committed, or where the applicant is under the age of 16 years.²¹⁹ A person will be granted an Apprehended Domestic Violence Order or an Apprehended Personal Violence Order depending on the relationship between the applicant and defendant.

3.63 An application for an Apprehended Domestic Violence Order may be made where the applicant and the defendant are in a domestic relationship. A domestic relationship is defined as one where the applicant and defendant:

- are or were married or in a ***de facto*** (including same sex) relationship;
- are or were in an intimate personal relationship (whether or not there is a sexual element);
- share or have shared a household or residential facility;
- are or were in a relationship involving dependence or ongoing care (paid or unpaid); or
- are or have been relatives.

3.64 Where the applicant and defendant are in a relationship other than a domestic one, the applicant must apply for an Apprehended Personal Violence Order.

3.65 The order may be granted if the defendant consents, or if the court is satisfied that a person, on a balance of probabilities, has reasonable grounds to fear, and does in fact fear -

²¹⁸ Crimes Act s 562C(3). Section 562AB of the Crimes Act provides that a person who stalks or intimidates another person with the intention of causing that person to fear physical or mental harm, is guilty of an offence. The test for establishing that intention is an objective one: it is assumed to exist where the conduct in question is likely to cause fear: s 562AB(3). It does not matter whether the person being stalked or intimidated actually feared physical or mental harm: s 562 AB(4).

²¹⁹ New South Wales Law Reform Commission Discussion Paper 45 ***Apprehended Violence Orders: Part 15A of the Crimes Act*** pp 4.

- the commission of a person violence offence;²²⁰ or
- conduct amounting to harassment or molestation, being conduct, sufficient in the opinion of the court, to warrant the making of the order;²²¹ or
- conduct which is either intimidating or amounts to stalking.

3.66 Despite its location in the **Crimes Act**, the Apprehended Violence Order process is not a criminal one. However a breach of an Apprehended Violence Order constitutes a criminal offence.

3.67 Apprehended Violence Orders are preventative measures: they are granted based on indications of past behaviour but essentially aim to prevent future conduct.

3.68 A distinction is drawn between Apprehended Domestic Violence Orders and Apprehended Personal Violence Orders. In accordance with s 562AK(3) of the **Crimes Act**, authorised justices have the discretion to refuse to issue an Apprehended Personal Violence Order which they consider is based on a complaint that is “frivolous, without substance or has no reasonable prospect of success”. However in terms of subsection (4) of the same Act, there is a presumption against exercising that discretion if the complaint discloses allegations of a personal violence offence, a stalking or intimidation offence or harassment in the nature of racial, religious, homosexual, transgender or HIV-AIDS vilification. There is no such discretion in relation to a domestic violence order. The further distinctions relate to the awarding of costs against complainants and the restriction on disclosure of the protected person’s address. Both distinctions weighing in favour of the Apprehended Domestic Violence Order.

²²⁰ Personal violence offence is defined in s 4 of the Crimes Act to include offences such as murder, manslaughter, malicious wounding and damage, sexual assault, indecent assault, assault with or without inflicting actual bodily harm, and breaching an Apprehended Violence Order, as quoted in New South Wales Law Reform Commission Discussion Paper 45 **Apprehended Violence Orders: Part 15A of the Crimes Act** November 2002, at pp 5.

²²¹ Conduct may amount to harassment or molestation even though it does not involve actual or threatened violence to the person, or consists only of actual or threatened damage to property belonging to, in the possession of, or used by, the applicant: Crimes Act s 562AE(3) and s562AI(3) as quoted in New South Wales Law Reform Commission Discussion Paper 45 **Apprehended Violence Orders: Part 15A of the Crimes Act** November 2002, at pp 6.

Victoria

3.69 In January 1995, the Victorian Parliament created the new offence of stalking by inserting section 21A into the **Crimes Act 1958**.

3.70 The offence of stalking which is punishable by 10 years imprisonment is constituted by 'a course of conduct' intended to cause, and causing, physical or mental harm to the victim, or fear in the victim for their own safety, or that of another. A non-exhaustive list of stalking conduct in subsection 21A(2) includes: following the victim or another, telephoning or otherwise contacting the victim or another, entering or loitering outside or near a place frequented by the victim or another, interfering with the property in the possession of the victim, giving offensive material to the victim or another, keeping the victim or another under surveillance or acting in a way that could reasonably be expected to arouse apprehension or fear in the victim for their own safety or that of another.

3.71 This section does not provide a time frame for determining what constitutes a 'course of conduct' however, in the Supreme Court decision of ***Gunes and Tunc v Pearson***,²²² McDonald J found that 'course of conduct' encompassed conduct that was engaged in on more than one separate occasion, or one protracted incident.

3.72 The Act specifically excludes from its operation persons performing official duties in relation to the enforcement of the criminal law, the administration of an Act, the enforcement of a law imposing a penalty, the execution of a warrant, or the protection of public revenue. It does not go so far as to protect private investigators engaged by members of the public.

3.73 Whether or not a criminal charge of stalking has or will be made a victim of stalking behaviour can also apply for an intervention order.²²³

²²² (1997) 21 A Crim 297.

²²³ Nash et al 'Assessment of the Impact of Stalking Legislation' Paper presented at the Restoration for Victims of Crime Conference convened by the Australian Institute of Criminology in conjunction with Victims Referral and Assistance Service and held in Melbourne, September 1999, pp2.

3.74 Subsection 21A(5) provides a civil remedy for responding to stalking behaviour, allowing the court to make an intervention order under the **Crimes (Family Violence) Act** when satisfied on a balance of probabilities that a person has stalked a person and is likely to continue to do so. Provision is made for the **Crimes (Family Violence) Act**, which originally provided for intervention orders only in cases of family violence, to be read as if a stalking victim were a family member.

3.75 An intervention order can prohibit or restrict access to the victim, his or her home or workplace, prohibit contact with the victim, prohibit damage to the victim's property or direct the alleged stalker to receive counselling (section 5 **Crimes (Family Violence) Act 1987**).²²⁴

South Australia

3.76 The South Australia's stalking legislation was enacted by the **Criminal Law Consolidation (Stalking) Amendment Act, No 7 of 1994** which came into effect on 1 June 1994. The Act requires that, on at least two separate occasions, the person should follow the other person, or loiter outside the place of residence of the other person or some other place frequented by the other person, or enter or interfere with property in the possession of the other person, or give offensive material to the other person or leave offensive material where it will be found by, given to or brought to the attention of the other person, or keep the other person under surveillance, or act in any other way that could reasonably be expected to arouse the other person's apprehension or fear.

3.77 The Act requires the person to intend to cause serious physical or mental harm to the other person or a third person or to cause serious apprehension or fear. The offence will be regarded as aggravated and hence attract the higher applicable maximum penalty if the offender was either in breach of any injunction or other court order or was, on any occasion to which the charge relates, in possession of an offensive weapon.²²⁵

²²⁴ Ibid pp3.

²²⁵ Goode M 'Stalking: Crime of the 90s?' (1995) 19 **Criminal Law Journal** at pp201.

Hong Kong

3.78 In its Report on Stalking the Law Reform Commission of Hong Kong found that the existing criminal and civil law remedies in Hong Kong are inappropriate to deal with stalking. The Report makes the following recommendations in relation to the phenomenon of stalking:²²⁶

- a person who pursues a course of conduct which amounts to harassment of another, and which he or she knows or ought to know amounts to harassment of the other, should be guilty of a criminal offence;
- for the purposes of this offence, the harassment should be serious enough to cause that person alarm or distress; and
- a person ought to know that his or her course of conduct amounts to harassment of another if a reasonable person in possession of the same information would think that the course of conduct amounted to harassment of the other.

3.79 The Hong Kong Law Reform Commission recommends that it be a defence for a defendant who is charged with the offence of harassment to show that -

- the conduct was pursued for the purpose of preventing or detecting crime;
- the conduct was pursued under lawful authority; or
- the pursuit of the course of conduct was reasonable in the particular circumstances.

3.80 It is also recommended that -

- a court sentencing a person convicted of the offence of harassment may make an order prohibiting him or her from doing anything which causes alarm or distress to the victim of the offence or any other person, as the court thinks fit;
- the restraining order may be made in addition to a sentence imposed on the defendant convicted of the offence of harassment, or in addition to a probation

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The Law Reform Commission of Hong Kong Report on *Stalking* October 2000. pp 184.

order or an order discharging him or her absolutely or conditionally;

- the restraining order may have effect for a specified period or until further notice;
- the prosecutor, the defendant or any other person mentioned in the restraining order may apply to the court for it to be varied or discharged; and
- a person who, without reasonable excuse, does anything which he or she is prohibited from doing by a restraining order should be guilty of an offence which is punishable by imprisonment for 12 months.

3.81 The Hong Kong Law Reform Commission pertinently recommends that the courts may require any person convicted of the offence of harassment to receive counselling, undergo medical, psychiatric or psychological evaluation, and receive such treatment as is appropriate in the circumstances.²²⁷

3.82 Finally, it is recommended that -

- where a civil court grants an injunction in an action for harassment, it should have the power to attach a power of arrest to the injunction;
- a police officer should be able to arrest without warrant any person whom he reasonably suspects to be in breach of an injunction to which a power of arrest is attached; and
- the court dealing with the breach should have the power to remand the defendant in custody or release him or her on bail.²²⁸

England and Wales

3.83 ‘The Stalkers Bill’ was presented to parliament in May 1996 by Janet Anderson MP as a private members Bill. Section 1 of ‘the Stalkers Bill’ reads as follows:²²⁹

“1.(1) In this Act “stalking” shall mean engaging in a course of conduct whereby

²²⁷ The Law Reform Commission of Hong Kong Report on *Stalking* October 2000. pp 186.

²²⁸ Ibid.

²²⁹ [Http://www.harassmentlaw.pwp.blueyonder.co.uk/book/bill.htm](http://www.harassmentlaw.pwp.blueyonder.co.uk/book/bill.htm) as at 2003/12/10.

- a person
- (a) follows, loiters near, watches or approaches another person;
 - (b) telephones (which for the avoidance of doubt shall include telephoning a person but remaining silent during the call), contacts by other electronic means or otherwise contacts another person;
 - (c) loiters near, watches, approaches or enters a place where another person lives works or repeatedly visits;
 - (d) interferes with property which does not belong to him and is in the possession of another person;
 - (e) leaves offensive, unwarranted or unsolicited material at a place where another person lives, works or regularly visits;
 - (f) gives offensive unwarranted or unsolicited material to another person; or
 - (g) does any other act or acts in connection with another person

so as to be reasonably likely to cause that other person to feel harassed, alarmed, distressed or to fear for his safety or for that of one or more third persons to whom he has a duty of protection or with whom he is associated.”

3.84 However, the UK Government²³⁰ was not convinced that the Stalking Bill provided effective or workable solutions to the problem and proceeded to publish a consultation paper on Stalking in July 1996.²³¹ **The Protection from Harassment Act 1997** represents the results of that consultation. Despite the enactment of the **Protection from Harassment Act 1997**, the term ‘stalking’ has no legal status in England and Wales. The Act, although informally referred to as an ‘anti-stalking law’, does not actually use or define the term stalking.²³²

3.85 The Act creates two specific criminal offences. The first is an offence of harassment whereby persons are enjoined not to pursue a course of conduct which amounts to harassment of another and which the person knows or ought to know amounts to harassment of another.²³³ The second offence is the offence of putting

²³⁰ The Law Reform Commission of Hong Kong Report on **Stalking** pp 89.

²³¹ Home Office, Stalking – The Solutions: A Consultation Paper (July 1996) as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 89.

²³² Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate pp 2.

²³³ Section 1 of the Protection from Harassment Act 1997.

people in fear of violence.²³⁴ This offence provides that a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him or her is guilty of an offence if he or she knows or ought to know that his or her course of conduct will cause the other to fear on each of those occasions.

3.86 The offence of harassment is a summary offence. It involves causing harassment or distress but does not require the victim to have been put in fear of violence, and attracts a maximum sentence of six months imprisonment. The offence of putting people in fear of violence requires proof that the victim was put in fear of violence, regardless of whether or not the offender intended to do so, and attracts a maximum sentence of five years imprisonment.²³⁵

3.87 Section 7 of the **Protection from Harassment Act 1997** provides that reference to harassing a person includes alarming the person or causing the person distress, that a “course of conduct” must involve conduct on at least two occasions and that “conduct” includes speech.

3.88 It is the stalking background to the act which explains why the act requires two incidents of harassment and not only one. It is also the reason why the legal test as to whether a person is guilty of harassment is based on the judgement of ‘a reasonable person’ - unlike most criminal offences which require some degree of intent before an offence is committed. Many stalkers claim that they have no intention of harassing their victims. Indeed many believe that they are in love even if that love is totally unwelcome and unreciprocated.²³⁶

3.89 To protect the victim from further conduct which amounts to harassment or will cause a fear of violence, the court is empowered to make a restraining order prohibiting

²³⁴ Section 4 of the Protection from Harassment Act 1997.

²³⁵ Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate pp 1.

²³⁶ [Http://www.harassmentlaw.pwp.blueyonder.co.uk/stalk.htm](http://www.harassmentlaw.pwp.blueyonder.co.uk/stalk.htm) as at 2003/12/10.

the defendant from doing anything described in the order.²³⁷

3.90 By virtue of section 3(1), an actual or apprehended breach of the provision prohibiting harassment may be the subject of a claim in civil proceedings by the victim. The victim may claim damages for an anxiety caused by the harassment and any financial loss resulting from it. He or she may also seek an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment. Where the court has reasonable grounds for believing that the defendant has done anything which he or she is prohibited from doing by the injunction, the plaintiff may apply for a warrant of arrest of the defendant. The defendant is guilty of an offence if he or she has done anything in breach of the injunction without reasonable excuse.

3.91 **The Protection from Harassment Act of 1997** is not the only part of the English law dealing with stalkers. Injunctions can also be granted in common law. Where stalkers and their victims are former partners or people who have lived together or are related, the victim can apply to the courts for a Non Molestation Order under the provisions of the **Family Law Act 1996**. Courts can attach a power of arrest to such orders which authorises the police to arrest the defendant if he, or she, breaches the order.²³⁸

3.92 The **Public Order Act 1986** also makes intentional harassment, alarm or distress a summary offence. A person who, with intent to cause a person “harassment, alarm or distress”, “uses threatening, abusive or insulting words or behaviour” thereby causing that or another person “harassment, alarm or distress”, is guilty of an offence under section 4A of the **Public Order Act 1986**. Section 5 of the Act creates a lesser offence by removing the requirement to prove intent. It is sufficient that the words or behaviour are likely to cause “harassment, alarm or distress” to a person who is present. Both sections make it a defence for the defendant to prove that his conduct was reasonable. It is also an offence under section 4 to use “threatening, abusive or

²³⁷ Section 4(3). The defence of acting reasonably is not available because it cannot be reasonable to place someone in fear of violence as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 90.

²³⁸ [Http://www.harassmentlaw.pwp.blueyonder.co.uk/book/bill.htm](http://www.harassmentlaw.pwp.blueyonder.co.uk/book/bill.htm) as at 2003/12/10.

insulting words or behaviour” with intent to cause another person to believe that immediate unlawful violence will be used against him or another, or whereby that person is likely to believe that such violence will be used.

3.93 A common and particularly unpleasant form of harassment is that involving malicious communications either through the post, the telephone, fax, by cyberstalking, through the internet or, an increasing problem, by the use of text or SMS messages sent to mobile phones.

3.94 Under section 1 of the **Malicious Communications Act 1998** it is an offence to send an indecent, offensive or threatening letter, electronic communication or other article to another person and under section 43 of the **Telecommunications Act 1984** it is a similar offence to send a telephone message which is indecent, offensive or threatening. Both offences are punishable with up to six months imprisonment and/or a fine. Because the Malicious Communications Offence is more wide ranging, it is more likely to be charged by the police than the **Telecommunications Act** offence.

3.95 In most cases involving malicious communications, however, there will be more than one offensive or threatening letter or telephone call and therefore the police will often choose to charge the offender with an offence contrary to section 2 of the **Protection from Harassment Act 1997**. Part of the reason for using this charge is that when someone is convicted of an offence under the Protection from Harassment Act, the court can make a Restraining Order preventing him or her from contacting his or her victim again. Breach of a Restraining Order is punishable with up to five years imprisonment. A Restraining Order cannot be imposed for a conviction under the **Malicious Communications or Telecommunications Acts**.

3.96 If the messages, e-mails, phone calls etc cause the victim to fear that violence will be used against him or her the police can choose to charge the offender with an offence contrary to section 4 of the **Protection from Harassment Act 1997** which is punishable with up to five years imprisonment and also allows the court to make a Restraining Order.²³⁹

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[Http://www.harassmentlaw.pwp.blueyonder.co.uk/comm.htm](http://www.harassmentlaw.pwp.blueyonder.co.uk/comm.htm) as at 2003/12/10.

3.97 There is a great deal of confusion as to the legal position where either the sender or the recipient of an offensive communication is outside the jurisdiction of English law. The Internet in particular is often assumed to be completely outside of any legal control. The legal position is not as clear as it could be and the Government has not specifically legislated to clarify the position.

3.98 In general terms: provided the offensive message was either sent from within England and Wales or was received within England and Wales an offence has been committed which the police and the courts in England and Wales can deal with.

3.99 Where the offender has sent the message from outside England and Wales the police will usually inform their foreign counterparts. It will frequently be the case that the offender has also broken the law in his or her own jurisdiction and will be dealt with by the authorities in that jurisdiction. Similarly if someone in England and Wales is harassing someone abroad by means of letters e-mails etc and the police in England and Wales are informed of this, the offender could be arrested for criminal harassment and prosecuted regardless of the fact that the victim was abroad.²⁴⁰

3.100 There is also a range of possible criminal offences which can be committed by stalkers and in the 1997 case of *R v Burstow & R v Ireland* the House of Lords decided that stalkers who cause psychological injury to their victims can be prosecuted for the criminal offences of causing actual bodily harm or grievous bodily harm even where they have not physically attacked their victim. A new and potentially important offence in cases involving stalking is the offence of harassment of a person at his or her home. This offence authorises police officers to direct someone, who is harassing another person in his or her home, to leave the area and to arrest him or her if they disobey the direction.²⁴¹

²⁴⁰ [Http://www.harassmentlaw.pwp.blueyonder.co.uk/book/bill.htm](http://www.harassmentlaw.pwp.blueyonder.co.uk/book/bill.htm) as at 2003/12/10.

²⁴¹ [Http://www.harassmentlaw.pwp.blueyonder.co.uk/comm.htm](http://www.harassmentlaw.pwp.blueyonder.co.uk/comm.htm) as at 2003/12/10.

Ireland

3.101 The Irish Republic addresses stalking by way of the **Non Fatal Offences against the Person Act 1997**. Section 10 of this Act reads as follows.²⁴²

'Harassment'

10. (1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.

(2) For the purposes of this section a person harasses another where
 (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
 (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may, specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

(4) A person who fails to comply with the terms of an order under subsection (3) shall be guilty of an offence.

(5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.

(6) A person guilty of an offence under this section shall be liable –
 (a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or
 (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

Canada

3.102 In April 1993 the **Criminal Code** was amended to include section 264, which deals with "criminal harassment". Criminal harassment is the legal term in Canada for

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As obtained by www.harassment-law.co.uk from Internet site www.bailii.org.

stalking. Section 264 of the **Canadian Criminal Code** is defined as follows:²⁴³

“(1) No person shall, without lawful authority and knowing that another 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.

- (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.”

3.103 The key elements that must be met to qualify for this charge are –

- the offender engaged in **conduct** described in subsection 264(2);
- the offender did not have **lawful authority** to engage in the prohibited conduct;
- the offender knew that the victim was **harassed** or he/she was **reckless or wilfully blind** as to whether the victim was harassed;
- the conduct caused the victim to **fear for her/his safety** of that of someone known to her/him;
- the victim’s **fear was reasonable** in all of the circumstances.²⁴⁴

3.104 A Handbook for Police and Crown Prosecutors on Criminal Harassment²⁴⁵ clarifies the **fear** clauses, showing that:

²⁴³ Act to Amend the Criminal Code and the Young Offenders Act, RSC C-126 S264(1)(2)(1993) as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 85.

²⁴⁴ A Handbook for Police and Crown Prosecutors on Criminal Harassment, 1999,p21 as quoted in Mc Call R Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada Concepts and Recommendations (2003) Victim Assistance Online Resources pp5.

²⁴⁵ A Handbook for Police and Crown Prosecutors on Criminal Harassment, 1999, p pp.28 - 29 as quoted in Mc Call R Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada Concepts and Recommendations (2003) Victim Assistance Online Resources pp5.

- “The victim must actually fear for her/his safety or that of someone known to her/him as a result of the defendant’s conduct”.
- “The victim’s fear for her/his “safety” or that of someone know to her/him is not restricted to fear of physical harm but rather, includes fear for her/his mental, psychological and emotional safety”.
- “In assessing the reasonableness of the victim’s fear, consideration may be given to the victim’s sex, race and age, but section 264 did not require that the victim have knowledge of what the defendant is capable”.
- “Victims of harassment do not have to ‘suffer ill health or major disruption in their lives before obtaining the protection of section 264”.
- “One incident of threat is sufficient and need not be of a repetitive nature to satisfy subsection 264(2)(d)”.

3.105 One of the key parts of section 264 of the **Criminal Code** is the requirement that when the conduct being complained of is “following” or “communicating”, it has to be “repeated”. There is no set rule on this. It can be persistent or frequent behaviour but the “following” or “communicating” has to happen more than once for it to constitute criminal harassment.

3.106 On the other hand if the conduct is watching, prowling, or “besetting” a place where a person is visiting, lives or works, or if there has been threatening conduct, one incident would suffice in getting a conviction under section 264.

3.107 In all cases, the conduct must be such that apprehension or “fear for his or her safety” is “reasonable”. This means having a fear for which there is a reason; not a fear based on exaggeration of the situation or on imagined problems.

3.108 Thus a single incident of harassment, provided it creates reasonable fear in the victim, is sufficient to invoke Criminal Harassment charges.²⁴⁶ There is no mention in Canadian Law of electronic harassment or stalking, although it is possible to apply the

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Mc Call R Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada Concepts and Recommendations (2003) Victim Assistance Online Resources pp5.

statutes to cyberspace.²⁴⁷

3.109 The **Criminal Code** passed in 1993 prohibits trespassing on another's property at night, uttering threats, indecent or harassing phone calls, intimidation and mischief on another person's property. Under the Criminal Code, you can also get a restraining order or a peace bond against a person, measures which might, in certain circumstances, be preferable in some cases of aggressive or predatory stalking.²⁴⁸

3.110 The Code is applicable even if the conduct of the stalker is not done with the intent to scare a person. It is enough if it does scare the person.

3.111 The punishment for stalking can be as high as a five-year jail term.²⁴⁹ The law also excuses those that have "lawful authority" from being convicted under this section. One example of this has been given as the private investigator who has been hired to check into an insurance claim that a person has filed.

3.112 Additionally section 372 of the **Criminal Code** provides as follows:

Section 372, False Messages

372.(1) Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who, with intent to alarm or annoy any person, makes any indecent telephone call to that person is guilty of an offence punishable on summary conviction.

(3) Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable on summary conviction.²⁵⁰

²⁴⁷ http://www.wiredpatrol.org/cyberstalking_harassment/canada/ca-stalkinglaw.html as at 2003/12/10.

²⁴⁸ <http://wwlia.org/ca-stalk.htm> as at 2003/12/10.

²⁴⁹ Ibid.

²⁵⁰ http://www.cyber-stalking.net/legal_canada.htm as at 2003/12/10.

Netherlands

3.113 In the proposed anti-stalking regulation of the **Dutch penal code**, which came into effect in 2001, stalking is defined as “the wilful, unlawful, systematic violation of a person’s private life with the intention of forcing someone to do, not to do, or to tolerate something or to frighten him or her”.²⁵¹ The accompanying explanatory memorandum makes it clear that stalking is viewed as a psychological assault with malice against the physical and psychological integrity of the victim. The Dutch protection of privacy draws on Article 10 of the Dutch Constitution: “Everyone has a right to the respect of his/her private life subject to and under the limitations of the law.” Article 8 of the European Convention on Human Rights also states: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

3.114 Royakkers²⁵² notes that the Dutch regulation, by focussing on the disruption of someone’s life, enhances the ability of law enforcement and prosecutors to intervene and protect stalking victims at the earliest time, before threats occur.

United States of America

3.115 In 1990, following the fatal shooting of actress Rebecca Schaeffer and the murders of four other Californian women, the Californian legislature responded by passing the first anti-stalking law in the US. Within a four-year period thereafter, all 50 states and the District of Columbia had enacted certain legislative measures to guard against stalking behaviour.

3.116 While most states define stalking as the wilful, malicious and repeated following and harassing of another person, some states include in their definition such activities as lying-in-wait, surveillance, non-consensual communication, telephone harassment, and vandalism. Despite the development of a ‘model’ anti-stalking code by the National

²⁵¹ Royakkers L The Dutch Approach to Stalking Laws 2 Cal. Crim. L. Rev.1 (Oct 2000) available at <http://www.boalt.org/CCLR/v3/v3royakkersnf.htm> (par 31).

²⁵² Royakkers L The Dutch approach a remedy to the shortcomings of American stalking regulation? 2 Cal.Crim.L.Rev.1 (Oct 200) par 6 available at <http://www.boalt.org/CCLR/v3/v3royakkersnf.htm>.

Institute of Justice the legal definition of stalking varies widely from state to state.²⁵³

3.117 The Violence Against Women Act (VAWA), Title IV of the Violent Crime Control and Enforcement Act was passed in 1994. The Act fosters collaboration among law enforcement, health care providers, nonprofit service groups, community leaders, and the private sector in relation to domestic violence, sexual assault and stalking. In addition, the Act provides a substantial commitment of Federal resources for police, prosecutors, prevention programs, and victim service initiatives in cases involving these crimes.²⁵⁴

3.118 An important provision of the VAWA directs the Attorney General to submit annual reports to Congress providing information concerning the incidence of stalking and the effectiveness of State antistalking efforts and legislation.

3.119 An Annual Report notes the observation that the first wave of legislation resulted in a “hodgepodge of flawed statutes”, placing prosecutors in a position of dealing with laws that were virtually unenforceable due to ambiguities and the dual requirements to show both specific intent and a credible threat. Since the early 1990s, when the first antistalking legislation was passed, many states have amended their initial laws, in part due to concerns about constitutional challenges and other issues that arose in implementing the laws. Many of the initial statutes, for example, did not specifically prohibit threats or assaults on nonfamily members, such as the victim’s new intimate partner. In general, the revised laws include specific intent and credible threat requirements, broaden definitions, refine wording, stiffen penalties, and emphasize the suspect’s pattern of activity. State statutes typically define stalking, in essence, as culpable and repeated following and harassing of another person. Many states require that the stalker exhibit a pattern of conduct and possess intent to instil fear in the

²⁵³ National Criminal Justice Association, Project to Develop a Model Anti-Stalking Code for States, Washington D.C.: U.S. Department of Justice, National Institute of Justice, October 1993 as quoted by the Home Office Research Study 210 The extent and nature of stalking: findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate October 2000, pp 2.

²⁵⁴ National Institute of Justice Research Report ‘Domestic Violence, Stalking, and Antistalking Legislation’ An Annual Report to Congress under the Violence Against Women Act April 1996.

victim.²⁵⁵

3.120 Prior to the enactment of antistalking legislation, police had little power to arrest someone who behaved in a threatening but legal way. Even when the suspect had followed his or her victim, sent him or her hate mail, or behaved in a threatening manner, the police were without legal recourse. Antistalking legislation enables law enforcement officials in the USA to determine whether an arrest can and should be made. The criminalisation of stalking behaviour has stimulated the development of techniques to help law enforcement assess the level of threats involved in such cases.²⁵⁶ An overview of some of the federal and state laws criminalising stalking follows.

Selected federal laws

3.121 Federal law 18 U.S.C. mandates nationwide enforcement of orders of protection, including injunctions against harassment and stalking, in states, tribes, and U.S. territories.²⁵⁷

3.122 Section 2261A(1) of federal law 18 U.S.C Interstate Stalking (1996; 2000) makes it a federal crime, punishable from five years to life in prison, to travel across state, tribal or international lines to stalk another person. The defendant must have the intent to kill, injure, harass, or intimidate the victim, or to place the victim, a family member, or a spouse or intimate partner of the victim, in fear of death or serious bodily injury.

3.123 Section 2261A(2) makes it a federal crime, punishable from five years to life in prison, to stalk another person across state, tribal or international lines, using regular mail, e-mail, or the internet (i.e. cyberstalking). The defendant must have the intent to kill or injure the victim, or to place the victim, a family member, or a spouse or intimate partner of the victim in fear of death or serious bodily injury.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ <http://www.ncvc.org/src/Legislation/state/summary.html> as at 2003/02/12.

3.124 Federal law 47 U.S.C. Title 18 Section 875(c) Interstate Communications makes it a federal crime, punishable by up to five years in prison, to transmit in interstate or foreign communications, any threat to kidnap or injure another person. This federal statute is seldom applied unless there are unusual circumstances, such as a death threat against the President. None of the provisions cover a situation in which a resentful suitor or obsessed stalker uses the Internet or digital technology in the absence of extortion or threats to physically harm the victim.²⁵⁸

3.125 Federal law 47 U.S.C. Section 223(a)(1)(C) Harassing Telephone Calls in Interstate Communications makes it a federal crime, punishable by up to two years in prison, to use a telephone or other telecommunications device to annoy, abuse, harass, or threaten another person at the called number.

State laws:

California

3.126 As a result of heavy lobbying by a coalition of celebrities, the Screen Actors Guild, and victims' rights groups, California has enacted the nation's first "anti-paparazzi" law, which creates tort liability for "physical" and "constructive" invasions of privacy through photographing, videotaping, or recording a person engaging in a "person or familial activity". Notwithstanding the "anti-paparazzi" nomenclature, the legislation broadly applies to all members of the media and has potentially far-reaching implications for mainstream photojournalists.²⁵⁹

3.127 California's anti-paparazzi law purports to create two new privacy torts: "physical invasion of privacy" and "constructive invasion of privacy". But in many ways the new law is duplicative of existing Californian law. For example, California has long recognised trespass as a tort. Thus, even before the anti-paparazzi statute was passed,

²⁵⁸ [Http://www.cyber-stalking.net/legal_usfederal.htm](http://www.cyber-stalking.net/legal_usfederal.htm).

²⁵⁹ [Http://library.lp.findlaw.com/articles/file/00010/005746/title/Subject/topic/Injury%20...](http://library.lp.findlaw.com/articles/file/00010/005746/title/Subject/topic/Injury%20...) As at 2003/02/12.

any person - not just a celebrity - could sue a photojournalist or other member of the media for entering his or her private property without permission. Similarly, existing Californian law already recognised the tort of intrusion. Privacy is an “inalienable right” under the Californian Constitution, and courts already allowed lawsuits to proceed under various theories for invasion of that right. Other existing protections against claimed “abuses” by the media include statutory and common law prohibitions against assault, battery, false imprisonment, stalking, and surreptitious audio or video recording of “confidential communications”.

3.128 The most significant change made by the “physical invasion of privacy” provision of the anti-paparazzi law is the availability of stiffer sanctions for a trespass if the purpose of the trespass is to photograph or videotape someone. The remedies for “physical invasion of privacy” include general damages, special damages, treble damages (i.e., three times the general and special damages), punitive damages, disgorgement of profits, and equitable relief, including injunctions and restraining orders. Trebled damages and disgorgement of profits have not been awarded for simple trespass, and punitive damages are very rare in such cases. Stalking conduct is specifically dealt with in the following civil and criminal codes.

Cal. Civil Code SS 1708.7

1708. Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights.

1708.7 (a) A person is liable for the tort of stalking when the plaintiff proves all of the following elements of the tort:

(1) The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence.

(2) As a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this paragraph, “immediate family” means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff’s household.

(3) One of the following:

(A) The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with the intent to place the plaintiff in reasonable fear for his or

her safety, or the safety of an immediate family member and, on at least one occasion, the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct.

(B) The defendant violated a restraining order, including, but not limited to, any order issued pursuant to Section 527.6 of the Code of Civil Procedure, prohibiting any act described in subdivision (a).

(b) For the purposes of this section:

(1) "Pattern of conduct" means conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "pattern of conduct".

(2) "Credible threat" means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

(3) "Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

(4) "Harass" means a knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

(c) A person who commits a tort of stalking upon another is liable to that person for damages, including but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.

(d) In an action pursuant to this section, the court may grant equitable relief, including but not limited to, an injunction.²⁶⁰

Penal Code S 422

422. Any person who wilfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and

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http://www.cyber-stalking.net/legal_state_california.htm as at 2004/04/29.

specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

For the purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

"Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.²⁶¹

Penal Code S 646.9

646.9 (a) Any person who wilfully, maliciously, and repeatedly follows or wilfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years.

(c) (1) Every person who, after having been convicted of a felony under Section 273.5, 273.6, or 422, commits a violation of subdivision (a) shall be punished by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or five years.

(2) Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three, or five years.

(d) In addition to the penalties provided in this section, the sentencing court may order a person convicted of a felony under this section to register as a sex offender pursuant to subparagraph (E) of paragraph (2) of subdivision (a) of Section 290.

(e) For the purposes of this section, "harasses" means engages in a knowing and wilful course of conduct directed at a specific person that seriously alarms, annoys, torments,

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ibid.

or terrorizes the person, and that serves no legitimate purpose.

(f) For the purposes of this section, “course of conduct” means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “course of conduct”.

(g) For the purposes of this section, “credible threat” means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of “credible threat”.

(h) For the purposes of this section, the term “electronic communication device” includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. “Electronic communication” has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

(i) This section shall not apply to conduct that occurs during labor picketing.

(j) If probation is granted, or the execution or imposition of a sentence is suspended, for any person convicted under this section, it shall be a condition of probation that the person participate in counselling, as designated by the court. However, the court, upon a showing of good cause, may find that the counselling requirement shall not be imposed.

(k) The sentencing court also shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family.

(l) For purposes of this section “immediate family” means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who resides in the household , or who, within the prior six months, regularly resided in the household.

(m) The court shall consider whether the defendant would benefit from treatment pursuant to Section 2684. If it is determined to be appropriate, the court shall recommend that the Department of Corrections make a certification as provided in section 2684. Upon the certification, the defendant shall be evaluated and transferred to the appropriate hospital for treatment pursuant to Section 2684.²⁶²

²⁶²

Ibid.

Penal Code S653m

653m. (a) Every person who, with the intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith.

(b) Every person who makes repeated telephone calls or makes repeated contact by means of an electronic communication device with intent to annoy another person at his or her residence is, whether or not conversation ensues from making the telephone call or electronic contact, guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith.

(c) Every person who makes repeated telephone calls or makes repeated contact by means of an electronic communication device with the intent to annoy another person at his or her place of work is guilty of a misdemeanor punishable by a fine or not more than one thousand dollars (\$1,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith. This subdivision applies only if one or both of the following circumstances exist:

(1) There is a temporary restraining order, an injunction, or any other court order, or any combination of these court orders, in effect prohibiting the behaviour described in this section.

(2) The person makes repeated telephone calls or makes repeated contact by means of an electronic communication device with the intent to annoy another person at his or her place of work, totalling more than 10 times in a 24-hour period, whether or not conversation ensues from making the telephone call or electronic contact, and the repeated telephone calls or electronic contacts are made to the workplace of an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the person has a child or has had a dating or engagement relationship or is having a dating or engagement relationship.

(d) Any offense committed by use of a telephone may be deemed to have been committed where the telephone call or calls were made or received. Any offense committed by use of an electronic communication device or medium, including the internet, may be deemed to have been committed when the electronic communication or communications were originally sent or first viewed by the recipient.

(e) Subdivision (a), (b), or (c) is violated when the person acting with intent to annoy makes a telephone call requesting a return call and performs the acts prohibited under subdivision (a), (b) or (c) upon receiving the return call.

(f) If probation is granted, or the execution or imposition of sentence is suspended, for

any person convicted under this section, the court may order as a condition of probation that the person participate in counselling.

(g) For purposes of this section, the term “electronic communication device” includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. “Electronic communication” has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.²⁶³

Colorado

3.129 Colorado legislators enacted a new law requiring an employer with fifty or more employees to permit an employee who is the victim of domestic abuse, stalking, sexual assault, or other crimes involving domestic violence to take three days of leave in a twelve-month period to seek protection for him or herself. An employee may use the leave time to pursue a civil restraining order, obtain medical care or mental health counselling for self or children, secure his or her home from the perpetrator of the crime, seek legal assistance, or to prepare for and attend court proceedings. In order to qualify for this leave time, the employee must have been employed for twelve months or more, and must give the employer appropriate advance notice of the need for such leave time except when there is imminent danger to the employee’s health or safety. This law authorizes a judge or magistrate to issue a civil restraining order to a business entity in order to protect employees of the business upon finding that an imminent danger exists.²⁶⁴

North Dakota

3.130 In North Dakota stalking is defined as follows: to engage in an intentional course of conduct directed at a special person which frightens, intimidates, or harasses that person, and that serves no legitimate purpose. The course of conduct may be directed toward that person or a member of that person’s immediate family and must cause a reasonable person to experience fear, intimidation, or harassment.²⁶⁵

²⁶³ [Http://www.cyber-stalking.net/legal_state_california.htm](http://www.cyber-stalking.net/legal_state_california.htm) as at 2004/04/29.

²⁶⁴ [Http://www.ncvc.org/src/Legislation/updates/summer2002.html](http://www.ncvc.org/src/Legislation/updates/summer2002.html) as at 2003/02/12.

²⁶⁵ [Http://www.ndcaws.org/stalkingharassment/stalkinglaws.asp](http://www.ndcaws.org/stalkingharassment/stalkinglaws.asp) as at 2004/01/22.

Kansas

3.131 Kansas' **Protection From Stalking Act** was signed into law on May 17 2002. Under the act, a stalking victim may seek a verified petition for a civil protection from stalking order. The parent or an adult residing with a minor may also seek relief on the child's behalf. A protection from stalking order shall remain in effect for up to one year, and be extended for an additional year if a continuing threat of stalking is shown. The Act contains a provision prohibiting disclosure of the victim's address and telephone number, and authorising the issuance of ex parte, temporary orders, as well as allowing attorneys fees to be awarded to the victim in any case in which a protection from stalking order is granted.²⁶⁶

Kentucky

3.132 Under a new law in Kentucky, a plea or verdict of guilty to the offence of stalking in the first or second degree operates as an application for a civil restraining order limiting contact between the victim and the stalker, unless the victim requests otherwise. An order issued pursuant to the provisions of this law, enacted on April 1, 2002 may prohibit the defendant from entering the victim's residence, property, school, or place of employment; from contacting the victim personally or through an agent; or from initiating any personal, written, telephonic, electronic or any other communication likely to seriously alarm, annoy, intimidate, or harass the victim. Such an order is valid for up to ten years with the specific duration to be determined by the court based on such factors as the probability of future violations and the safety of the victim or an immediate family member of the victim. A person who violates a stalking restraining order commits a Class A misdemeanour, and is subject to a mandatory warrantless arrest by a law enforcement officer who has probable cause to believe that a violation has occurred.²⁶⁷

Minnesota

3.133 S.F. 3172, enacted on May 21, 2002, amended Minnesota's stalking law to,

²⁶⁶ [Http://www.ncvc.org/src/Legislation/updates/summer2002.html](http://www.ncvc.org/src/Legislation/updates/summer2002.html) as at 2003/02/12.

²⁶⁷ Ibid.

among other things, expand the definition of aggravated harassing conduct to include acts of criminal sexual conduct as offences which may be considered to establish a pattern of harassing conduct. In addition, specific penalties for certain violation of the law were added, including making it a felony for stalking a victim under eighteen when the stalker is more than thirty-six months older than the victim and the conduct is committed with sexual or aggressive intent. That crime is punishable for up to ten years imprisonment, a fine of not more than \$20,000 or both.²⁶⁸

New Hampshire

3.134 HB 1285, which took effect on January 1, 2003, amended New Hampshire's stalking statute to extend the recourse available under civil protective orders to stalking victims who are minors.

North Carolina

3.135 North Carolina's stalking law was amended by **SB 346**, enacted on January 5, 2002. The new legislation explains the conduct which constitutes stalking to include harassment, which is defined to include written, telephonic, cellular, facsimile, voice mail, computerized, and other electronic communications or transmissions which torment or terrify the person to whom they are directed. The amendment also eliminates the specific intent requirements and lowers the level of fear that the victim must experience as a result of the conduct.²⁶⁹

Washington

3.136 Victims of stalking and domestic violence may now be eligible to receive unemployment insurance benefits upon showing that their unemployment was necessary to protect themselves or their family members from being stalked or abused. In looking for suitable work for such victims, the individual's need to address the physical, psychological, legal and other effects of the stalking or domestic violence must

²⁶⁸ Ibid.

²⁶⁹ Ibid.

be considered. This law was enacted on May 12, 2002.²⁷⁰

West Virginia

3.137 West Virginia's legislature passed HB 97 on March 7, 2002, enacting the **West Virginia Computer Crime and Abuse Act**. Under the new law, it is a misdemeanour for any person to, with the intent to harass or abuse another, to use a computer to make contact with a person without disclosing his or her identity; make contact with a person who has requested that the contact cease; threaten or commit a crime against any person or property; or cause obscene material to be transmitted to a person who has requested that such material not be sent.²⁷¹

Other states

3.138 A handful of states have narrow definitions of stalking. Illinois, for example, limits stalking to cases involving following or keeping a person under surveillance. Maryland requires that the pattern of conduct include approaching or pursuing another person. Hawaii is similar, limiting stalking to cases in which the stalker pursues the victim or conducts surveillance of the victim. Connecticut limits stalking to following or lying in wait. Wisconsin requires "maintaining a visual or physical proximity to a person".²⁷²

Evaluation and recommendation

3.139 The defining of stalking in the South African legal context as found in the **Domestic Violence Act 1998** is discussed above²⁷³ and the recommendations in this regard will not be repeated here save to confirm that the legislature has found adequate justification to provide recourse to victims of stalking, intimidation and harassment within

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² U.S. Department of Justice Office of Justice Programs OVC 'Strengthening Antistalking Statutes' 2002 Legal Series 1 **Bulletin** pp2.

²⁷³ See page 9 and further.

a domestic context. In order to determine the international and domestic imperative to provide legal recourse to victims of stalking in South Africa it is apposite to consider two recent judgements of the Constitutional Court, namely ***Carmichele v Minister of Safety and Security and Another***²⁷⁴ and ***S v Baloyi (Minister of Justice and Another Intervening)***.²⁷⁵

3.140 The Constitutional Court held in ***Carmichele v Minister of Safety and Security and Another***²⁷⁶ that the Constitution imposes a duty on the State and all of its organs not to perform any act that infringes the entrenched rights such as the right to life, human dignity, and freedom and security of the person. The court also held that:

'In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.'²⁷⁷

3.141 At paragraph 45 the Constitutional Court quoted ***Osman v United Kingdom***,²⁷⁸ a judgment of the European Court of Human Rights with apparent approval:

'... the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. In this case the complaints were directed at the failure of the authorities to appreciate and act on what they claim was a series of clear warning signs that one P represented a serious threat to the physical safety of A and his family.'

3.142 In ***S v Baloyi (Minister of Justice and Another Intervening)***²⁷⁹ the court determined that the imperative for legislation to address violence within a domestic

²⁷⁴ 2001 (10) BCLR 995 (CC) para 44.

²⁷⁵ 2000 (2) SA 425 (CC).

²⁷⁶ 2001 (10) BCLR 995 (CC) para 44.

²⁷⁷ Minister of Safety and Security and Another v Carmichele 2004(3)SA305 (SCA).

²⁷⁸ 29 EHHR 245 at 305; [1998] 5 BHRC 293 para 115.

²⁷⁹ 2000 (2) SA 425 (CC).

setting derives from section 12(1) of the Constitution, which reads:

“Everyone has the right to freedom and security of the person, which includes the right –
 . . .
 (c) to be free from all forms of violence from either public or private sources;
 . . .”

3.143 The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read together with the right to privacy as enumerated in section 14 of the Constitution and the obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights as stated in section 7(2) of the Constitution, section 12(1) has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence. The court found that the State is under a series of constitutional mandates which include the obligation to deal with domestic violence, to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected. The court also highlighted the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.

3.144 Before embarking on the merits of the case, the court²⁸⁰ established the relevant constitutional and legislative context pertaining to domestic violence. In so doing the court quoted the US National Council of Juvenile and Family Court Judges as follows:

“Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities’ safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.”

3.145 The submissions received on the impact of stalking on its victims mirrors the impact of domestic violence on its victims and society at large.

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S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC).

3.146 The court²⁸¹ further found that the ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behaviour are normalised rather than combated. Yet it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied.

3.147 The submissions made to the Commission on the Issue Paper on Stalking reflects similar if not the very same difficulties faced by victims of stalking resulting from the ineffectiveness of existing remedies to combat stalking behaviour.

3.148 The court commented that in seeking to remedy the injustice, the Legislature, by way of the **Domestic Violence Act**, was acting in compliance with South Africa's international obligations. Freedom from fear is one of the fundamental rights identified in the preamble of the **Universal Declaration of Human Rights (1948)**, which speaks of: . . . the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.'

3.149 The Declaration on the Elimination of Violence Against Women²⁸² specifically enjoins member states to eliminate violence against women. In this regard the member states undertake to pass legislation to punish violence against women.²⁸³ It is instructive to note that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms.

281 Ibid.

282 General Assembly Resolution 48/104 of 1993.

283 Article 4(d).

3.150 The Convention on the Elimination of Discrimination Against Women²⁸⁴ imposes a positive obligation on states to pursue policies of eliminating discrimination against women by, amongst other things, adopting legislative and other measures which prohibit such discrimination.²⁸⁵ Similarly the African Charter on Human and Peoples' Rights²⁸⁶ obliges signatory states to ensure the elimination of discrimination against women.²⁸⁷

3.151 In explaining the need for domestic violence protection orders the court argued that the ambivalence of the victim and the reluctance of law enforcement officers to 'take sides' in family matters, coupled with the intimate and potentially repetitive character of the violence, is highly relevant to the creation of a special process for the issuing of domestic violence interdicts. The interdict process is intended to be accessible, speedy, simple and effective.²⁸⁸ The principle objective of granting an interdict is not to solve domestic problems or impose punishments, but to provide a breathing-space to enable solutions to be found; not to punish past misdeeds, but to prevent future misconduct. At its most optimistic, it seeks preventive rather than retributive justice, undertaken with a view ultimately to promoting restorative justice.

3.152 The overall purpose of the domestic violence interdict is to protect the victim of domestic violence, uphold the respect for the law and indicate that organised society will not idly sit by in the face of spousal abuse. The Act does not purport to oust existing family and criminal law remedies and penalties, but to supplement and reinforce them. It presupposes an interactive relationship between victim and law enforcement agencies, where the victim initiates and retains some measure of control over the process, while the State ensures that at the end of the day the orders of the court are respected. The form of proceedings is neither that of a normal civil trial nor that of an ordinary criminal trial, but of a special enquiry involving elements of both.

²⁸⁴ Commonly known as CEDAW, the Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995.

²⁸⁵ Article 2.

²⁸⁶ The Charter was signed by South Africa in 1995 and ratified in 1996.

²⁸⁷ Article 18.

²⁸⁸ **Rutenberg v Magistrate, Wynberg and Another** 1997 (4) SA 735 (C).

3.153 The international right to be free from fear and the constitutional right to be free from all forms of violence from either a public or a private source is not restricted to violence within a domestic setting. The Commission believes that the imperative to enact legislative measures to combat violence against women who do not find themselves in a domestic relationship is equally compelling and that similar if not the same arguments put forward in **S v Baloyi** hold true for women outside of a domestic relationship.

3.154 The majority of respondents share the belief that legislative intervention to address stalking is necessary and that a two prong approach should be followed, ensuring both a civil and criminal remedy. Specific recommendations were made with regard to the type of intervention, with the focus being on protection from the stalking behaviour and prevention from the occurrence or re-currence of such behaviour. From the comment received it is clear that criminalisation of stalking or the provision of a protection order against stalking behaviour or a combination of both will do little to ameliorate the situation if the stalker is not provided with a psychological assessment and treatment to address the root cause of the stalking behaviour. A psychological assessment of the complainant may also be necessary as there have been reported cases of complainants suffering from paranoid schizophrenia who in reality exhibit the very conduct they are complaining of. Sensitivity and training of officials in the criminal justice system cannot be over-emphasised in this regard.

3.155 A dissenting view is held by Professor Labuschagne of the University of Pretoria. He argues that the common law definition of assault in South Africa is dynamic enough to apply to incidents of tele-terrorism²⁸⁹ including incidents of silent telephone calls where fear is instilled in the recipient.²⁹⁰ The Commission agrees that apprehension may be awakened by acts or gestures or words which inspire the belief in the victim that

²⁸⁹ He defines tele-terrorism as the invasion and terrorising of another persons privacy and bio-psychological integrity by way of a telephone or another method of distance-connection, such as facsimiles, television or computers.

²⁹⁰ Labuschagne JMT 'Teleterrorisme, psigiatriese besering en die organiese aard van die misdaad aanranding'.

force is immediately to be applied to him or her.²⁹¹ However, as described above in paragraph 1.38 and further, stalking behaviour may consist of behaviour other than what is defined by Professor Labuschagne as tele-terrorism and may result in the victim being fearful that acquaintances or family members may be in physical danger. The Commission concedes that if a silent caller instils fear in a person that immediate personal force will be used against him or her, the caller could be found guilty of assault.

3.156 The Commission believes that in certain instances relief from stalking behaviour will not be adequately provided for through the use of a criminal law remedy. A victim may not wish to put the stalker in jail and may not want to see the stalker's career and future ruined by a criminal conviction. Moreover, arresting the stalker might worsen an already volatile situation and provoke him or her to take aggressive action against the victim and his or her family members. Some victims therefore prefer civil remedies that are designed to protect them from further harassment and to compensate for their losses.

3.157 The Commission is of the belief that the best possible approach would be to allow for both a civil and criminal remedy, thereby acknowledging the seriousness of the behaviour but at the same time granting a victim of stalking access to speedy intervention by way of a protection order. Annexure A contains a proposal of a Bill containing both a civil and a criminal remedy.

3.158 An added advantage of providing a civil remedy for harassment is that the standard of proof is lower in civil cases. A conviction in criminal proceedings requires the courts to be satisfied beyond reasonable doubt that the defendant committed the offence. Criminal law cannot provide protection where the evidence does not satisfy the criminal standard of proof. In civil proceedings, the courts need only be satisfied on a balance of probabilities that the defendant committed the wrongful act.

The Commission recommends that when a protection order is sought and granted, such protection order should be accompanied by a suspended warrant of

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arrest, as is done under the Domestic Violence Act. A police officer should be able to arrest without warrant any person whom he reasonably suspects of having committed an act of stalking accompanied by an element of violence.

3.159 The proposal to mentally evaluate an alleged stalker and the prohibition of firearms and refusal of bail will be dealt with below under specific topic headings.

3.160 The Commission proposes that persistent unwanted attention that causes one to fear or which causes detriment or distress, should be the point at which mere unwanted attention or annoying behaviour becomes criminal behaviour. The Commission agrees that it is more the effect and the nature of the behaviour, rather than the number of phone calls, etc which should define the parameters of stalking.

3.161 Many suggestions, covering a wide range of behaviour, were made in respect of the definition of stalking. The Commission considers all the suggestions relevant. However the Commission is mindful of the fact that exclusively restricting stalking behaviour to the behaviour suggested in the submissions could result in the omission of other behaviour which may be equally fear instilling or detrimental.

The Commission therefore recommends that the definition of stalking should contain a non-exhaustive list of behaviour coupled to the impact of the behaviour. A non-exhaustive list could include nuisance, irritation, watching, loitering near, interfering with property, causing a person to be kept under surveillance by a third person, making telephone calls or using other electronic media, harassment, intimidation, threatening, causing another person to change his or her habits and behaviour, and causing other people to interfere with a person; approaching another person or his or her place of work, residence or where he or she visits, giving or leaving offensive material, interception of e-mail, investigating a victim's medical history or other personal information, telephone tapping and the use of listening devices. The inclusion of a 'catch-all' phrase such as "or any other controlling or abusive behaviour towards a complainant" within the definition of

domestic violence as is used in the Domestic Violence Act, 1998 could be considered.

3.162 The Commission takes note of the submissions received enumerating abuse of power or position in relation to stalking.

The Commission agrees that a defence can be raised when something is done in the pursuance of a legal purpose, irrespective of whether such defence is embodied in legislation. The court needs to weigh the merits of each case. Consequently no specific exemption from prosecution should be listed.

Lex Certa (legal certainty)

Introduction

3.163 The offence of stalking is by nature imprecise, as behaviour which is otherwise considered quite ordinary becomes threatening in context. Stalking is difficult to define as a concept, some actions falling within the ambit of stalking may constitute a legitimate pursuit of a love interest, but seen in a different context, could engender immense fear in the object of the attention. It is difficult to define at what point the behaviour warrants criminal sanction. Consequently it is difficult to set clear parameters in legislation.²⁹² The possibility arises that a court may rule that no crime exists due to the fact that the law does not reflect with certainty which actions constitute a criminal offence. In the absence of comment on this dilemma reference will directly be made to the manner in which comparative jurisdictions have dealt with challenges against stalking legislation. Most of the cases challenging the constitutionality of stalking laws focus on one of two questions: whether the statute is overbroad or whether it is unconstitutionally vague. A statute is constitutionally overbroad when it inadvertently criminalises legitimate behaviour.

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Comparative overview

3.164 In a Pennsylvania case, the defendant claimed that the stalking statute was unconstitutional because it criminalised a substantial amount of constitutionally protected conduct. The court found that the statute was not overbroad and did not criminalise constitutionally protected behaviour. The court noted that “the appellant cites us no cases, nor are we able to locate any, announcing a constitutional right to engage in a course of conduct or repeatedly committed acts toward another person [with the] intent to cause substantial emotional distress to the person.”²⁹³

3.165 Defendants have also argued that stalking laws are unconstitutionally vague. The essential test for vagueness was set out by the U.S. Supreme Court in 1926. A Government restriction is vague if it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” Whether a given term is unconstitutionally vague is left to the interpretation of each state’s courts.²⁹⁴

3.166 In order to overcome unconstitutional vagueness the Kansas legislature revised the state’s stalking statute by including an objective standard, that is, the standard of a “reasonable person,” and defined the key terms “course of conduct,” “harassment,” and “credible threat”. The amended statute has been ruled constitutional.²⁹⁵

3.167 The Texas Court of Criminal Appeals found that the state’s original antistalking law was unconstitutionally vague. Although there were several factors in this ruling, the expansive nature of the prohibited conduct was a key point in the decision. That conduct included actions that would “annoy” and “alarm” the victim. The court observed that “the First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be

²⁹³ Department of Justice Office of Justice Programs OVC ‘Strengthening Antistalking Statutes’ pp3.

²⁹⁴ Ibid.

²⁹⁵ State v Rucker, 1999 Kan. LEXIS 410 (1999) as quoted in U.S. Department of Justice Office of Justice Programs OVC ‘Strengthening Antistalking Statutes’ 2002 Legal Series 1 **Bulletin** pp4.

annoyed.”²⁹⁶ The Texas Legislature subsequently revised the law to correct the problem.

Evaluation and recommendation

3.168 According to established rules of interpretation, a court once it has ascertained the meaning of the words, must ask itself whether the by-law or regulation, so construed, indicates with reasonable certainty to those who are bound by it, the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; that is the end of the matter . . . the test is whether a reasonably precise meaning is ascertainable.²⁹⁷ Steyn²⁹⁸ believes that only reasonable clarity and not absolute clarity is necessary. This means that a provision will not necessarily be contestable on the ground of vagueness if it is difficult to apply it in certain circumstances or if a person experiences difficulty in trying to determine whether or not he or she should comply with an order contained in a regulation or what he or she should do to ensure that his or her behaviour falls outside of the prohibition.

3.169 The Commission is mindful of the pitfall of preparing legislation which is vague or overly broad manner and therefore recommends that legislation aimed at addressing the phenomenon of stalking should contain an objective standard as is found in the state of Kansas. To further ensure reasonable clarity, the Commission recommends that key terms should be defined wherever possible.

²⁹⁶ Long v State 931 S.W.2d 285, 290n.4 (Tex. Crim. App. 1996) as quoted in U.S. Department of Justice Office of Justice Programs OVC ‘Strengthening Antistalking Statutes’ 2002 Legal Series 1 **Bulletin** pp4.

²⁹⁷ *R v Jopp and another* 1949 4 SA 11 (N) 13-14 as quoted by L.C. Steyn Die Uitleg van Wette vyfde uitgawe Juta 1981, pp231.

²⁹⁸ L.C. Steyn Die Uitleg van Wette vyfde uitgawe Juta 1981, pp231.

CHAPTER 4: ISSUES OF CONCERN NOT ADDRESSED IN THE ISSUE PAPER

Firearms

Introduction

4.1 A number of respondents to the Issue Paper on Stalking consider a need to seize arms and dangerous weapons used or threatened to be used in a stalking situation to be a critical component of a successful legal response to stalking.

4.2 The Commission was faced with the same dilemma in the Domestic Violence investigation and came to the conclusion that . . . "it is important to provide a mechanism through which arms and dangerous weapons may be seized to remove the immediate source of danger from the victim's environment and to make it more difficult for the abuser to access these weapons."²⁹⁹ The legislature addressed this concern by specifically providing for the seizure of arms and dangerous weapons in terms of section 9 of the **Domestic Violence Act** in the following circumstances, namely where:

- “(a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or
- (b) possession of such arm or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent's-
 - (i) state of mind or mental condition;
 - (ii) inclination to violence; or
 - (iii) use of or dependence on intoxicating liquor or drugs.

...

4.3 Pursuant to the repeal of the **Arms and Ammunition Act 75 of 1969** (which presented the legal position surrounding seizure of arms at the time of the enactment of the Domestic Violence Act) the **Firearms Control Act, No 60 of 2000** was enacted specifically recognising that a causal link existed between the possession of a firearm and domestic violence. Sections 102 – 104 of the **Firearms Control Act, No 60 of 2000** regulate the declaration of a person as unfit to possess a firearm and the

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South African Law Commission Research Paper on Domestic Violence April 1999 pp227.

consequences of such a declaration. Of importance to this discussion is the fact that this Act specifically states in section 102 that:

“(1) The Registrar may declare a person unfit to possess a firearm if, on the grounds of information contained in a statement under oath or affirmation including a statement made by any person called as a witness, it appears that –

(a) a final protection order has been issued against such person in terms of the Domestic Violence Act, 1998 (Act 116 of 1998);

(b) that person has expressed the intention to kill or injure himself or herself or any other person by means of a firearm or any other dangerous weapon;

(c) because of that person’s mental condition, inclination to violence or dependence on any substance which has an intoxicating or narcotic effect, the possession of a firearm by that person is not in the interests of that person or of any other person;

...”

4.4 In terms of section 103 of the **Firearms Control Act** a court may also declare a person unfit to possess a firearm. The pertinent subsections of section 103 *inter alia* read as follows:

(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of-

... .

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;

... .

(i) any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998);

... .

(l) any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) in respect of which the accused is sentenced to a period of imprisonment without the option of a fine.

... .”

4.5 The effect of a declaration to be unfit to possess a firearm is that all competency certificates, licences, authorisations and permits issued in terms of the Act cease to be valid from the date of conviction, or the declaration. The affected person must surrender all documentation authorising him or her to be in possession of the firearm, all firearms and all ammunition in his or her possession to the nearest police station. Thereafter the

firearms are to be disposed of.³⁰⁰

Comparative overview

Australia

New South Wales

4.6 When making an Apprehended Violence Order the court may make an order restricting or prohibiting the possession of all or any specified firearms by the defendant.³⁰¹ The court may require the defendant to dispose of any firearms in his or her possession and to surrender to the Commissioner of Police any licence permit or authority to possess the firearms in question. A licence or a permit to possess a firearm may not be issued to a person who is, or who has, at any time within ten years before the licence or permit application was made, been subject to an Apprehended Domestic Violence Order. A licence or a permit is also automatically suspended when an interim Apprehended Violence Order becomes final. **The Firearms Act 1996 (NSW)** also prohibits a person who is subject to an Apprehended Violence Order from being a firearms dealer.

New Zealand

4.7 It is a standard condition of every protection order that the respondent must –

- (a) not possess, or have under his or her control, any weapon;
- (b) not hold a firearm licence; and
- (c) surrender to a member of the Police any weapon and any firearms licence.³⁰²

United States of America

³⁰⁰ Section 104 of the Firearms Control Act.

³⁰¹ New South Wales Law Reform Commission Discussion Paper 45 ***Apprehended Violence Orders: Part 15A of the Crimes Act*** pp 24.

³⁰² Domestic Violence Act 86 of 1995, section 21 as quoted in the South African Law Commission Research Paper on Domestic Violence April 1999 at pp226.

Pennsylvania

4.8 The protection order may include ordering the defendant to relinquish weapons which may have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children temporarily. Subsequent to an arrest for violation of an order the police officer shall seize all such weapons.³⁰³

Evaluation and Recommendation

4.9 The Commission acknowledges the validity of the concern that failure to seize firearms could leave a stalking victim even more vulnerable and susceptible to the wrath of the stalker.

4.10 The Commission believes that the **Firearms Control Act, 2000** clearly recognises that a causal link may exist between the possession of a firearm and domestic violence and provides for the finding of a person to be unfit to possess a firearm. This Act provides a wider discretion to the court to declare a person unfit to possess a firearm than section 9 of the **Domestic Violence Act, 1998**.

4.11 **The question arises as to whether the provisions in the Firearms Control Act will adequately provide recourse to a victim of stalking seeking the seizure of a stalker's firearm without specifying stalking specifically. If not, the question is whether adequate recourse would be provided if the sections addressing domestic violence were to be expanded to include stalking in those circumstances. Due to the fact that the Firearms Control Act does not regulate dangerous weapons other than firearms, it may be deemed necessary to mirror the relevant sections of the Firearms Control Act in the legislation regulating stalking behaviour including the power to seize dangerous weapons. Comment is invited.**

³⁰³

Pennsylvania Protection from Abuse Act, sections 6108.(a)(7),6113.(b). as quoted in the South African Law Commission Research Paper on Domestic Violence April 1999 at pp227.

Bail

Introduction

4.12 Submissions on the Issue Paper on Stalking highlight the problem of inadequate bail conditions being set. Ms Waterhouse requests that when a bail application is considered, specific attention should be given to the eliciting of third parties to continue or commence with stalking behaviour towards the complainant or anyone associated with him or her.

4.13 The current legal position regarding bail is regulated by the **Criminal Procedure Act 51 of 1977**. Section 58 of the Criminal Procedure Act provides that an accused in custody, other than an accused charged with Schedule 5 or 6 offences, shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail. The purpose of bail is to strike a balance between the liberty of the accused (who, pending the outcome of the trial, is presumed to be innocent)³⁰⁴ and the interests of society (the accused should stand trial and there should be no interference with the administration of justice).³⁰⁵

4.14 Section 60 provides that where an accused person is charged with an offence listed in Schedule 6 of the **Criminal Procedure Act**, this person must remain in custody unless he or she satisfies the court that exceptional circumstances exist which permits his or her release. The offences in Schedule 6 include, amongst others, murder, rape and robbery committed under specified circumstances. Where an accused person is charged with an offence listed in Schedule 5, the court is required to order the detention of the accused unless he or she adduces evidence which satisfies the court that the interests of justice permit his or her release. Schedule 5 lists offences such as murder and rape.

³⁰⁴ Section 35(3)(h) of the Constitution of the Republic of South Africa 108 of 1996.

³⁰⁵ E du Toit et al Commentary on the Criminal Procedure Act (Service 22, 1999) at 9/2 as quoted in South African Law Reform Commission Discussion Paper Sexual Offences: Process and Procedure 2001 at pp169.

4.15 Section 60(4) lists specific grounds which prohibit the release of an accused on bail. Under these circumstances bail will be refused in the interests of justice.

Comparative overview

United States

4.16 Most states are grappling with the matter of pretrial release of people charged with stalking. Because stalkers often remain dangerous after being charged with a crime, some states have sought means to protect victims at the pretrial stage. Many states permit the court to enter a no-contact order as a condition of pretrial release. A few give the court discretion to deny bail.³⁰⁶

4.17 Eleven states include bail or pretrial release provisions for stalking defendants in their stalking or related laws. Arkansas, Maryland, Texas, and West Virginia require a no-contact order as a condition of pretrial release. Georgia, in addition to requiring a no-contact order, provides that bail may be denied if evidence shows that the defendant previously violated conditions of pretrial release, probation or parole arising from a stalking offense.

4.18 The Illinois statute provides that the court may deny bail if: (i) there is evidence that the defendant committed the stalking offence; (ii) the defendant poses a real and present threat to the physical safety of the alleged victim; (iii) denial of bail is necessary to prevent fulfilment of the threat; and (iv) no combination of conditions can reasonably assure the victim's safety.³⁰⁷

4.19 The Ohio statute lists specific factors that a court must consider in determining the amount and conditions of bail. In Montana, the defendant may not be released without appearing before a judge, and the court must notify the victim or pretrial release.

³⁰⁶ 725 Ill. Comp. Stat. 5/110-4, -6.3 (2001) as quoted in U.S. Department of Justice Office of Justice Programs OVC 'Strengthening Antistalking Statutes' 2002 Legal Series 1 **Bulletin** pp5.

³⁰⁷ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000, pp161.

In California, a hearing must be held before a person arrested for stalking or domestic abuse is released on bail or if the individual is released on his or her own recognizance. Vermont law considers stalking a violent crime, and bail is determined according to State guidelines for violent crimes. In a number of states, the constitutional right to bail does not apply to persons charged with felony offences if the alleged offence was committed while the accused was out on bail, probation, or parole for another offence or if the accused previously has been convicted of a felony.³⁰⁸

Hong Kong

4.20 The Hong Kong Law Reform Commission found it unnecessary to legislate in this matter as the bail procedure in the Criminal Procedure Ordinance (Cap 221) already enables the courts to refuse bail if the defendant would commit an offence while on bail or interfere with a witness. Furthermore, where the court orders an accused to be released on bail, the order may be subject to such conditions as appear to the court to be necessary to secure that he will not commit an offence while on bail or interfere with a witness. Thus, the court may make it a condition of release on bail that the defendant-

- shall reside at a specified address for a specified period;
- shall not enter any specified place or premises;
- shall not go within such distance of any specified place or premises; and
- shall not contact directly or indirectly a specified person.

4.21 The court may exercise these powers where a person is apprehended for the harassment offence and there are substantial grounds for believing that he or she would continue to harass or interfere with the victim.³⁰⁹

New South Wales

4.22 In New South Wales Part 15A of the **Crimes Act** provides that the **Bail Act 1978**

³⁰⁸ Bureau of Justice Assistance Regional Seminar Series on Implementing Antistalking Codes (1996) **Monograph** pp19.

³⁰⁹ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000, pp161.

(NSW) applies to the defendant of an Apprehended Violence Order in the same way as it does to people charged with an offence. Under the **Bail Act 1978 (NSW)** there is a general presumption against granting bail for particular violent offences or those acts that would contravene the stalking provisions in s562AB of the **Crimes Act**. This presumption does not apply in relation to domestic violence offences or breach of an Apprehended Domestic Violence Order where the defendant has –

- a history of violence;
- been violent to the applicant in the past (whether or not the defendant was convicted of a violent offence); or
- failed to comply with a bail condition that was applied by the court for the protection and welfare of the applicant.³¹⁰

4.23 Removing the presumption in favour of granting bail does not mean that bail will automatically be refused, but requires the defendant to prove to the court why bail should be granted.

Evaluation and recommendation

4.24 The Commission is mindful of the fact that the impact of stalking is quite profound on victims. The violation that a victim of stalking is subjugated to may be physical or psychological or both. A corollary can be drawn to the experience of a victim of a sexual offence. In a research report on the implementation of bail legislation in sexual assault cases, Barday and Combrinck state that: “. . . The purpose of the rapist is to terrorise, dominate and humiliate his victim, to render her utterly helpless.”³¹¹ This assessment largely mirrors the experience of a stalking victim. Significantly too, victims of stalking may be particularly concerned of an escalation in violence once they have reported the behaviour, for example an assault or threat to assault and therefore would be specifically interested in the question of whether or not the accused is firstly, arrested, and secondly,

³¹⁰ New South Wales Law Reform Commission Discussion Paper 45 **Apprehended Violence Orders: Part 15A of the Crimes Act** pp 23.

³¹¹ Barday, R., and Combrinck, H. 2002 *Implementation of Bail Legislation in Sexual Assault Cases: First Report* Gender Project, Community Law Centre, University of the Western Cape: South Africa at pp 3.

released before commencement of trial. Barday and Combrinck relate that this concern is generally related to anxiety about the complainant's safety.³¹²

4.25 It has been argued that the inappropriate release of offenders on bail or release with insufficient conditions is not the result of the legislation being inadequate to accommodate the seriousness of offences. Rather, the difficulties arise around the implementation of the legislation – for example, where the prosecution fails to disclose information that will enable a presiding officer to decide whether or not the release of the accused would be in the interests of justice.³¹³ The Research Report by Barday and Combrinck draws the same conclusion.³¹⁴

4.26 Barday and Combrinck conclude the Research Report with the finding that a great deal remains to be done in terms of specialised training on sexual assault and the contents of the bail legislation, addressing stereotypical views regarding these offences, providing guidance to presiding officers on the interpretation of the bail legislation and, very specifically, the appropriate allocation of resources.

The Commission submits that the existing legislation regulating bail is theoretically sound and endorses the above assessment that there should be renewed efforts to train and guide officials regarding bail. The Commission further contends that if legislation acknowledging stalking in relation to persons outside of domestic violence relationships is promulgated, sensitisation towards the effect and impact of stalking should, due to the potential for overlap, form part of the training curriculum addressing domestic violence and sexual offences. This in turn would positively impact on the manner in which bail applications are dealt with.

³¹² Ibid pp 4.

³¹³ South African Law Reform Commission Discussion Paper Sexual Offences: Process and Procedure 2001 at pp183.

³¹⁴ Barday, R., and Combrinck, H pp 64.

Mental evaluation and treatment for stalkers

Introduction

4.27 Although stalking cannot be considered normal or appropriate, a stalker may not necessarily be diagnosed as mentally ill. However, some stalkers appear to suffer from psychiatric or psychological disorders, and it is unlikely that simply punishing a stalker will resolve the problem.

Comparative overview

4.28 The *Project to Develop a Model Anti-Stalking Code* (The Project) in the United States recommends that states should consider requiring evaluation and offering counselling as part of any sentence imposed upon a convicted stalker, and consider requiring counselling as a condition of release for convicted stalkers placed on probation or parole.³¹⁵

4.29 The Project believe that by including counselling in a stalker's sentence it may make it easier to intervene immediately if a stalker resumes pursuit of the victim after release. If a probationer or parolee fails to comply with the counselling conditions, the release could be revoked. In cases where the stalker does not comply, or if treatment fails initially, the prosecutor may be more successful in obtaining a jail sentence at a later court date. However, judges do not always know whether a defendant complies with release conditions.³¹⁶

4.30 However, some mental health professionals and others in the field contend that it is useless to require counselling for individuals who do not believe they have a problem. The Project group recognised that treatment and counselling may be more useful in obsessive, vengeful, or domestic situations than in less common stalking cases involving

³¹⁵ The Law Reform Commission of Hong Kong Report on *Stalking* October 2000, pp162.

³¹⁶ Bureau of Justice Assistance Regional Seminar Series on Implementing Antistalking Codes (1996) **Monograph** pp12.

organised crime, gang activity, or abortion protesters.³¹⁷

4.31 In the opinion of McAnaney and others,³¹⁸ it is in the best interests of the state to mandate a comprehensive evaluation of a defendant who is charged with stalking:

“Ideally, this evaluation should include both a medical and a psychiatric or psychological evaluation. A medical evaluation could alert the court to underlying medical problems that increase the stalker’s risk of violent behaviour. In addition, a psychiatric or psychological evaluation could test the defendant for organic brain damage, delusional disorders, and personality disturbances that influence the stalker’s behaviour – and importantly, the stalkers intent. Based on these evaluations, the court could determine the best course of pretrial action, and if warranted, appropriate sentencing. If the state fails to adequately assess the mental and emotional status of the stalker, it may jeopardize the right of the stalker to fair sentencing and appropriate treatment and the need of the victim for safety and privacy. In addition, because stalking victims often exhibit symptoms of post-traumatic stress disorder or other emotional disturbances, they may need counselling or other supportive services after the stalker is incapacitated.”

4.32 Minnesota and West Virginia require courts to order evaluation and counselling for all stalking defendants. Laws that recommend mental health treatment for convicted stalkers allow medical professionals to determine the treatment to be provided.

4.33 An example of how a treatment order was structured in a particular case follows:

Diana Napolis was found guilty of stalking Steven Spielberg and Love Hewitt. She claimed that director Steven Spielberg had planted a mind-control device in her brain called a “soul catcher” that was controlling her. Napolis was referred for psychiatric evaluation and was diagnosed with a delusional disorder and paranoid schizophrenia. After being released from a psychiatric hospital she has to comply with several conditions to remain free, inter alia taking her psychiatric drugs, staying away from computers and guns and seek court permission before travelling. She has to take part in a program for mentally ill criminals. Prosecutors argued for probation with restrictions instead of jail time for the reason that a prison term would have resulted in Napolis being

³¹⁷ Ibid pp13.

³¹⁸ K G McAnaney, A C Laura and C E Abeyta-Price, “From Imprudence to Crime: Anti-Stalking Laws” (1993) 68 *Notre Dame Law Review* 819, 853-854 as quoted in The Law Reform Commission of Hong Kong Report on *Stalking* October 2000, pp161.

released after a short time and moving about without much supervision.³¹⁹

Hong Kong

4.34 The Hong Kong Law Reform Commission found that the existing powers of the courts to require psychiatric treatment as part of a probation order or to make hospital orders for the mentally disordered are sufficient. It also found that it is unnecessary for legislation to impose a requirement that all persons charged with or convicted of the proposed offence must be subject to mental evaluation or psychiatric treatment.³²⁰

Evaluation and recommendation

4.35 As suggested above stalking may be remedied by either following a civil or criminal justice route or a combination of both.

4.36 Where a complainant chooses to use a civil remedy to address stalking behaviour such remedy could be structured to empower the presiding officer with the option of making a number of orders, one of them being that the respondent submits to psychological treatment, anger management or counselling.

4.37 A complainant may alternatively seek recourse from the criminal justice system, where the perpetrator if convicted would be appropriately sentenced. Without treatment a stalker with a mental disorder who has been convicted and incarcerated may return to the community with strong feelings of anger. This could be exacerbated by their own victimisation in prison and sometimes by a need to avenge the time spent in prison as they lack understanding of the impact of their own behaviour on the victim. Appropriate treatment programmes would alleviate these strong feelings of anger and assist in the development of insight into the impact of their abusive behaviour on victims and communities, and will also help develop alternative behaviours and ways of managing anti-social impulses.

³¹⁹ Available at: [Http://signonsandiego.printthis.clickability.com](http://signonsandiego.printthis.clickability.com) (accessed on 5th May 2004).

³²⁰ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000, pp164.

4.38 A number of options are available to provide offenders with treatment within the criminal justice framework. The offender could submit voluntarily to undergo treatment. The advantage of this option is that if the offender attends voluntarily, he or she may be better motivated to fully utilise the rehabilitation opportunity. However, the disadvantage is that the offender who obtains treatment voluntarily cannot be compelled to remain in treatment for the time period the therapist might assess to be necessary for rehabilitation to be effective.³²¹

4.39 Another option is that treatment may be prescribed by a 'diversion' contract or as part of the sexual offender's sentencing 'package'. Diversion can take place in the pre-trial or post conviction stage.³²² The relevant portion of section 297 of the **Criminal Procedure Act** reads as follow:

"297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-

- (i) on one or more conditions, whether as to- . . .
- (dd) submission to instruction or treatment; . . .
- (ff) the compulsory attendance or residence at some specified centre for a specified purpose;
- (gg) good conduct;
- (hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or . . .

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) which the court may specify in the order; or . . ."

³²¹ South African Law Reform Commission Discussion Paper Sexual Offences: Process and Procedure 2001 at pp 789.

³²² South African Law Reform Commission Discussion Paper Sexual Offences: Process and Procedure 2001 at pp 790.

4.40 The offender may also receive treatment in prison by staff from the Department of Correctional Services or alternatively an offender may receive treatment once released from prison, either as part of his or her parole conditions or as part of the original 'sentencing package'.

4.41 The concept of treatment and rehabilitation of offenders in prison forms one of the principle aims of sentencing. Section 41(6) of the **Correctional Services Act 11 of 1998**³²³ now specifically provides that sentenced prisoners may be compelled to participate in programmes and to use services offered (such as literacy programmes, mental health and support programmes) 'where in the opinion of the Commissioner their participation is necessary, having regard to the nature of their previous criminal conduct and the risk they pose to the community'.³²⁴

4.42 Furthermore sections 77 to 79 of the Criminal Procedure Act deals specifically with the issue of mental illness of the accused and provides for an enquiry into the mental condition of the accused. Section 78 contains a presumption that every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.

4.43 However subsections 78(6) and (7) provide as follows –

“(6) if the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act –

- (a) the court shall find the accused not guilty; or
- (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or mental defect, as the case may be, and direct-

- (i) in a case where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court

³²³ The Act was assented to on 19 November 1998, but is yet to commence.

³²⁴ South African Law Reform Commission Discussion Paper Sexual Offences: Process and Procedure 2001 at pp 801.

considers it to be necessary in the public interest that the accused be –

- (aa) detained in a psychiatric hospital or a prison ending the decision of a judge in chambers in terms of section 29(1)(a) of the Mental Health Act, 1973 (Act 18 of 1973);
 - (bb) admitted to, detained and treated in an institution stated in order in terms of Chapter 3 of the Mental Health Act, 1973 (Act 18 of 1973), pending discharge by a hospital board in terms of section 29 (4A)(a) of that Act;
 - (cc) treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;
 - (dd) released subject to such conditions as the court considers appropriate; or
 - (ee) released unconditionally;
- (ii) in any other case than a case contemplated in subparagraph (i), that the accused-
- (aa) be admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act 18 of 1973), pending discharge by a hospital board in terms of section 29 (4A)(a) of that Act;
 - (bb) be treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;
 - (cc) be released subject to such conditions as the court considers appropriate; or
 - (dd) be released unconditionally.

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.”

4.44 The Commission is convinced that certain stalkers would benefit from treatment or behavioural counselling.

The Commission considers the existing powers of the courts in criminal matters to be adequate in relation to referral, evaluation and treatment of offenders. Where a complainant chooses to use a civil remedy to address stalking behaviour the Commission recommends that the presiding officer be empowered to make a number of orders, one of them being that the respondent submits to psychological treatment, anger management or counselling.

4.45 The Commission would caution though that counselling or treatment is not a guaranteed panacea to the problem of stalking. Victims should still be informed that treatment may not be successful and that they should still take steps to protect themselves. While the defendant or the respondent is undergoing treatment, the victim may have an opportunity to relocate, commence separation proceedings, or make other decisions with less fear.³²⁵

³²⁵

Bureau of Justice Assistance Regional Seminar Series on Implementing Antistalking Codes (1996) **Monograph** pp13.

CHAPTER 5: NON – LEGISLATIVE INTERVENTION

5.1 Legislative intervention on its own is not sufficient in itself to deal with stalking behaviour. The serious obsessive stalker is unlikely to know or believe that his or her conduct is against the law and is likely, even if he or she does know, to disregard that law. If a legislative strategy against stalking is to achieve more than symbolic importance and be useful against the serious stalker, implementation is a key.

5.2 A Threat Management Unit was created in the Los Angeles Police Department in 1989. This Unit has the task of assessing the threat posed by individual stalkers, taking what steps might be possible to stop the stalking before it escalates into more serious violence. Intervention by the Unit is designed to ensure at the very least that the stalker is aware of police awareness of and concern about the behaviour. This is an example of the kind of preventive policing which is needed to implement laws on stalking and to try to get to the problem before it escalates to a more serious level. The Unit also aims to help the victim decide what action he or she can take about the threat. They advise about security, assist with obtaining a restraining order and encourage the victim of stalking to 'manage the threat'.³²⁶

5.3 The fear induced by stalking, the drastic way it disrupts victims' lives, and the real dangers faced by many victims all demand effective intervention by law enforcement. Yet, comparative jurisdictions have found that stalking is exceptionally difficult to police – difficult to investigate, prosecute, and prevent – and the majority of police departments in the USA lack clearly defined policies to deal with it.

5.4 Goode³²⁷ argues that traditional "reactive" policing is ill-suited to the challenges because it means waiting for something to happen and then responding. Where there is an ever-present risk that stalking will cross over into physical violence and victim safety and prevention are the priorities, such an approach inevitably falls short. Stalking by its nature calls for early intervention, preventive action, and proactive problem-solving. These are the hallmarks of community policing.

³²⁶ Goode M 'Stalking: Crime of the 90s?' (1995) 19 **Criminal Law Journal** at pp 202.

³²⁷ Ibid.

5.5 According to the Bureau of Justice Assistance police officials should receive training in four principal areas: stalking law provisions and evidentiary requirements; identifying and monitoring stalking incidents; assessing the potential danger posed by a suspected stalker; and assisting stalking victims. Training for police officials should be incorporated into the training curricula.³²⁸

5.6 Comment is invited on the necessity, extent and form of non-legislative intervention.

6. EXPLANATORY NOTE - ANNEXURE A:

6.1 The Commission proposes a Bill which combines a civil and a criminal remedy. This Bill is in keeping with the Australian approach to stalking and more specifically the twin or mirror system followed in New South Wales i.e Apprehended Domestic Violence Orders and Apprehended Violence Orders. With regard to the civil remedy for stalking the Commission proposes that the Domestic Violence Act, 1998 be mirrored in order to provide the remedy of a protection order to persons being stalked who are not or have not been in a domestic relationship with the person stalking them. One of the advantages of mirroring provisions in the Domestic Violence Act is that the implementation of such stalking legislation would be less troublesome as the implementation hurdles which faced the Domestic Violence Act have to a large extent been overcome. Training and sensitising officials to the application of the legislation and the effects and impact of stalking could then be incorporated into existing curricula dealing with sexual offences and domestic violence.

6.2 The Commission welcomes comment in this regard and invites suggestions with regard to the legislative approach to be followed.

³²⁸

Bureau of Justice Assistance Regional Seminar Series on Implementing Antistalking Codes (1996) **Monograph** pp42.

B I L L

To provide that a person can be convicted of the stalking of another person; to provide for the granting of protection orders with regard to stalking; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance; and

WHEREAS the freedom from fear is one of the fundamental rights identified in the preamble of the Universal Declaration of Human Rights (1948);

IT IS THE PURPOSE of this Act to afford complainants of stalking behaviour an effective remedy in terms of the criminal and civil law, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to give effect to the state's commitment to intercept and eradicate violence committed against persons in the Republic or elsewhere by its citizens.

B E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise-
“**firearm**” means any firearm or any handgun or airgun or ammunition as defined in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000);

“clerk of the court” means a clerk of the court appointed in terms of section 13 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and includes an assistant clerk of the court so appointed;

“complainant” refers to any person who is or has been subjected or allegedly subjected to stalking as contemplated in this Act;

“conduct” means a single act or a number of acts that form part of a pattern of behaviour of the following or similar type –

- (a) following, loitering near, watching or approaching a person;
- (b) making contact with a person in any way, including by telephone, mail, facsimile, electronic mail or through the use of any technology, whether or not conversation ensues;
- (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects;
- (d) loitering near, watching, approaching or entering a place where a person lives, works or visits;
- (e) leaving offensive material to a person, directly or indirectly;
- (f) an intimidating, harassing or threatening act or the causing of such an act against a person, whether or not involving violence or a threat of violence;
- (g) an act or threat of violence against a person or against property of a person;
- (h) keeping a person under surveillance; or
- (i) any other controlling or abusive behaviour towards a person, where such conduct harms, or may cause imminent harm to, the safety, health or well-being of a person.

“court” means any court contemplated in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“dangerous weapon” means any weapon as defined in section 1 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968);

“detriment” includes the following –

- (a) apprehension or fear of violence towards, or against property of any person;
- (b) mental, psychological or emotional harm;
- (c) prevention or hindrance from doing an act which a person is lawfully entitled to do;
- (d) compulsion to do an act which a person is lawfully entitled to abstain from doing.

The inclusion of “detriment” flows from the Queensland model, pertinently addressing behaviour which impacts on the manner in which the victim goes about his or her business.

Examples of paragraph (c) –

A person no longer walks outside his or her place of residence or employment.

A person significantly changes the route or form of transport which he or she would ordinarily use to travel to work or other places.

Example of paragraph (d) –

A person sells a property which he or she would not otherwise sell.

Comment is invited on whether “detriment” should be included in the Bill.

“**member of the South African Police Service**” means any member as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995);

“**peace officer**” means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

“**prescribed**” means prescribed in terms of a regulation made under section 16;

“**protection order**” means an order issued in terms of a regulation made under section 5 or 6 but, in section 5 excludes an interim protection order;

“**sheriff**” means a sheriff appointed in terms of section 2(1) of the Sheriffs Act, 1986 (Act No. 90 of 1986), or an acting sheriff appointed in terms of section 5(1) of the said Act;

“**this Act**” includes the regulations.

Stalking

2. (1) Any person who unlawfully and intentionally engages or attempts to engage or causes another to engage in conduct –

- (a) on any one occasion if the conduct is protracted or on more than one occasion;
- (b) directed at a complainant or the complainant's relatives, acquaintances, work colleagues or property; and
- (c) that –

- (i) is, reasonably arising in all the circumstances, likely to cause apprehension or fear of violence to, or against property of, the complainant or another person; or
- (ii) causes detriment or distress, reasonably arising in all the circumstances, to the complainant or another person

is guilty of the offence of stalking, and is liable upon to conviction to . . .

The Commission requests comments regarding which sentence(s) would be appropriate, for example a reprimand; a fine; imprisonment; submission to instruction or treatment; or a suspended sentence.

(2) A determination of mental illness and criminal responsibility of the person against whom a charge has been brought in terms of subsection (1) must be made in accordance with section 78 of the Criminal Procedure Act, 1977 (Act No.51 of 1977).

(3) For the purposes of subsection (1) it is immaterial whether the person engaging in the conduct–

- (a) intends that the complainant should be aware that the conduct is directed at himself or herself;
- (b) has a mistaken belief about the identity of the person at whom the conduct is intentionally directed;
- (c) intended to cause apprehension, fear, detriment or distress; or
- (d) actually causes the apprehension or fear of violence.

Arrest by peace officer without warrant

3. A peace officer may without warrant arrest anyone whom he or she reasonably believes of having committed an offence of stalking containing an element of violence or threat to imminent violence against a complainant.

Application for protection order

4. (1) Notwithstanding the provisions of section 2, any complainant may in the prescribed manner apply to the court for a protection order.

(2) If the complainant is not represented by a legal representative, the clerk of the court must inform the complainant, in the prescribed manner –

- (a) of the relief available in terms of this Act; and

(b) of the right to lodge a criminal complaint against the respondent.

(3) Notwithstanding the provisions of any other law, the application may be brought on behalf of the complainant by another person who has a material interest in the well-being of the complainant: Provided that the application must be brought with the written consent of the complainant, except in circumstances where the complainant is –

- (a) a minor;
- (b) mentally ill as defined in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973);
- (c) unconscious; or
- (d) a person who, in the opinion of the court, is unable to provide the required consent.

(4) Notwithstanding the provisions of any other law, any minor, or any person on behalf of a minor, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that the complainant may suffer detriment or distress if the application is not dealt with immediately.

(6) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application.

(7) The application and affidavits must be lodged with the clerk of the court who shall forthwith submit the application and affidavits to the court.

Consideration of application and issuing of interim protection order

5. (1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of proceedings.

(2) If the court is satisfied that there is *prima facie* evidence that –

- (a) the respondent is committing, or has committed any act of stalking; and
- (b) detriment or distress may be suffered by the complainant as a result of such stalking if a protection order is not issued immediately,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent, in the prescribed manner.

(3) (a) An interim protection order must be served on the respondent in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued.

(b) A copy of the application referred to in section 4(1) and the record of any evidence noted in terms of subsection (1) must be served on the respondent together with the interim protection order.

(4) If the court does not issue an interim protection order in terms of subsection (2), the court must direct the clerk of the court to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.

(5) The return dates referred to in subsections (3)(a) and (4) may not be less than 10 days after service has been effected upon the respondent: Provided that the return date referred to in subsection (3)(a) may be anticipated by the respondent upon not less than 24 hours' written notice to the complainant and the court.

(6) An interim protection order shall have no force and effect until it has been served on the respondent.

(7) Upon service or upon receipt of a return of service of an interim protection order, the clerk of the court must forthwith cause –

(a) a certified copy of the interim protection order; and

(b) the original warrant of arrest contemplated in section 8(1)(a).

to be served on the complainant.

Issuing of protection order

6. (1) If the respondent does not appear on a return date contemplated in section 5(3) or (4), and if the court is satisfied that –

(a) proper service has been effected on the respondent; and

(b) the application contains *prima facie* evidence that the respondent has committed or is committing an act of stalking,

the court must issue a protection order in the prescribed form.

(2) If the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter and-

(a) consider any evidence previously received in terms of section 5(1); and

(b) consider such further affidavits or oral evidence as it may direct, which shall form part of the record of the proceedings.

(3) The court may, on its own accord or on the request of the complainant, if it is of the opinion that it is just or desirable to do so, order that in the examination of witnesses, including the complainant, a respondent who is not represented by a legal representative –

(a) is not entitled to cross-examine directly a person whom he or she is alleged to have stalked; and

(b) shall put any question to such witness by stating the question to the court, and the court is to repeat the question accurately to the respondent.

(4) The court must, after a hearing as contemplated in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of stalking.

(5) Upon the issuing of a protection order the clerk of the court must forthwith in the prescribed manner cause –

(a) the original of such order to be served on the respondent; and

(b) a certified copy of such order, and the original warrant of arrest contemplated in section 8(1)(a), to be served on the complainant.

(6) The clerk of the court must forthwith in the prescribed manner forward certified copies of any protection order and of the warrant of arrest contemplated in section 8(1)(a) to the police station of the complainant's choice.

(7) Subject to the provisions of section 7(6), a protection order issued in terms of this section remains in force until it is set aside, and the execution of such order shall not be automatically suspended upon the noting of an appeal.

Court's powers in respect of protection order

7. (1) The court may, by means of a protection order referred to in sections 5 and 6, prohibit the respondent from –

(a) committing or attempting to commit any act of stalking;

(b) enlisting the help of another person to commit any such act;

(c) entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;

(d) entering the complainant's residence;

(e) entering the complainant's place of employment; or

(f) committing any other act as specified in the protection order.

(2) The court may, by means of a protection order referred to in sections 5 and 6 order the respondent to submit to -

- (a) psychological treatment,
- (b) anger management instruction;
- (c) counselling or instruction;
- (d) treatment;
- (e) the compulsory attendance or residence at some specified centre for a specified purpose; or
- (f) any other appropriate behavioural intervention mechanism.

(3) If the magistrate, upon consideration of all the evidence relating to the mental condition of the person concerned, including his own observations with regard to such condition, is satisfied that such person is mentally ill to such a degree that he should be detained as a patient, he may issue a reception order in the form prescribed in the Mental Health Act 1973 (Act No. 18 of 1973) authorising the patient to be received, detained and treated at an institution specified in the order, or directing that the patient be received and detained as a single patient under section 10(1) of the said Act.

(4) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or well-being of the complainant, including an order –

- (a) to seize any firearm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 9; and
- (b) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property.

(5) (a) The physical address of the complainant must be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of such address.

(b) The court may issue any directions to ensure that the complainant's physical address is not disclosed in any manner which may endanger the safety, health or well-being of the complainant.

(6) (a) The court may not refuse –

- (i) to issue a protection order; or
- (ii) to impose any condition or make any order which it is competent to impose or make under this section,

merely on the grounds that other legal remedies are available to the complainant.

(b) If the court is of the opinion that any provision of a protection order deals with a matter that should, in the interests of justice, be dealt with further in terms of any other relevant law the court must order that such a provision shall be in force for such limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.

Warrant of arrest upon issuing of protection order

8. (1) Whenever a court issues a protection order, the court must make an order-

- (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and
- (b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.

(2) The warrant referred to in subsection (1)(a) remains in force unless the protection order is set aside, or it is cancelled after execution.

(3) The clerk of the court must issue the complainant with a second or further warrant of arrest, if the complainant files an affidavit in the prescribed form in which it is stated that such warrant is required for her or his protection and that the existing warrant of arrest has been –

- (a) executed and cancelled; or
- (b) lost or destroyed.

(4) (a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.

(b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 15(a).

(c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which-

- (i) specifies the name, the residential address and the occupation or status of the respondent;

- (ii) calls upon the respondent to appear before a court, and on the date and at the time specified in the notice, on a charge of committing the offence referred to in section 15(a); and
- (iii) contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent.

(d) The member must forthwith forward a duplicate original of a notice referred to in paragraph (c) to the clerk of the court concerned, and the mere production in the court of such a duplicate original shall be *prima facie* proof that the original thereof was handed to the respondent specified therein.

(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account-

- (a) the risk to the safety, health or well-being of the complainant;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred.

(6) Whenever a warrant of arrest is handed to a member of the South African Police Service in terms of subsection (4)(a), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

Seizure of arms and dangerous weapons

9. The court must order a member of the South African Police Service to seize any arm or dangerous weapon in the possession or under the control of a respondent and declare such person unfit to possess a firearm in accordance with section 103 of the Firearms Control Act, 2000 (Act No. 60 of 2000) and direct the clerk of the court to refer a copy of the record of the evidence concerned to the National Commissioner of the South African Police Service for consideration in terms of chapter 12 of the said Act.

Variation or setting aside of protection order

10. (1) A complainant or a respondent may, upon written notice to the other party and the court concerned, apply for the variation or setting aside of a protection order referred to in section 6 in the prescribed manner.

(2) If the court is satisfied that good cause has been shown for the variation or setting aside of the protection order, it may issue an order to this effect: Provided that the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.

(3) The clerk of the court must forward a notice as prescribed to the complainant and the respondent if the protection order is varied or set aside as contemplated in subsection (1).

Jurisdiction

11. (1) Any court within the area in which-

- (a) the complainant permanently or temporarily resides, carries on business or is employed;
- (b) the respondent resides, carries on business or is employed; or
- (c) the cause of action arose,

has jurisdiction to grant a protection order as contemplated in this Act.

(2) No specific minimum period is required in relation to subsection (1)(a).

(3) A protection order is enforceable throughout the Republic.

Service of documents

12. Service of any document in terms of this Act must forthwith be effected in the prescribed manner by the clerk of the court, the sheriff or a peace officer, or as the court may direct.

Costs

13. The court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably.

Appeal and review

14. The provisions in respect of appeal and review contemplated in the Magistrate's Courts Act, 1944 (Act No. 32 of 1944), and the Supreme Court Act, 1959 (Act No. 59 of 1959), apply to any proceedings in terms of this Act.

Offences

- 15.** Notwithstanding the provisions of any other law, any person who-
- (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7; or
 - (b) in an affidavit referred to in section 8(4)(a), wilfully makes a false statement in a material respect,

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Regulations

- 16.** (1) The Minister of Justice may make regulations regarding-
- (a) any form required to be prescribed in terms of this Act;
 - (b) any matter required to be prescribed in terms of this Act; and
 - (c) any other matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of this Act.

- (2) Any regulation made under subsection (1)-
- (a) must be submitted to Parliament prior to publication thereof in the *Gazette*;
 - (b) which may result in expenditure for the State, must be made in consultation with the Minister of Finance; and
 - (c) may provide that any person who contravenes a provision thereof fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Amendment of section 40 of Act 51 of 1977, as amended by section 41 of Act 129 of 1993 and section 4 of Act 18 of 1996

17. Section 40 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for paragraph (q) of subsection (1) of the following paragraph:

“(q) who is reasonably suspected of having engaged in stalking conduct as contemplated in section (1) of the Domestic Violence Act, 1998, or the Stalking Act, 200X, which constitutes an offence in respect of which violence is an element.”

Amendment of section 102 of Act 60 of 2000

18. Section 102 of the Firearms Control Act, 2000, is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph:

“(a) a final protection order has been issued against such person in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) or the Stalking Act, 200X;”

Amendment of section 103 of Act 60 of 2000

19. Section 103 of the Firearms Control Act, 2000, is hereby amended by-
(a) the insertion, after paragraph (i) of subsection (1), of the following paragraph:

“(iA) any offence involving violent conduct as contemplated in section 1 of the Stalking Act, 200X;” and

(b) the substitution for paragraph (l) of subsection (1) of the following paragraph:

“(l) any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) or the Stalking Act, 200X in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;”

Short title and commencement

20. This Act shall be called the Stalking Act, 200X, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.