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Stalking: Proposed New Legislation for Namibia



by

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1. THE PROBLEM: SOME RECENT NAMIBIAN EXAMPLES

Imagine being a 15-year-old girl in the city of Windhoek. You are out with a few friends and you suddenly notice a strange man who is staring intently. You feel uncomfortable and nervous because of the way he is looking at you. Is he actually watching you or is he merely staring in your direction? You and your friends cross the street and enter the first store you see. He follows close behind you for the next half hour, shadowing your every movement and trying to make eye contact. Your heart is pounding with fear. You have never seen him before and he is old enough to be your teacher or your parent. A week later, the same man follows you as you are leaving the movies with the same group of friends. Once again, he says nothing but just follows you, even when you suddenly change directions. What does he want? Will he try to hurt you?

Now imagine that you are an independent 28-year-old working woman. After work, you always catch your taxi behind the shop where you buy groceries. The first time you notice a man watching you catch your taxi, you do not think much of it. When you see the same man watching you a second time, you still brush it off as coincidence. But by the third time, you start to suspect that he is waiting for you and you feel suspicious and anxious. One evening after work, you choose a taxi and climb into the back seat. He runs over to your taxi and tries to climb in beside you. You manage to jump out of the taxi before the driver takes off, separating yourself from the stranger you fear. From that day forward, you walk an extra 15 minutes and catch your taxi further up the street to avoid the stranger.

Consider a third situation. You are a middle-aged man. Several years ago, you had a "one-night stand" with a woman that you met in a bar. You did not even exchange names. You know that it was unwise, but it happened. You are now happily married.

But the woman you once slept with keeps following you and your wife around town, and asking other people to tell her your name. You do not know what she really wants, but the situation is making you and your wife feel very anxious and uncomfortable.

2. WHAT IS STALKING?

Stalking is not a legal term in Namibia. Rather it is a general term used to describe the behaviour of wilfully and repeatedly following or harassing another person in circumstances which would cause reasonable persons to be afraid for their safety.

The Stalking Resource Centre, which is a project of the US National Centre for Victims of Crime, defines stalking broadly as "*a course of conduct directed at a specific person that would cause a reasonable person to feel fear*".¹ Another suggested definition is "repeated and persistent unwanted communications and/or approaches that produce fear in the victim".²

It has been pointed out, however, that requiring an element of "fear" may be setting the bar too high, as some instances of stalking make the victim more uncomfortable than afraid, and are more in the nature of being a nuisance.³ It has also been noted that children may not be able to perceive the intent behind stalking, and may even find attention from an adult to be flattering rather than threatening – even though it is known that paedophiles often stalk their victims as a prelude to a sexual assault.⁴ Furthermore, there can be instances where a stalker secretly keeps a person under surveillance, meaning that victim is unaware of the stalking behaviour.⁵

Stalking is a form of gender-based violence as it is experienced mostly by women and is largely perpetrated by men. For example, a large national study in America found that 87% of stalkers in America were men while 78% of stalking victims were women.⁶ Many other studies have confirmed that most stalkers are men and most victims are women.⁷

¹ Stalking Resource Centre, National Centre for Victims of Crime, "Stalking Fact Sheet", undated, www.ncvc.org/src/, accessed 14 April 2008.

² PE Mullen and M Pathy, Stalkers and Their Victims, *Psychiatric Times*, Vol. 23 No. 4, April 2001. The South African Law Reform Commission provides a survey of several other definitions. South African Law Reform Commission (SALRC), "Stalking", Discussion Paper, Project 130, November 2004, Chapter 1, pages 4-ff.

³ South African Law Reform Commission (SALRC), "Stalking", Discussion Paper, Project 130, November 2004 at paragraph 1.10 (hereinafter "SALRC Discussion Paper").

⁴ Ibid at paragraph 1.11.

⁵ Ibid at paragraph 1.21.

⁶ P Tjaden and N Thoennes, Stalking in America: Findings From the National Violence Against Women Survey, US Department of Justice, National Institute of Justice, Washington, DC, 1998; key findings summarised at www.ncvc.org/src/main.aspx?dbID=DB_NVAW587, accessed 14 April 2008. This study involved a national sample of 8000 women and 8000 men, and defined stalking as "a course of conduct directed at a specific person that involves repeated visual or physical proximity, nonconsensual communication, or verbal, written or implied threats or a combination thereof, that would cause a reasonable person to fear".

⁷ See R Purcell, M Pathy, and PE Mullen, A Study of Women Who Stalk, *Am J Psychiatry* 158:2056-2060, December 2001, which cites five British and US studies on this point.

Stalking of women often involves people who are known to the victim, frequently intimate partners or past intimate partners. For example, the US study found that 77% of female victims were stalked by someone they knew, with 59% of female victims in this group being stalked by an intimate partner. Male victims were somewhat less likely to fit into this pattern, with 64% being stalked by someone they knew, but with only 30% of this group being stalked by an intimate partner.⁸

Stalking behaviour

Stalking generally involves a pattern of actions, some of which may be legal and socially acceptable in isolation. For example, a stalker may follow another person, telephone them, or send them text messages or gifts. Such actions are not illegal or objectionable in themselves, but they can be intimidating if they occur repeatedly and against the will of the recipient. Other manifestations of stalking, such as making threats or trespassing, may be clearly illegal in themselves.⁹

An article in the British Medical Journal classifies stalking behaviour into three broad categories:

Firstly, there is **following**, which includes frequenting workplaces and homes, maintaining surveillance, and engineering "coincidences." Secondly, there is **communicating** – by phone, letters, cards, graffiti, gifts, and, increasingly, electronic mail and the internet ("cyberstalking"). Often the stalker will order goods and services on the victim's behalf. Finally comes **aggression or violence**, in which stalkers threaten their victims, harass their families, damage their property, make false accusations about them, and cause sexual or physical injury.¹⁰

The following forms of behaviour can fall within the category of stalking:¹¹

- **Communicating:** This could include making persistent phone calls (including obscene or "silent" calls); sending written messages such as letters, faxes, emails, text messages, or even by means of graffiti; making rude or obscene gestures to the victim; sending gifts from the seemingly "romantic" (such as flowers or candy) to the bizarre (various strange objects), perverted (pornographic objects) or sinister (an object soaked in blood).

⁸ P Tjaden and N Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, US Department of Justice, National Institute of Justice, Washington, DC, 1998; key findings summarised at www.ncvc.org/src/main.aspx?dbID=DB_NVAW587, accessed 14 April 2008.

⁹ See South African Law Reform Commission (SALRC), "Stalking", Issue Paper 22, Project 130, September 2003 at page xvi (hereinafter "SALRC Issue Paper").

¹⁰ R Nadkarni and D Grubin, *Stalking-Why Do People Do It?*, *BMJ* 2000;320:1486-1487, www.bmj.com/cgi/content/full/320/7248/1486, accessed 14 April 2008 (emphasis added).

¹¹ See SALRC Discussion Paper at paragraph 1.41 and National Centre for the Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, available at www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=41822, accessed 27 April 2008.

- **Surveillance:** This could include following the victim from place to place by car or on foot; waiting at the victim's house, school, workplace or some other place the victim often goes; trespassing on the victim's property; persistently watching or spying on the victim; contacting people who know the victim to gather information about him or her; searching public or personal records for information about the victim; getting someone else to watch the victim; using video cameras or recording equipment to monitor the victim; tapping telephones or using listening devices; or intercepting the victim's letters or emails. This category can also include more bizarre behaviour, such as going through the victim's rubbish to learn more about the victim's life, repeatedly gaining entrance to an individual's personal space (such as the home, car or office) and leaving behind some evidence to make the intrusion obvious, or taking items from the victim (such as articles of the victim's clothing).
- **Manipulative behaviour,** such as bringing legal action against the victim, or threatening to commit suicide in an attempt to get the victim to take notice.
- **Defamation:** spreading false information about the victim, such as making false claims of infidelity. This could be a way of trying to isolate the victim and weaken his or her support network, which could make the victim feel more vulnerable and give the stalker a feeling of power and control.
- **Culturally inappropriate courtship behaviours** (such as bluntly asking for sex repeatedly or persisting in asking for dates after the victim has indicated that this is unwelcome).
- **Indecent exposure,** such as repeatedly "flashing" the victim. This can be done in such a way as to make the exposure appear accidental.
- **Threats and violence:** This could include making explicit threats of harm; property damage (such as slashing tyres on the victim's car); actual physical attacks (minor assaults that leave abrasions or bruises intended to frighten the victim, assaults which can cause serious injury, or sexual assaults); killing pets; threatening dependants or other third parties known to the victim; or even situations where the stalker threatens to harm himself or herself.
- **Litigation abuse:** using the legal system to harass a victim by continuously bringing baseless lawsuits or protection order applications or criminal charges against the victim.
- **Cyberstalking:** This refers to using electronic mediums such as the internet to pursue, harass or contact the victim. For example, it could include repeatedly sending unwanted e-mails which are abusive, threatening or obscene; sending computer viruses to the victim; impersonating the victim online and sending abusive e-mails in the victim's name, putting the victim's name on online sex forums or inviting persons online to call the victim or to come to the victim's home.

- **Gang stalking:** This refers to stalking by multiple perpetrators, or to situations where one perpetrator enlists others to assist in carrying out stalking activities. It has been pointed out in South Africa that “perpetrators of sexual violence who are also members of gangs sometimes use the other gang members or friends to maintain surveillance over the victim or to intimidate the victim”.¹²
- **Indirect stalking:** using third parties to carry out the stalking behaviours (such as asking third parties to deliver gift packages to victims) or indirectly intimidating or threatening the victim by making contact with the victim’s employer, children or other family members.

The following example from the United States illustrates how invasive “cyberstalking” can be:

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.¹³

Stalking behaviours have occurred for centuries, but this phenomenon has only recently been named and recognised as a social problem. Media reports began using the word “*stalking*” in the late 1980s to describe following and harassment of celebrities, and the term then became used more broadly. The US state of California passed the first anti-stalking statute in 1990. Other states in the United States followed suit, and stalking laws were also enacted in Canada, Australia, the United Kingdom and some other European countries. The social recognition of stalking also stimulated studies of stalking behaviour.¹⁴

¹² SALRC Discussion Paper at paragraph 1.41.

¹³ This 1999 case was reported in the *Los Angeles Times*. The description is quoted from SALRC Discussion Paper at paragraph 1.65.

¹⁴ PE Mullen and M Pathy, *Stalkers and Their Victims*, *Psychiatric Times*, Vol. 23 No. 4, April 2001.

Categories of stalkers

There are many different ways of categorising stalkers. A US policing manual published in 2004 provides the following description of types of stalkers:

One widely accepted typology of stalkers is based on the stalker's underlying motives, and includes the following categories:

Simple obsessional. This is the most common type. The stalker is usually a male, and the victim an ex-spouse, ex-lover, or former boss. The stalking sometimes results from the stalker's feeling the victim has mistreated him or her. In intimate relationships, the stalking frequently begins before a breakup.

Love obsessional. The stalker is a stranger or casual acquaintance to the victim, but is obsessed and begins a campaign of harassment to make the victim aware of his or her existence. This type often stalks a celebrity or public figure, but can also stalk a non-celebrity.

Erotomania. The stalker falsely believes that the victim is in love with him or her, and that, but for some external obstacle or interference, they would be together. The victim may be rich or famous, or in a position of power (eg, a movie star, employer, or political figure). In this situation, the stalker could also pose a great risk to those close to the victim (eg, a spouse or lover perceived to be "in the way").

False victimisation syndrome. This is extremely rare and involves someone who consciously or subconsciously wants to play the role of victim. He or she may make up a complex tale, claiming to be a stalking victim. In such cases, the would-be victim is sometimes the actual stalker, and the alleged offender is the real victim.

Another typology used to classify stalkers identifies them by their relationship to the victim. This typology divides stalkers into two basic categories: intimate and non-intimate. The following is a brief description of these categories:

Intimate. A former relationship exists between the stalker and the victim. There is likely a history of abuse, such as domestic violence, by the stalker. The stalker often seeks to re-establish a relationship the victim has tried to end.

Non-intimate. The stalker has no interpersonal relationship with the victim. He or she may choose the victim after a brief encounter, or simply after observing the victim. The victim is often unable to identify the stalker when he or she first becomes aware of being stalked. This type is subdivided into two categories:

- **Organised.** The relationship between the stalker and the victim is characterised by one-way, anonymous communication from stalker to victim. The stalker is methodical and calculating, and the victim usually does not know the stalker's identity.

- **Delusional.** The relationship between the stalker and the victim is based solely on the stalker's psychological fixation on the victim. The stalker is delusional and falsely believes he or she has a relationship or other connection with the victim.

Again, stalkers often exhibit behaviours from more than one typology. The typologies are an overview, and you should never use them as a substitute for a thorough threat assessment.¹⁵

The South African Law Reform Commission also refers to several other more unusual categories of stalkers:

Disgruntled clients of private organisations or public bodies: Some private organisations and public bodies have extensive contact with members of the public. On occasion, their clients take exception to their policies or decisions, or are dissatisfied with the type or level of service delivered by them. These clients may choose to express their anger or dissatisfaction by stalking or harassment. The usual tactics employed by these disgruntled clients include the following:

- repeated telephone or personal calls to the office, complaining and insisting that their demands be met, or questioning the organisation's policy or decision with abusive, insulting and humiliating remarks;
- lodging repeated oral and written complaints on frivolous or vexatious matters which are without substance or even malicious;
- following the responsible officer or staff;
- visiting the home of the officer after finding out his or her address by following the officer home; and
- intercepting or threatening to intercept the officer or his or her staff near their place of work or on the street.

These stalkers are vengeful over some real or imagined grievance.¹⁶

¹⁵ National Centre for Victims of Crime, Community-Oriented Policing Services (COPS) Manual on Stalking, 2004, available at www.cops.usdoj.gov/mime/open.pdf?Item=1042, accessed 14 April 2008 at pages 7-8 (hereinafter "COPS Manual"), citing J Meloy, "Stalking and Violence" in J Boon and L Sheridan (eds), *Stalking and Psychosexual Obsession: Psychological Perspectives for Prevention, Policing, and Treatment*. West Sussex (United Kingdom): John Wiley & Sons, Ltd, 2002 and J Wright, A Burgess, A Burgess, A Laszlo, G McCrary and J Douglas, "A Typology of Interpersonal Stalking", *Journal of Interpersonal Violence* 11(4): 487-502, 1996.

¹⁶ Quoted from SALRC Issue Paper at xxii-xxiii, footnotes omitted. One comment on this category in South Africa was as follows:

Ms Massyn questions the validity of the category regarding disgruntled clients of private organisations, 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.

SALRC Discussion Paper at paragraph 1.86.

Clients of counselling staff: Counsellors are often stalked or harassed, and the risk may extend to their family members. The Health Professions Council of South Africa reported that the personal details of some professionals had to be removed from the roll to prevent harassment.¹⁷

Debt collectors: Debt collectors may exert pressure on debtors or their referees, friends, relatives and neighbours by frequently calling the home of the debtor and leaving threatening messages or publicising the indebtedness of the debtor by putting up notices near his home or place of work.¹⁸

Victims of crime: Victims of crimes often become victims of stalking as well. The perpetrator of a crime sometimes uses stalking as a method to instil fear in an effort to ensure the victim's silence.¹⁹

How dangerous is stalking?

Stalking can certainly be dangerous to the victim, although different studies on this question have produced inconsistent results. One survey of the literature on this topic provides the following summary:

Zona et al (1993) were the first to systematically study assault in stalking. They suggested a low risk of overt violence, with only two out of 74 stalkers physically assaulting their victims. In contrast, Harmon and colleagues (1998) reported that 46% of stalkers exhibited violent conduct. The majority of stalkers who threatened their victims subsequently acted upon their stated intentions. Kienlen and colleagues (1997) reported that 32% of stalkers in their study committed assaults, with assault higher among the non-psychotic subjects with personality disorder or substance abuse. Mullen et al (1999) reported [that] over a third of the victims in their study were attacked by their stalker. In addition, 6% of stalkers assaulted third parties whom they believed were impeding their access to the target.

These studies are based on samples of stalkers. Victims, however, are in our view the most reliable source of information about intimidation, threats and violence. Hall (1998) reported that 41% of the 145 victims studied had been threatened, 43% had their property damaged, 38% were hit or beaten, and 22% were sexually assaulted. In addition, 11 subjects were kidnapped and two were victims of arson attacks. Pathy and Mullen (1997), in their sample of 100 victims, reported that 58 had been threatened, 36% were assaulted and 7% suffered sexual attacks. Threats preceded assault in 70% of cases. Assault was significantly more likely for victims who had had a former intimate relationship with the stalker. Meloy (1999, 1998) concluded that approximately half of all stalkers threaten the victim. The majority of those who threaten do not proceed

¹⁷ SALRC Issue Paper at xxii-xxiii. One counselling professional in South Africa stated: "I have been stalked by both male and female patients. It can be very invasive if you are constantly bombarded with letters and calls. It can be disruptive to your private life. It can be a problem when you don't know who could be lurking in the shadows." Id.

¹⁸ Quoted from SALRC Issue Paper at xxii-xxiii, footnotes omitted. In South Africa, sections 14-15 of the Debt Collectors Act 114 of 1998 regulate acts by debt collectors to some extent.

¹⁹ SALRC Discussion Paper at paragraph 1.72.

to subsequent violence. Nonetheless, threats should be taken seriously, as those who proceed to assault have usually threatened previously. Violence occurs in approximately a third of the cases, yet rarely results in serious physical injury.²⁰

A national US study reported that 45% of female victims and 43% of male victims were overtly threatened by their stalkers.²¹ The US community policing manual estimates that 25-35% of stalking cases actually involve violence and concludes:

Stalkers are, by their very nature, obsessive and dangerous. Regardless of typology, you should always consider stalkers capable of killing their victims. Anyone the stalker perceives as impeding his or her contact with the victim, including police, prosecutors, and advocates, is also at risk. Some stalkers seek union with their victims through murder-suicide. Any suicidal statements or gestures the stalker makes should serve as an indication that the stalker is a high-risk threat.²²

Stalking seems to be particularly dangerous when the stalker is an intimate partner. The same US study cited above reported that 81% of women who were stalked by a current or former husband or cohabiting partner were also physically assaulted and 31% were also sexually assaulted by that partner.²³ It is also significant to note that in the USA, stalking precedes an exceedingly high proportion of homicides by intimate partners; over 75% of attempted and completed murders of women by their intimate partners were preceded by stalking during the year prior to the offence.²⁴

The impact on the victim

Stalking can have a profound impact on the victim even when it does not turn overtly violent.

Stalking's impact is often wide-ranging, severe, and psychologically traumatic. Many victims feel constantly on alert, vulnerable, out of control, stressed, and anxious. Dealing with stalking can consume all their energy. They may experience a loss of trust, long-term emotional distress, and significant disruption of everyday living. Many seek psychological counselling. Victims'

²⁰ PE Mullen and M Pathy, *Stalkers and Their Victims*, *Psychiatric Times*, Vol. 23 No. 4, April 2001.

²¹ P Tjaden and N Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, US Department of Justice, National Institute of Justice, Washington, DC, 1998; key findings summarised at www.ncvc.org/src/main.aspx?dbID=DB_NVAW587, accessed 14 April 2008.

²² COPS Manual at pages 2 and 9.

²³ P Tjaden and N Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, US Department of Justice, National Institute of Justice, Washington, DC, 1998; key findings summarised at www.ncvc.org/src/main.aspx?dbID=DB_NVAW587, accessed 14 April 2008.

²⁴ COPS Manual at page 3, citing J McFarlane, J Campbell, S Wilt, C Sachs Y Ulrich and X Xu, "Stalking and Intimate Partner Femicide," *Homicide Studies* 3(4):300-316 (1999).

symptoms tend to worsen with each new incident, and may be compounded by concerns about the effects on their children and other secondary victims.

Stalking can also trigger a wide variety of behavioural reactions. Many victims take steps to avoid being followed and spied on. They alter their normal routines, avoid going out alone, and give up leisure activities. To protect themselves, they may screen all telephone calls (at home and work) and change their telephone number, email and postal addresses... More drastic action may include temporary or permanent relocation..., often uprooting children in the process, leaving behind close friends and relatives, and abandoning careers.²⁵

In addition to the psychological trauma, victims can incur extra expenses such as costs for extra security measures or counselling services. They may also have to endure considerable inconvenience, such as changing their regular routes to and from work or changing their telephone numbers or email addresses.

The South African Law Reform Commission cites a report from the Manitoba Law Reform Commission (in Canada) which analyses the impact on victims in terms of interference with specific rights of the victim:

- (a) **Interest in privacy:** Privacy includes the notion of being left alone, free of unwanted scrutiny, in our private lives.
- (b) **Interest in emotional or psychological security:** This includes being protected against unjustifiable conduct which threatens self-esteem, emotional security and mental health.
- (c) **Interest in freedom of action and autonomous decision-making:** This includes the freedom from being subjected to the control, coercion or intimidation of the stalker so as to be compelled to act in a manner inconsistent with the victim's interests and desires.²⁶

One victim of stalking in South Africa described the impact as follows:

"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."²⁷

3. STALKING IN NAMIBIA

There have been no studies of the problem of stalking in Namibia. A search of newspaper articles reveals a few examples of the problem in a range of different contexts:

²⁵ COPS Manual at pages 9-10.

²⁶ SALRC Issue Paper at xxiv, footnote omitted.

²⁷ SALRC Discussion Paper at paragraph 1.93.

- In 2006, a news photographer was arrested for trespassing in Swakopmund when he was "stalking" Angelina Jolie in an attempt to get a photograph. When he entered police offices in an effort to gain access to the adjacent hospital where the movie star was giving birth, he was arrested for entering an area of the police property which was not accessible to the public.²⁸
- In 2004, Swakopmund residents complained that some sex workers were "stalking" and harassing local residents and tourists in their search for clients, with one person reporting that "they scream and storm after possible clients in cars".²⁹
- In 1999, it was reported that "state security agents have stepped up their surveillance of Namibia's newest political party by stalking party activists as they undertake a mobilisation campaign around the country". Members of the newly-formed party claimed that they were being monitored by state intelligence officials as they went about their lawful activities.³⁰

It would be extremely difficult to extract information on stalking from national crime statistics because there are many different criminal offences which might apply to different manifestations of stalking, as discussed below.

It is relevant to Namibia to note that the definition of "gender-based violence" in the latest draft of the SADC Protocol on Gender is broad enough to encompass the concept of stalking:

"gender based violence" means all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.³¹

4. CURRENT LAW IN NAMIBIA

There are a few laws which can be used to address stalking in Namibia, although there is no legislation aimed specifically at this behaviour.

A. Statutory remedies for stalking in specific contexts

Combating of Domestic Violence Act, No 4 of 2003

Where stalking occurs within a domestic relationship, it can be addressed by the Combating of Domestic Violence Act. The definition of domestic violence in section 2 of this Act includes both "intimidation" and "harassment".

²⁸ "Photographer arrested for trespassing while stalking Brangelina", *The Namibian*, 22 May 2006.

²⁹ "Swakop residents to tackle hookers", *The Namibian*, 19 August 2004.

³⁰ "Spooks trail CoD across Namibia", *The Namibian*, 23 April 1999.

³¹ SADC Protocol on Gender and Development, as amended by Senior Officials responsible for Gender and Women Affairs, in Livingstone, Zambia, 13 December 2007.

"Intimidation" means

intentionally inducing fear in the complainant, or a family member or dependant of the complainant by –

- (i) committing physical abuse against a family member or dependant of the complainant;
- (ii) threatening to physically abuse the complainant, or a family member or dependant of the complainant;
- (iii) exhibiting a weapon; or
- (iv) any other menacing behaviour, including sending, delivering or causing to be delivered an item which implies menacing behaviour.

"Harassment" means

repeatedly following, pursuing or accosting the complainant, or a family member or dependant of the complainant, or making persistent unwelcome communications, and includes but is not limited to –

- (i) watching, or loitering outside or near the building or place where such person resides, works, carries on business, studies or happens to be;
- (ii) repeatedly making telephone calls or inducing a third person to make telephone calls to such person, whether or not conversation ensues; or
- (iii) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects or messages to such person's residence, school or workplace;

A domestic relationship is defined in terms of the law to include relationships between spouses, parents and children, extended family members who have some domestic connection and romantic partners of the opposite sex. Past spouses and partners are covered by the definition for at least one year after the break-up of the relationship if they have no children together, and for longer if they do have children.

So where stalking occurs between people who are in what the law defines as a domestic relationship, the victim of the stalking can utilise the Combating of Domestic Violence Act to get a protection order from a magistrate's court ordering the stalker to stop the offending behaviour. Failure to obey the court order is a criminal offence punishable by a fine of up to N\$8000 or imprisonment of up to two years, or both.

Labour Act, No 11 of 2007

Some manifestations of stalking in a workplace environment would be covered by the definition of sexual harassment in the Labour Act.

In terms of section 5 of this Act, "sexual harassment" means

any unwarranted conduct of a sexual nature towards an employee which constitutes a barrier to equality in employment where –

- (i) the victim has made it known to the perpetrator that he or she finds the conduct offensive; or
- (ii) the perpetrator should have reasonably realised that the conduct is regarded as unacceptable, taking into account the respective positions of the parties in the place of employment, the nature of their employment relationships and the nature of the place of employment.

Sexual harassment is thus forbidden by the Labour Act (although the consequences for the perpetrator are not entirely clear). The Act goes on to say that where a victim resigns to escape the harassment this will be treated as a "constructive dismissal" which entitles the victim to the same remedies as an employee who has been unfairly dismissed.

So where an employer or a co-worker is engaging in stalking behaviour with a sexual purpose, this situation can be addressed through the Labour Act.

B. Applicable crimes

Stalking can and does occur between persons who would not be covered by the Combating of Domestic Violence Act or the Labour Act. But the legal options available in other situations are less well-suited to the problem.

Crimen injuria

A stalker could be charged with the criminal offence of *crimen injuria*. *Crimen injuria* is the unlawful, intentional and serious violation of the dignity or privacy of another person. It is very difficult to determine precisely what actions will constitute *crimen injuria*, as this can differ depending on the particular circumstances of each case. There are four components of the crime: (1) impairment of the dignity of another person; (2) seriousness; (3) unlawfulness; and (4) intentionality.³²

The first criterion for the offence is that the offender must impair the dignity of the complainant. Dignity, as a concept, has been explained in both positive and negative terminology. In a positive sense, dignity is described as a person's right to self-respect, privacy and mental tranquillity. Negatively, dignity has been described as a person's right to be free from insulting, offensive, humiliating and degrading treatment and to be free of any invasion of privacy in their homes, property, possessions and communications.

The second criterion is that the invasion of dignity must be serious. The determination of whether an act is sufficiently serious is largely dependent upon "the modes of thought and conduct prevalent in a particular community at a particular time and place and is in principle determined by an objective test."³³ The court will take into account several factors when determining the gravity of the offence. These include:

³² CR Snyman, *Criminal Law*, 4th edition, Durban: Butterworths, 2002 at page 453.

³³ Ibid at page 458.

- age
- sex
- social standing
- sexual impropriety
- the parties' previous relationship
- persistence
- publicity
- the complainant's personal reaction
- the public interest and
- the nature of the act.

The third criterion is that the invasion of dignity must be done unlawfully. This means that in certain circumstances, self-defence, necessity, consent, and statutory authority may justify actions which would otherwise be categorised as *crimen injuria*.

Finally, the offender must intentionally offend the complainant's dignity. This implies that the offender knows that the complainant did not consent to his or her conduct. Mere negligence is insufficient to support the cause of action of *crimen injuria*.³⁴

"Peeping toms", opening private post and eavesdropping on private conversations with listening devices are actions which may be considered forms of *crimen injuria* because they constitute invasions of privacy.³⁵ "Grooming" a child as a preliminary step towards sexual contact can constitute *crimen injuria*, as an invasion of dignity.³⁶

A stranger who stares or follows a woman without her consent may also commit *crimen iniuria*.³⁷ An example is the 1923 case of *R v Van Meer*,³⁸ where a 47-year-old man was found guilty of *crimen injuria* for following a 24-year-old woman around a library. The charge was that

with indecent and lascivious intent he followed the complainant from place to place in the precincts of the Public Library, at the same time staring into her face and standing close beside her repeatedly and following her from thence to a motor-car, behaving in a deliberately objectionable manner with intent to insult and injure the complainant in her modesty, which actions the accused did damage and insult the complainant, and thus the accused did commit the crime of *crimen injuria*.³⁹

The accused was found guilty in the lower court, but challenged this verdict on appeal. His major ground of appeal was that the injury was not serious enough

³⁴ Ibid at pages 453-9; J Burchell and J Milton, *Principles of Criminal Law*, 3rd edition, Cape Town; Juta & Co (2005) at pages 747.

³⁵ CR Snyman, *Criminal Law*, 4th edition, Durban: Butterworths, 2002 at page 457; J Burchell and J Milton, *Principles of Criminal Law*, 3rd edition, Cape Town; Juta & Co (2005) at pages 747-ff.

³⁶ J Burchell and J Milton, *Principles of Criminal Law*, 3rd edition, Cape Town; Juta & Co (2005) at page 750.

³⁷ CR Snyman, *Criminal Law*, 4th edition, Durban: Butterworths, 2002 at page 457.

³⁸ 1923 OPD 77.

³⁹ At page 78.

to constitute the crime of *crimen injuria*. He argued that the case should be dismissed against him because the lower court found his actions "objectionable and deliberately insulting" without finding that he had an indecent and lascivious intent. The appeal court rejected this argument:

I am quite willing to accept the proposition laid down...that under certain circumstances acts which are merely insulting would be considered to be minor offences by our modern law; and one can quite imagine cases where that would clearly be so. If one man, for instance, makes an insulting gesture at another man, not amounting to assault or anything like that, that would be very likely be considered not to constitute a criminal *injuria*; it might be such a light form of *injuria* that the complainant might be left to his civil remedy. That might be in the case of one man insulting another, or of a woman insulting another woman. But it seems to me that the position is altogether different when a man insults a woman. When a woman, especially a young woman, is insulted by a man with whom she is not even acquainted, for then, according to the circumstances of each case, the insult may be of such a serious nature as to found a criminal charge. The law would naturally be always more studious to protect girls and women against insults from men than it would be in the case of insult offered by one man to another, for obvious reasons which I do not need to enlarge upon. So that taking that the magistrate finds that the accused's intent was not in any way indecent or lascivious, but was merely insulting, seems to me under the circumstances, it is not such a light form of *injuria* as to be relegated to the civil law.⁴⁰

The court refused to lay down a definition of the crime *crimen injuria*, but stated that the crime would depend on a variety of circumstances:

It would depend upon the place where the acts are committed, and upon the time of the commission. It would depend upon the relation between the parties; upon the sex of the two parties concerned. It would also depend very largely upon the degree to which the conduct is persisted in after it has been shown to be distasteful, or to be objected to by the other party. It is contended that very often an act which might seem injurious is really meant to express a legitimate admiration for a lady; and that an act merely expressing admiration would not necessarily constitute an *injuria*. That may be, but when it is made clear by the lady that the acts are distasteful, or unwelcome, and are objected to then, if the acts are repeated again and again, a *crimen injuria* may be committed.⁴¹

Ultimately, the court dismissed the accused's appeal but conceded that "[i]t is perhaps a case which is very near the border line".⁴² However, the court acknowledged that "[i]f it is not the crime of *injuria*, then one does not see how ladies can be prevented from being subjected to conduct such as took place in this case".⁴³

⁴⁰ At page 80.

⁴¹ At page 81.

⁴² At page 82.

⁴³ Id.

The High Court of Namibia addressed the crime of *crimen injuria* more recently in the 1992 case of *S v Vries*.⁴⁴ In this case, the accused was charged with *crimen injuria* and assault. It was alleged that the accused impaired the dignity of the complainant by stating to him, "Jy is 'n Damara, jy is sleg en jou hond" which translates to "You are a Damara, you are bad and you are a dog." The court described the *crimen injuria* as "saying or doing something to another unlawfully and with the intention of seriously impairing such person's dignity".⁴⁵ The court held that mere vulgar abuse can injure a person's dignity but only if the accused has the intention to degrade and humiliate and the complainant actually testifies that he or she was in fact degraded or humiliated. In this case, the complainant did not testify that he felt humiliated and degraded by the insult and a result no charge of *crimen injuria* could stand.

The crime of *crimen injuria* is alive in Namibian jurisprudence, but its definition is very subjective. The *Van Meer* precedent on *crimen injuria* committed by means of following a stranger is quite dated, and appears to be based to some extent on stereotypical ideas of relations between men and women. So, although the charge of *crimen injuria* could be used successfully in at least some situations of stalking, the crime is not intended for this specific purpose and so is not an ideal fit.

Assault

Assault is widely understood to mean the unlawful and intentional application of physical force to another person's body. What is less widely known is that the crime of assault also covers threats of assault. In other words, inspiring an apprehension in another person that he or she is about to be assaulted is in itself a form of assault. It is also not widely known that even slight forms of physical contact can qualify as assault – such as bumping against someone or holding a person's arm.⁴⁶

Thus, some forms of stalking could be prosecuted as assault – but other forms of stalking (such as repeatedly following someone or sending them text messages) would not necessarily give rise to a reasonable fear of imminent assault.

Trespass

Stalking behaviour can also be addressed by the statutory crime of trespass if the stalking extends beyond the public realm onto private land or buildings. The Trespass Ordinance, No 3 of 1962 prohibits entry or presence upon land or in buildings without permission of the owner or lawful occupier. Careful recording of the incidence of trespass and supporting evidence from other eyewitnesses could assist in obtaining a conviction for trespass.

Other criminal offences

Depending on the specific form which the stalking takes, it is possible that there may be violations of other criminal laws or municipal regulations – such as the

⁴⁴ 1992 NR 5 (HC).

⁴⁵ At page 6 and following discussion.

⁴⁶ CR Snyman, *Criminal Law*, 4th edition, Durban: Butterworths, 2002 at pages 430-1.

offences of criminal defamation or malicious damage to property, or prohibitions on loitering or committing public nuisances. However, such prohibitions are not aimed at the problem of stalking and would be applicable only to a limited range of stalking behaviours.

Overview

These criminal offences could be applied to some specific incidents of stalking, but they are not applicable to many forms of stalking behaviour, and not well-suited to a situation where the offending behaviour takes the form of a pattern of connected incidents.

C. Civil law remedies

Some recourse for stalking behaviour may also be found in civil law remedies.

Interdicts

One option would be to approach a court for an interdict, which is a court order directing that the person in question desist from the potentially damaging behaviour. In order to obtain a final interdict there must be a clear right on the part of the complainant, an actual or threatened violation of the complainant's right and the absence of similar protection by another remedy.

Although the concept of an interdict sounds useful, this civil remedy has some drawbacks. For instance, obtaining an interdict may be difficult where the complainant does not know the identity of the stalker – and the police will not be available to assist since this matter is a civil one and not a criminal one. Furthermore, obtaining an interdict is expensive as it generally requires the assistance of lawyer. Finally, an interdict may not always be appropriate where there is an emergency situation, although it is possible for the court to consider an interdict on an urgent basis and dispense with some of the formalities of the procedure if persuasive reasons for urgency are presented.

Civil claims for damages

A further option would be a civil action for damages, but the drawbacks in respect of an interdict would also apply to this remedy, not to mention the fact that the damages caused by the stalking – such as the mental suffering caused – might be difficult to quantify. Furthermore, forcing the stalker to pay for the damage caused by the stalking would not necessarily discourage future stalking behaviour. To provide for future protection, it would probably be necessary to combine an action for civil damages with a request for an interdict against continued stalking behaviour.

Peace order under the Criminal Procedure Act, No 56 of 1955

The 1955 Criminal Procedure Act has generally been replaced by more recent legislation, but two of its sections are still in force in Namibia. One of these is section 384, which provides a procedure for binding over persons to keep the peace.

If a person makes a complaint under oath that someone else is behaving violently, threatening injury to the person or property of another, or using language or engaging in behaviour which is likely to provoke a breach of the peace or assault, a magistrate may order the person engaging in the offending behaviour to appear before the court – by means of an arrest if necessary. After conducting an enquiry the magistrate may order the offending party to pledge up to N\$2000 for a period not exceeding six months, against the condition that the person must to keep the peace towards the complainant and refrain from doing harm or threatening injury to the complainant's body or property. If there is a violation of the conditions of the peace order, then the money which has pledged may be declared forfeited. This forfeiture can be enforced as if it were a civil judgment. Essentially, this procedure requires the person in question to enter into a legal agreement to forfeit a certain amount of money if he or she engages in behaviour again the complainant which constitutes a breach of the peace.

This procedure is re-enacted in section 369 of Namibia's Criminal Procedure Act, No 25 of 2004, which has been passed by Parliament but not yet brought into force. In its new form, the amount pledged to refrain from "doing or threatening injury to the complainant's person or property" will be up to N\$5000.

This civil remedy was available for domestic violence in the past, prior to the Combating of Domestic Violence Act, but it was seldom utilised in practice for either domestic violence or stalking.

Overview

Civil remedies have the disadvantage of not involving the police. It would not be possible to use a civil remedy against a stalker whose identity was unknown. Civil remedies are also slow and usually expensive.

5. INTERNATIONAL APPROACHES TO STALKING

There is an international trend towards enacting specific legislation to address stalking, as noted by the South African Law Reform Commission (SALRC):

Within all legal systems the general criminal law prohibits personal violence offences and in some systems, such as our own, domestic violence legislation provides recourse in the form of a protection order to prevent future incidences of personal violence. Despite this apparent level of protection, the enactment of specific anti-stalking legislation in numerous jurisdictions bears testimony

to the realisation that limited protection is available to people who fear that they will become victims of violent activity in the immediate future... Specific stalking legislation also recognises that the string of actions which constitute stalking cause mental and psychological harm and may result in grave danger to the person being pursued. The widespread enactment of specific stalking legislation is adequate proof that existing law, civil and criminal, has been found wanting in comparative jurisdictions.⁴⁷

The SALRC concluded that, at an international level, stalking is "an old behaviour but a new crime".⁴⁸

Stalking laws across the world take a variety of forms. The area of law under which stalking is penalised differs from country to country. Some countries have specific stalking laws, some include stalking under domestic violence acts, and some cover stalking in their general penal codes. The contents of these laws differ in three principal ways: (1) whether a reaction of fear on the part of the victim is required; (2) the scope and pattern of behaviour which is criminalised; and (3) the level of intent required of the perpetrator.

Worldwide, stalking laws can be roughly divided into the "US" model and the "non-US" model. Under the **US model**, followed in Australia, New Zealand, and Canada, the law responds in part to the problem of "celebrity stalking," and thus these laws require that the behaviour must cause fear in the victim. This requirement excludes "paparazzi" activities undertaken in the normal course of their employment and places the focus on the reaction of the victim. By contrast, in the **non-US model** (followed in the Netherlands and Norway for example), the state of mind of the victim is irrelevant. Some laws attempt to combine these two approaches as alternatives (such as the UK's Protection against Harassment Act 1997, and the bill proposed by the South African Law Reform Commission).

In terms of scope, while some more expansive laws cover "stranger" stalking, some laws apply only to domestic relationships (Bosnia-Herzegovina) or to the workplace (Egypt). Japan's law only covers behaviour related to a romantic relationship.

Laws also differ as to the type of behaviour covered. Some countries, such as Iran, only criminalise behaviour that contains threats, while other countries' laws apply primarily to public behaviour, with the focus on maintaining public order (Honduras).

The laws also differ as to the amount of behaviour that is criminalised. Most anti-stalking laws criminalise only repetitive stalking or a "pattern of behaviour" (New Zealand) which must involve a series of acts over time that evidence a continuity of purpose. A few stalking laws specify the number of acts and the time period required. Some laws do not specify the extent of harassment that will

⁴⁷ SALRC Issue Paper, at page viii. The South African Law Reform Commission conducted a wide-ranging survey of comparative statutes on stalking from many different jurisdictions, including Australia, Canada, England and Wales, Ireland, the Netherlands and the United States. The SALRC study can be consulted for details on the stalking laws in these jurisdictions. SALRC Discussion Paper at paragraphs 3.50-3.138.

Stalking legislation in the US, Canada, Australia and the UK is also discussed in B Clark & L Meintjies-Van der Walt, *Stalking: Do we need a statute?*, (1998) *South African Law Journal* 729.

⁴⁸ SALRC Issue Paper, at page xxviii.

be covered by the law, leaving open the possibility that a single instance could constitute a crime.

Further, the laws demonstrate a range of specificity in their language. Some laws are relatively vague, broadly covering behaviour that disturbs the victim's "tranquillity" (Belgium), while some are more specific, enumerating specific activities as criminal (Australia). Israel's statute is an example of a middle ground; it defines stalking as "a repeated or suspected repeated harassment of another person in any way including by means of surveillance, invasion of privacy, threats, contact either orally or in writing, or by causing damage to the victim's property, reputation, or freedom of movement."⁴⁹ The updated US Model Stalking Code also aims for a middle ground by suggesting that the offence of stalking should apply to a situation where the stalker "by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property".⁵⁰

Finally, the laws differ as to the level of intent required. Some laws include a component which requires a certain degree of intention on the part of the perpetrator (such as Kuwait) while other laws do not. There is also sometimes a distinction between "specific intent" (the stalker must have intended to cause fear or some other reaction on the part of the victim) and "general intent" (the stalker must have intended to commit the acts which are being complained of, with some laws adding the element that the stalker should reasonably have known that these acts could cause the reaction in question).

The annexures to this report provide the full text of a few examples of international stalking statutes which could serve as useful models or comparisons for Namibia.

6. RECOMMENDATIONS FOR NAMIBIA

In crafting a stalking law that will be effective and appropriate in Namibia, it is important to keep in mind what types of behaviour are already covered under Namibian law and to recognise where the "gaps" are that might be addressed by a stalking law. As explained above, certain forms of stalking are already covered in the context of domestic relationships by Namibia's Combating of Domestic Violence Act, as the basis for a protection order, while the new definition of sexual harassment, which is about to come into force in the Labour Act 2007, will likely suffice for employment relationships. Other applicable crimes include *crimen injuria* and assault, and there are some possibilities for judicial interdicts although none of these are specifically aimed at stalking.

Thus, the primary gap in the law that needs to be addressed is harassment that takes place outside of a domestic or employment relationship, where there is no

⁴⁹ Law for the Prevention of Stalking, October 2001.

⁵⁰ National Centre for the Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, available at www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=41822, accessed 27 April 2008.

specific threat of violence, and where it might be hard to prove injury to a person's dignity. Behaviours such as following a person or lurking outside a person's home or place of business, surveillance of a person or that person's family, and sending unwanted messages are examples of behaviour that could be usefully covered by a new Namibian law on stalking.

The law must be specific enough to avoid challenges of vagueness, yet broad enough to cover the wide variety of forms stalking can take. It must also contain an appropriate requirement pertaining to the perpetrator's state of mind which does not criminalise innocent behaviour, but does not make a charge of stalking impossible to prove in practice.

The penalty system for a law on stalking should be tiered so that the punishment can be tailored to the severity of the behaviour. It should provide for formal "warnings", in a manner similar to the Combating of Domestic Violence Act.

Finally, the law should place the focus on the actions of the stalker, and not on the reaction of the victim.

The following recommendations are offered on specific aspects of a Namibian stalking statute:

- 1) The law should apply to anyone who commits prohibited acts against anyone else, and not just to people who are in a domestic or employment relationship with the victim.**

By applying broadly to all persons, the law will fill the gap not covered by the Combating of Domestic Violence Act and the Labour Act.

- 2) Enumerated acts under the law must be broad enough to include a variety of acts, and not just violence or threats of violence.**

The important point here is that the law should be broad enough to allow latitude for a wide variety of behaviours to be criminalised, while being specific enough to be enforceable.⁵¹

It would be useful to have a list of behaviours which could constitute stalking, but this list should not be exhaustive. Stalking can sometimes involve bizarre behaviour which cannot easily be anticipated. For example, one case in Queensland, Australia involved a stalker who repeatedly danced around in front of his victim, talking nonsense.⁵²

⁵¹ The Belgian anti-stalking law (Article 442bis of the penal code) provides for punishment for any behaviour the actor knew or should have known would gravely distress the victim – without any enumerated behaviours or further explanation of what behaviour is prohibited. The UK also has a general prohibition on harassment which does not define the specific forms of behaviour which may fall into this category (Protection from Harassment Act 1997). Similarly, the law used to prosecute stalkers in Norway (§360 of the civil penal code) simply makes punishable "frightening or annoying behaviour and other inconsiderate conduct" that violates another person's right to be left in peace. Such approaches as these have led to challenges on the grounds that the laws are too vague. Namibia should enact a law on stalking which is specific enough to avoid the problem of vagueness.

⁵² S Kift, "Stalking in Queensland: From the Nineties to Y2K", [1999] *BondLRev* 8; (1999) 11(1) *Bond Law Review* 144, available at www.austlii.edu.au/au/journals/BondLRev/1999/8.html, accessed 27 April 2008.

3) The intent needed to prove stalking should be a general intent standard because of the difficulty of proving specific intent in stalking cases.

There are three classes of statutes in Namibia with respect to intent.⁵³

- *strict liability*: The state must prove only that the acts were committed; intent is irrelevant.
- *mens rea – culpa* (negligence): The state must prove that the acts were committed. The burden is then on the accused to disprove intent, which he or she may do by raising reasonable doubt. *Mens rea* is inferred from the fact that the accused committed the acts. This is similar to what some other countries refer to as a general intent.
- *mens rea – dolus* (intention): The state must prove that the acts were committed, and that there was intent to cause a particular harm by means of the acts. *Mens rea* is not inferred from the fact that the accused committed the acts. This is similar to what some other countries refer to as a specific intent.

The intent to cause the victim harm can be very difficult to prove in stalking cases, especially if the perpetrator wrongly believes that the victim is interested in pursuing a relationship. For this reason, a “general intent” requirement is appropriate, which would fit into the category of the “mens rea culpa” standard described above. This approach would place the focus on the acts of the stalker, rather than on the stalker’s motivation.

Under this approach, the state would have to prove only that the acts in question were wilfully carried out. This approach reflects the idea that stalking behaviour should be criminalised where the stalker should reasonably have known that his or her actions would cause fear or distress. An accused who could prove a reasonable belief that the acts were committed in good faith could avoid conviction.

4) The statute should require that the criminal acts would cause fear or distress to a reasonable person in the victim’s circumstances. This approach sets an objective standard and removes the burden on the victim to prove actual fear or distress. Reference to the victim’s circumstances would allow the court to consider the context of the actions complained of, which might appear innocent in themselves.

The major difference between what has been termed here the US and the non-US models for stalking legislation is the requirement of fear. Utilisation of a “reasonable person” standard of fear instead of an “actual fear” standard places the focus on the acts of the perpetrator rather than on the reaction of the victim, who may find it difficult or impossible to prove that he or she experienced actual fear at the time of the stalking. This standard

⁵³ See *S v Maritz* 2004 NR 22 (HC), citing *S v Zemura* 1974 (1) SA 584 (RA).

also appropriately does not only punish stalkers who have *succeeded* in causing fear in their victims, but also punishes those who may have *attempted* unsuccessfully to cause fear.

The requirement that the fear incurred must be judged against the response of a "reasonable person *in the victim's circumstances*" also recognises that certain behaviour may inspire fear in some circumstances and not in others. An example is sending flowers to a victim; this seemingly inoffensive action would be experienced very differently in a situation where the stalker has previously told the victim that the day she receives flowers will be the day that she will die.

An alternative would be to use a two-prong approach, requiring *either* (a) that acts would cause fear to a reasonable person in the victim's circumstances or (b) that the acts did in fact cause fear to the victim.

Another issue here is whether the test should be that the actions complained of would reasonably cause fear, or whether the test should be a broader one. Focusing on "fear" alone may be too narrow.

Some statutes (such as the UK's Protection from Harassment Act 1997) allow for a lesser offence for acts that cause something akin to "annoyance" or "harassment", and a more serious offence with a higher penalty for the instigation of fear. Other laws have a single offence which refers to a reasonable possibility that the acts in question would cause fear or some other kind of harm. For example, the proposed statute for South Africa follows the approach used in Queensland, Australia by referring to "detriment" which includes "apprehension or fear of violence towards, or against the property of any person"; "mental, psychological or emotional harm"; "prevention or hindrance from doing an act which a person is lawfully entitled to do"; or "compulsion to do an act which a person is lawfully entitled to abstain from doing". The updated US Model Stalking Code suggests that the actions complained of should reasonably cause "emotional distress", which means "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counselling".⁵⁴

It is suggested that a Namibian law should apply a test which is somewhat broader than "fear" alone. Reference should also be made to "distress", "alarm", "harm", "harassment", "detriment" or some similar negative impact.

5) The law should require stalking behaviour which takes place on two or more occasions (even if the specific acts are not the same), rather than a "pattern" of behaviour, which is too stringent a requirement.

Many countries require either a pattern of behaviour or repeated incidents to constitute stalking. New Zealand law refers to a "pattern of behaviour". Ireland requires "persistent" behaviour". Canada, Israel, the Netherlands and many US states use the term "repeated" or "repeatedly".

The UK's Protection from Harassment Act 1997 refers to a "course of conduct" which requires conduct on at least two occasions. Queensland,

⁵⁴ See the annexures to this document for the full text of the cited examples.

Australia specifies that the behaviour complained of must take place on only one occasion "if the conduct is protracted", or otherwise on "more than one occasion". The Canadian Criminal Code requires the repetition of certain forms of stalking behaviour, while a single incident of certain forms of more threatening behaviour is sufficient.⁵⁵

The Namibian Combating of Domestic Violence Act, in its definition of "emotional, verbal or psychological abuse" requires a "pattern of degrading or humiliating conduct", and its definition of "harassment" refers to behaviour that occurs "repeatedly". However, its definition of intimidation can be satisfied by a single act.

A law on stalking must be specific enough to enforce, without being so restrictive that genuine stalking behaviour is excluded. We suggest that requiring a "pattern of behaviour" sets the bar too high in the context of stalking, as this may be interpreted to mean prolonged, consistent behaviour. The use of the terms "repeated" may also be problematic, as the stalking behaviour may take different forms on different occasions.

In practice, stalking may take place sporadically or employ a variety of techniques. In recognition of the unpredictability and potential inconsistency of stalking behaviour, the Queensland statute goes so far as to specify that it is immaterial whether the conduct complained of "consists of the same or different acts". The Queensland example is a useful model for Namibia on this point.

6) We recommend providing for a range of penalties to allow for different punishment of stalking behaviour of different degrees of seriousness.

In similar fashion to Namibia's Combating of Domestic Violence Act, a law on stalking could allow for formal warnings for first offences which are non-violent in nature.

On the other hand, the statute could also specify certain aggravating circumstances – such as the use of a weapon or threats of violence, or use of stalking behaviour against a minor – which warrant stiffer punishment.

The court should also be empowered to make participation in an appropriate counselling or treatment programme a condition of the sentence in appropriate cases.

7) Proscribed defences should prohibit the perpetrator from escaping punishment where he or she should have known the acts would cause fear or distress.

There may be some individuals who are incapable of understanding that their acts are likely to cause fear or distress. The approach suggested by the updated US Model Stalking Code is useful here. It specifies that it is no defence for the stalker to show that (a) the victim did not give the stalker actual notice that the actions complained of were unwanted; or (b) the stalker did not actually intend to cause the victim fear or other emotional distress.

⁵⁵ See the annexures to this document for the full text of the examples discussed in this paragraph.

- 8) **The statute should clearly make exceptions for certain lawful behaviour which might otherwise fall under the definition of stalking.**

Examples of such exceptions would be acts done in the execution of a law, or for the purposes of the prevention or detection of crime.

- 9) **We suggest that the statute on stalking should provide for protection orders analogous to protection orders available under Namibia's Combating of Domestic Violence Act, independently or in conjunction with a criminal conviction.**

In many cases, the victim of the stalking behaviour will be more interested in stopping the offending behaviour than in seeing the stalker punished. In some cases, a protection order may be the most appropriate mechanism for achieving this objective.

- 10) **Behaviour which constitutes a criminal offence of stalking should also be treated as a basis for a civil action for damages.**

The UK's Protection from Harassment Act 1997 provides an example on this point. A provision on civil damages would increase the options available to the victim of the stalking.

DRAFT STALKING ACT FOR NAMIBIA

The following draft law is intended to be used as a basis for further discussion and consideration, with a view to potential law reform on stalking in Namibia.

1. Definitions

In this statute –

“conduct” means –

- (a) an act or threat of violence against the complainant;
- (b) damage or destruction, or a threat to damage or destroy, the property of the complainant;
- (c) exhibiting a weapon or any other menacing behaviour, including sending, delivering or causing to be delivered an item which implies menacing behaviour;
- (d) any other intimidating, harassing or threatening act, whether or not such an act involves violence or a threat of violence;
- (e) following, loitering near, watching or approaching the complainant;

- (f) loitering near, watching, approaching or entering a place where the complainant resides, works, carries on business, studies or happens to be;
- (g) keeping the complainant under direct or indirect surveillance;
- (h) making contact with the complainant in any way, including by telephone, mail, facsimile, electronic mail or through the use of any technology, whether or not conversation ensues;
- (i) sending, delivering or causing the delivery of facsimiles, electronic mail, text messages, letters, telegrams, packages or other objects to the complainant or to the complainant's residence, school or workplace or any other place frequented by the complainant;
- (j) using any electronic mediums such as the internet to pursue, harass, contact or impersonate the complainant;
- (k) entering the residence or property of the complainant, without the express or implied consent of the complainant, where the persons in question do not share the same residence;
- (l) any other controlling or abusive behaviour directed towards the complainant;
- (m) any other invasion of the complainant's privacy or dignity, or interference with the complainant's freedom of movement; or
- (n) any similar behaviour;

"complainant" means a person towards whom the unlawful stalking is directed, irrespective of whether or not that person has actually laid a complaint or gives evidence in any relevant criminal proceedings;

"course of conduct" means conduct that takes place on at least two occasions;

"defendant" means a person against whom a charge of unlawful stalking has been laid;

"detriment" includes the following –

- (a) fear of violence to, or against property of, the complainant or another person;
- (b) substantial distress or alarm;
- (b) other mental, psychological or emotional harm;
- (c) prevention or hindrance from doing an act that the stalked person is lawfully entitled to do; or

- (d) compulsion to do an act that the stalked person is lawfully entitled to abstain from doing;

“property”, of a person, means –

- (a) property in which the person has an interest; or
- (b) property that is otherwise –
 - (i) used and enjoyed by the person;
 - (ii) available for the person's use or enjoyment;
 - (iii) in the person's care or custody;
 - (iv) at the premises at which the person is residing;

“respondent” means a person against whom a protection order is sought or has been made.

2. Unlawful stalking

(1) Any person who intentionally engages in a course of conduct directed at a specific person and knows or should know that the course of conduct is likely to cause a reasonable person in that person's circumstances to experience detriment is guilty of unlawful stalking and liable upon conviction to the penalties set forth in section 4.

(2) It is immaterial whether the person who engages in the course of conduct described in subsection (1) –

- (a) intends that the complainant be aware the conduct is directed at the complainant;
- (b) has a mistaken belief about the identity of the person at whom the conduct is directed;
- (c) intended to cause detriment to the complainant;
- (d) actually caused detriment to the complainant;
- (d) engages in conduct consisting of the same or different acts during the course of conduct in question;
- (e) was or was not given actual notice that the conduct in question was unwanted;
- (f) engages in a course of conduct against the complainant's family member, dependant, acquaintances or work colleagues instead of directly against the complainant.

(3) Any person who intentionally causes another person to engage in a course of conduct that amounts to unlawful stalking is deemed to have engaged in unlawful stalking.

3. Exceptions

Regardless of subsection (1), the offence of unlawful stalking cannot be committed by means of the following acts –

- (a) acts done in the execution or administration of a law, or under lawful authority;
- (b) reasonable conduct engaged in by a person for the person's lawful trade, business or occupation;
- (c) reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving
- (d) reasonable conduct by authorised persons for the purposes of protecting national security, or the prevention or detection of crime.

4. Penalty for unlawful stalking

(1) A person who is convicted of the offence of unlawful stalking in the case of a first offence which does not involve violence or a threat of violence against the complainant, damage or destruction of the complainant's property, or a threat to damage or destroy the complainant's property, is liable on conviction to –

- (a) a formal warning
- (b) a fine of up to XXX
- (c) a sentence of imprisonment for up to 1 year or
- (d) any combination of the foregoing.

(2) A person who is convicted of the offence of unlawful stalking in circumstances other than those described in subsection (1), in the absence of any aggravating circumstances, is liable on conviction to a sentence of imprisonment for up to 5 years.

(3) A person who is convicted of the offence of unlawful stalking in circumstances other than those described in subsection (1), is liable on conviction to a sentence of imprisonment for up to 7 years if any of the following aggravating circumstances are present –

- (a) the defendant employed physical force or a weapon in the course of conduct
- (b) the defendant directed the course of conduct against a minor
- (c) the defendant was convicted of stalking any person within the previous 10 years

- (d) the defendant's course of conduct violated a protection order or a peace order or an interdict under this law or any other law.

(4) At the time of sentencing, the complainant has the right to appear personally and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation.

(5) In addition to any other penalty, or as a condition of wholly or partially suspending any sentence of imprisonment, a court may impose an order directing the complainant to participate in an appropriate counselling or treatment programme aimed at the prevention of future stalking, or to undergo medical, psychiatric or psychological evaluation.

5. Protection orders against unlawful stalking

Part II of the Combating of Domestic Violence Act on protection orders shall apply with the necessary changes to any complainant who wishes to seek a protection order against a person who engages in a course of conduct which could amount to unlawful stalking of the complainant, regardless of –

- (a) whether or not the complainant and the defendant are in a domestic relationship; and
- (b) whether or not the complainant has laid a criminal charge of unlawful stalking against the defendant;

and the protection order may prohibit the defendant from engaging in any specified acts which would fall under the definition of "conduct" in section 1 and may include an order directing the complainant to participate in an appropriate counselling or treatment programme aimed at the prevention of future stalking, or to undergo medical, psychiatric or psychological evaluation.

6. Civil remedy

A course of conduct which could support a charge of unlawful stalking may be the basis for a civil claim for damages arising from any detriment which is actually suffered by the complainant, regardless of whether a criminal charge of unlawful stalking is laid or proved.

ANNEXURE A: South Africa

In 2003, the South African Law Reform Commission (SALRC) published an issue paper on stalking,¹ followed by a discussion paper in September 2000 which incorporated the input received from interested members of the public.² The SALRC completed the next step, a report on stalking, in December 2006, but as of April 2008 this report was still under consideration by government and had not yet been made public.³

Three options were initially put forward for discussion in South Africa, as summarised below:⁴

Option 1: Expand or enact similar legislation to the Domestic Violence Act.

South Africa's domestic violence legislation provides for protection orders in a manner similar to that provided by Namibia's domestic violence legislation. This option would involve expanding the protection order procedure to allow it to apply to all instances of stalking, regardless of whether the parties were in a domestic relationship, or creating a protection order for stalking under a new law which works in similar fashion to the protection order procedure in the Domestic Violence Act.

Option 2: Amend and adapt section 384 of the Criminal Procedure Act 1955 on peace orders.

Section 384 of the Criminal Procedure Act on peace orders is currently in force in South Africa just as it is in Namibia. Although this procedure is seldom used in practice, it is a procedurally simple and thus an inexpensive way to access assistance from a magistrate's court. The Commission proposed that if a person is found guilty of breaching an order for keeping the peace, the sanction should not be limited to a forfeiture of money but could include a restraining order or a sentence of imprisonment which could be suspended if the respondent submits to psychological treatment, a course in anger management or some other form of counselling.

Option 3: Enact independent legislation criminalising stalking.

This option would entail creating a new crime by means of statute.

After considering the approaches taken by other countries, the South African Law Reform Commission proposed a new statute on stalking which would provide for both a criminal offence of stalking and a civil protection order similar to that

¹ South African Law Reform Commission (SALRC), "Stalking", Issue Paper 22, Project 130, September 2003 (hereinafter "SALRC Issue Paper").

² South African Law Reform Commission (SALRC), "Stalking", Discussion Paper, Project 130, November 2004 (hereinafter "SALRC Discussion Paper").

³ Personal communication from Dellene Clark, South African Law Reform Commission, DClark@justice.gov.za, 17 April 2008.

⁴ SALRC Issue Paper at pages xli-ff.

available in cases of domestic violence. The text which follows is taken from the SALRC Discussion Paper; as noted above, the final Report, which is expected to contain a revised version of this Bill, was not yet available to the public at the time of writing.⁵

The proposed South African Bill appears to be a mixture of the "US" and "non-US models", as the definition of stalking contains two alternatives: (1) a test as to whether the behaviour complained of would be likely to cause "apprehension" or "fear" in a reasonable person, OR (2) a test based on whether the behaviour complained of did in fact cause "detriment" or "distress" to the complainant or another person (provided that this detriment or distress was reasonable in the circumstances). It is immaterial whether the stalker intended to cause fear or distress; the only intent required is the intention to carry out the actions which are the basis of the complaint.

SOUTH AFRICAN LAW REFORM AND DEVELOPMENT COMMISSION DISCUSSION PAPER, ANNEXURE A

DRAFT BILL

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.

⁵ Quoted from SALRC Discussion Paper, Appendix A, with commentary omitted.

BE 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.

"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... [comments invited on appropriate penalty].

(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*.

APPENDIX B: Queensland, Australia

All Australian states now have some anti-stalking legislation. Queensland was the first state in Australia to enact anti-stalking legislation, in 1993. That first attempt was criticised as being unnecessarily complex. The original law had the following characteristics:

- the offender must have engaged in a "course of conduct" (not defined) comprising two or more separate "concerning acts" (very broadly defined);
- the offender must have intended that the victim "be aware that the course of conduct is directed at" him/her;
- the victim must have in fact been aware that the course of conduct was directed at him/her;
- the course of conduct must have been one that would cause a reasonable person in the victim's circumstances to believe that an unlawful act of violence against the person or property of either the victim or someone about whom the victim would reasonably be expected to be concerned was "likely to happen".⁶

The stalking law in Queensland was reviewed and replaced with an amended version in 1999. The new statute is more simply and clearly drafted than its predecessor. It criminalises intentionally directed conduct that occurs on more than one occasion, or on only one occasion if protracted, if this conduct would cause a reasonable person in the victim's circumstances to experience fear or detriment. This objective standard makes the Queensland statute fall into the non-US model. The maximum penalty for the new offence of unlawful stalking is five years imprisonment, or seven years in the presence of aggravating circumstances.

One analysis of the old and new legislation came to the following conclusion:

The new *Code* Chapter 33A is a considerable advance in the formulation of this complex modern-day offence. The necessity for anti-stalking legislation has been well documented. It is often resorted to in bizarre and frightening situations to target conduct otherwise beyond the reach of the criminal law. Further, the value of these offences as part of a strategy to contain domestic violence and like behaviours has become widely accepted. The new Queensland provisions are a diligent and genuine effort to address past deficiencies in the law, to satisfy the concerns of victims and to take the law into the next century.⁷

A study of stalking cases in Queensland found that:

⁶ S Kift, "Stalking in Queensland: From the Nineties to Y2K", [1999] *BondLRev* 8; (1999) 11(1) *Bond Law Review* 144, available at www.austlii.edu.au/au/journals/BondLRev/1999/8.html, accessed 27 April 2008.

⁷ *Id.*

- 3248 incidents of stalking were reported during a 5-year period ending in 2000, with offenders being charged for 862 stalking incidents during that period
- the majority of victims were females (77%)
- the majority of offenders were males (88%)
- 12% of offenders were strangers to the victim
- 23% of offenders were ex-partners and 49% were acquaintances
- 57% of offenders convicted in higher courts were sentenced to imprisonment, with an average sentence of 1.56 years
- the most common penalties in the lower courts were community correction orders and fines.
- about one-quarter of the stalking cases reported over this period involved victims under the age of 20.⁸

QUEENSLAND, AUSTRALIA
Criminal Code (Stalking) Amendment Act 18 of 1999

REPLACEMENT OF S 359A OF THE CRIMINAL CODE (QLD).

CHAPTER 33A – UNLAWFUL STALKING

Definitions for ch 33A

359A. In this chapter –

“circumstances” means the following circumstances –

- (a) the alleged stalker’s circumstances;
- (b) the circumstances of the stalked person known, foreseen or reasonably foreseeable by the alleged stalker;
- (c) the circumstances surrounding the unlawful stalking;
- (d) any other relevant circumstances.

“detriment” includes the following –

- (a) apprehension or fear of violence to, or against property of, the stalked person or another person;
- (b) serious mental, psychological or emotional harm;

⁸ Queensland Government, Office of Statistical and Economic Research. Stalking Offences (Queensland Crime Statistics Bulletin No. 10), Key Issues and Table 3, available at www.oesr.qld.gov.au/queensland-by-theme/society/crime-justice/offences/bulletins/stalking-offences-qcsb/stalking-offences-qcsb.shtml, accessed 27 April 2008.

- (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.

Examples of paragraph (c) –

- A person no longer walks outside the person's place of residence or employment.
- A person significantly changes the route or form of transport the person would ordinarily use to travel to work or other places.

Example of paragraph (d) –

- A person sells a property the person would not otherwise sell.

“property”, of a person, means –

- (a) property in which the person has an interest, whether or not the defendant also has an interest in the property; or
- (b) property that is otherwise –
 - (i) used and enjoyed by the person; or
 - (ii) available for the person's use or enjoyment; or
 - (iii) in the person's care or custody; or
 - (iv) at the premises at which the person is residing.

“stalked person” see section 359B.

“unlawful stalking” see section 359B.

“violence” –

- (a) does not include any force or impact within the limits of what is acceptable as incidental to social interaction or to life in the community; and
- (b) against a person includes an act depriving a person of liberty; and
- (c) against property includes an act of damaging, destroying, removing, using or interfering with the property.

What is unlawful stalking?

359B. “Unlawful stalking” is conduct –

- (a) intentionally directed at a person (the **“stalked 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 a 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.

What is immaterial for unlawful stalking

359C. (1) For section 359B(a), it is immaterial whether the person doing the unlawful stalking –

- (a) intends that the stalked person be aware the conduct is directed at the stalked person; or
- (b) has a mistaken belief about the identity of the person at whom the conduct is intentionally directed.

(2) For section 359B(a) and (c), it is immaterial whether the conduct directed at the stalked person consists of conduct carried out in relation to another person or property of another person.

(3) For section 359B(b), it is immaterial whether the conduct throughout the occasion on which the conduct is protracted, or the conduct on each of a number of occasions, consists of the same or different acts.

(4) For section 359B(d), it is immaterial whether the person doing the unlawful stalking intended to cause the apprehension or fear, or the detriment, mentioned in the section.

(5) For section 359B(d)(i), it is immaterial whether the apprehension or fear, or the violence, mentioned in the section is actually caused.

Particular conduct that is not unlawful stalking

359D. "Unlawful stalking" does not include the following acts –

- (a) acts done in the execution of a law or administration of an Act or for a purpose authorised by an Act;
- (b) acts done for the purposes of a genuine industrial dispute;
- (c) acts done for the purposes of a genuine political or other genuine public dispute or issue carried on in the public interest;
- (d) reasonable conduct engaged in by a person for the person's lawful trade, business or occupation;

- (e) reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving.

Punishment of unlawful stalking

359E. (1) A person who unlawfully stalks another person is guilty of a crime.

(2) A person who commits the crime of unlawful stalking is liable to a maximum penalty of imprisonment for 5 years.

(3) However, a person is liable to a maximum penalty of imprisonment for 7 years if, for any of the acts constituting the unlawful stalking, the person –

- (a) uses or intentionally threatens to use, violence against anyone or anyone's property; or
- (b) possesses a weapon within the meaning of the Weapons Act 1990; or
- (c) contravenes or intentionally threatens to contravene an injunction or order imposed or made by a court or tribunal under a law of the Commonwealth or a State.

Court may restrain unlawful stalking

359F. (1) This section applies on the hearing before a court of a charge against a person of unlawful stalking.

(2) Whether the person is found guilty or not guilty or the prosecution ends in another way, if the presiding judge or magistrate considers it desirable, the judge or magistrate may constitute the court to consider whether a restraining order should be made against the person.

(3) The judge or magistrate may act under subsection (2) on application by the Crown or an interested person or on the judge's or magistrate's own initiative.

(4) Also, if the restraining order proceeding is started before the Supreme Court or the District Court, the court may order the proceeding to be transferred to a Magistrates Court.

(5) If a court makes an order under subsection (4), the registrar of the court must send to the clerk of the relevant Magistrates Court a copy of the order and the record of proceedings of the hearing of the charge and any application mentioned in subsection (3).

(6) The court hearing the restraining order proceeding may make a restraining order against the person in relation to any person or any property if it considers it desirable to do so having regard to the evidence given at the hearing of the charge and any application under subsection (3) and any further evidence the court may admit.

(7) A restraining order may be varied or revoked at any time by the court, and, if the order provides, by another court.

(8) A person who knowingly contravenes a restraining order commits an offence. Maximum penalty – 40 penalty units or 1 year's imprisonment.

(9) A restraining order may be made against a person whether or not another order is made against the person in the proceeding for the charge.

(10) A restraining order proceeding is not a criminal proceeding.

(11) A question of fact for a decision under subsection (2) and in a restraining order proceeding must be decided on the balance of probabilities.

(12) In this section –

“charge” means the charge of unlawful stalking mentioned in subsection (1).

“restraining order” against a person means any order considered appropriate for the purpose of prohibiting particular conduct, including, for example, contact for a stated period by the person with a stated person or the property of a stated person.

“restraining order proceeding” means a proceeding started under subsection (2).

ANNEXURE C: US Model Code

The US state of California enacted the first state stalking law in 1990. Since then, stalking laws have been passed in all fifty states and the District of Columbia. In 1996, Congress criminalised interstate stalking as a federal offence, later amending the statute to include stalking by means of electronic communications, to cover surveillance of a victim by a global positioning system (GPS) and to include conduct which causes the victim substantial emotional distress.

In 1993, the US Congress directed the National Institute of Justice to develop a *Model Anti-Stalking Code* which would serve as model for US states which wanted to enact legislation aimed at stalking.⁹ In the ensuing years, research provided new insights into the behaviour of stalkers and the effectiveness of the various state stalking laws. In 2007, the National Centre for Victims of Crime provided a 2007 update to the *Model Anti-Stalking Code*, to reflect the current realities of stalking – including the use of more modern technologies.¹⁰

According to the 2007 report by the National Centre for Victims of Crime, three major US studies provided a more accurate picture of stalking in America: the National Violence Against Women Survey in 1998, the Intimate Partner Stalking and Femicide Study in 1999, and the National Sexual Victimization of College Women Survey in 2000:¹¹

According to the National Violence Against Women Survey, an estimated 1.4 million people are stalked annually in the United States. This means that one in 12 women and one in 45 men will be stalked at some point in their lives. Seventy-eight percent of stalking victims are women, and 74 percent are between the ages of 18 and 39. Overall, 87 percent of stalkers are men: ninety-four percent of women and 60 percent of men are stalked by men. Seventy-seven percent of female stalking victims (and 64 percent of male victims) are stalked by someone they know, and 59 percent of female stalking victims (and 30 percent of male victims) are stalked by an intimate partner or former intimate partner.

The Intimate Partner Stalking and Femicide Study, which studied female murder victims who had been killed by intimate partners, found that 76 percent of femicide victims and 85 percent of attempted femicide victims had been stalked by their intimate partners in the year prior to their murders.

The National Sexual Victimization of College Women Survey showed a particular vulnerability within a specific subgroup of victims, with thirteen percent of college women reporting that they had been victimised by a stalker

⁹ See National Criminal Justice Association, Project to Develop a Model Anti-Stalking Code for States, Washington, DC: National Institute of Justice, US Department of Justice, 1993.

¹⁰ National Centre for the Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, available at www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=41822, accessed 27 April 2008.

¹¹ *Id.*, citing P Tjaden and N Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*. Washington, DC: US Department of Justice, National Institute of Justice and the Centres for Disease Control and Prevention, 1998; J McFarlane et al, "Stalking and Intimate Partner Femicide," *Homicide Studies* 3, number 4 (November 1999); B Fisher, FT Cullen, and MG Turner, *Sexual Victimization of College Women*, Washington, DC: National Institute of Justice, US Department of Justice, 2000.

in one six- to nine-month period. Consistent with the findings from other studies, more than 80 percent of these women knew their stalker, who was often a current or former boyfriend.

These landmark studies shed new light on specific stalking behaviours. The most commonly reported stalking behaviours were surveillance behaviours, such as following or spying on the victim, or waiting outside the victim's home, work, or school. Unwanted phone calls, letters, and gifts were also commonly reported by victims. Fewer than 50 percent of victims reported being directly threatened by their stalkers.¹²

The following weaknesses in existing state legislation were identified:

- Stalkers often can "get away" with their criminal behaviour and continue to wreak havoc on a victim's life with little or no risk of intervention by law enforcement.
- The burden of proof is so high under many stalking laws that it is extremely difficult to secure convictions.
- In most jurisdictions, stalking is only a misdemeanour crime, and sentences longer than a few days or weeks are rare. Most stalkers spend a remarkably short time in custody if and when they are arrested, prosecuted, and convicted.
- Statutory provisions written with the "stranger" stalker in mind restrict the types of stalking behaviour that can be prosecuted when the stalker and victim are in a relationship.
- Without a full appreciation of the role of *context* in a stalking situation – the private meaning of certain behaviours that would not necessarily be evident to an outside observer – many stalking behaviours can be viewed as harmless, when in fact the behaviours may terrify the victim. A love letter left on the doorstep of a victim's apartment, for example, might seem benign to a law enforcement officer. Without knowing the context, the officer cannot fully appreciate how terrifying that apparently harmless gesture is for a victim who believed her stalker did not know where she was.
- Current state laws do not address the full range of stalking behaviours, making it virtually impossible to arrest and prosecute an offender for many of those behaviours. Consider, for example, a situation in which a stalker is constantly watching and monitoring a victim's daily activities and has posted information about the victim on the Internet, but has never communicated directly with the victim or threatened the victim in any way. If, as is often the case, the applicable statute requires proof of some type of communication or threatening contact by the stalker, it is unlikely that a stalking charge could be brought. Many state stalking laws simply do not address surveillance by stalkers with newer forms of technology that do not require proximity to or communication with the victim.¹³

¹² Ibid at pages 13-14, footnotes omitted.

¹³ Ibid at pages 17-18.

The updated (and re-named) *Model Stalking Code* moves away from the US trend of requiring actual fear on the part of the victim, to a more objective standard that focuses on the stalker's behaviour. The key features of the updated *Code* are:

- a legislative intent section that emphasises the strong connections between stalking and domestic violence and between stalking and sexual assault, and underscores the importance of early intervention by law enforcement;
- a general intent requirement (that the stalker wilfully committed the behaviour in question) instead of a specific intent requirement (that the stalker intended to cause fear or emotional distress);
- a "reasonable person" standard of fear instead of an "actual fear" standard, with this standard being interpreted to mean a reasonable person in the victim's circumstances so that the context of the stalking can be taken into account;
- a two-prong approach which requires that a reasonable person in the victim's circumstances would (1) fear for his or her safety or the safety of a third person or (2) suffer other emotional distress;
- no requirement of an actual threat of harm;
- an open-ended definition of "course of conduct" which gives the courts guidance on the range of acts contemplated, including the use of modern technology;
- specific disqualification of two defences typically claimed by stalkers: (1) that the perpetrator was not given actual notice by the victim that the conduct was unwanted, or (2) that the stalker did not intend to cause fear or emotional distress.¹⁴

UPDATED MODEL STALKING CODE FOR THE US STATES

January 2007

SECTION ONE: LEGISLATIVE INTENT

The Legislature finds that stalking is a serious problem in this state and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.

¹⁴ Ibid at pages 61-62.

The Legislature recognises the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault.

Therefore, the Legislature enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behaviour that has serious or lethal consequences.

The Legislature intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct.

The Legislature recognises that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

SECTION TWO: OFFENCE

Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:

- (a) fear for his or her safety or the safety of a third person; or
- (b) suffer other emotional distress

is guilty of stalking.

SECTION THREE: DEFINITIONS

As used in this Model Statute:

- (a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.
- (b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counselling.
- (c) "Reasonable person" means a reasonable person in the victim's circumstances.

SECTION FOUR: DEFENCES

In any prosecution under this law, it shall not be a defence that:

- (a) the actor was not given actual notice that the course of conduct was unwanted; or
- (b) the actor did not intend to cause the victim fear or other emotional distress.

Optional Provisions

SECTION FIVE: CLASSIFICATION

Stalking is a felony.

Aggravating factors.

The following aggravating factors shall increase the penalty for stalking:

- (a) the defendant violated any order prohibiting contact with the victim;
or
- (b) the defendant was convicted of stalking any person within the previous 10 years; or
- (c) the defendant used force or a weapon or threatened to use force or a weapon; or
- (d) the victim is a minor.

SECTION SIX: JURISDICTION

As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction.

ANNEXURE D: England & Wales

The UK Protection from Harassment Act was passed in 1997. It contains one section which is applicable to England and Wales and another similar section which is applicable to Scotland. The portion of the statute which applies to England and Wales is reproduced below.

The statute creates two new criminal offences, one which is independent of the victim's reaction, and one which requires an element of fear on the part of the victim. In this sense, it combines the US and the non-US models.

The two offences are (1) **harassment**: a course of conduct which amounts to harassment of another and which the offender knows or reasonably ought to have known amounts to harassment of another; (2) **putting people in fear of violence**: a course of conduct which causes another to fear that violence will be used against him or her, where the offender knows or reasonably ought to have known that the conduct would inspire fear. This offence does not require that the offender intended to cause fear.

For both offences, a course of conduct must involve at least two occasions, and conduct is defined to include speech. The concept of harassing another person includes causing alarm or distress.

Harassment is a less serious crime, punishable by a maximum of 6 months' imprisonment, while putting people in fear of violence is punishable by a maximum of 5 years' imprisonment.

The statute also empowers the court to issue a restraining order prohibiting the defendant from pursuing the offending course of conduct.

The *Prohibition of Harassment Act 1997* is supplemented by the *Malicious Communications Act 1998*, which makes it an offence to send an indecent, offensive or threatening letter, electronic communication or other article to another person and by a provision of the *Telecommunications Act 1984* which makes it an offence to send a telephone message which is indecent, offensive or threatening. Both of these offences are punishable with up to six months imprisonment and/or a fine.¹⁵

A study of stalking in the UK published in 2004 produced the following findings:

- 1 in 8 UK adults is a victim of "persistent or unwanted attention";
- typical victims of stalking are professional women (such as managers, doctors or lawyers) in their 40s;
- up to 45% of stalking episodes include violence;
- typical stalking situations last a year or two, although 15% go on for up to five years and some for decades;
- 94% of the victims are forced to make "major lifestyle changes" such as moving house or changing jobs as a result of the stalking;

¹⁵ See South Africa Law Reform Commission (SALRC), "Stalking", Discussion Paper, Project 130, November 2004 at paragraph 3.83-ff.

- over half of stalking victims display the major symptoms of post-traumatic stress disorder such as anxiety, insomnia, inability to concentrate and flashbacks;
- email and internet databases make it easier for stalkers to compile detailed information on their targets.¹⁶

UK PROTECTION FROM HARASSMENT ACT 1997

1997 CHAPTER 40

An Act to make provision for protecting persons from harassment and similar conduct.

[21st March 1997]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

1 Prohibition of harassment

- (1) A person must not pursue a course of conduct –
- (a) which amounts to harassment of another, and
 - (b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

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

- (a) that it was pursued for the purpose of preventing or detecting crime,
- (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
- (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

¹⁶ Prof D Canter and Dr D Youngs, Chubb Insurance Report on Stalking, as reported in "First Comprehensive Review of Stalking in UK Published by Chubb Insurance", PR Newswire, 7 May 2004, available at www.prnewswire.co.uk/cgi/news/release?id=122401 and Rosie Cowan, "One in eight Britons has been stalked". *The Guardian*, 6 May 2004, available at www.guardian.co.uk/uk/2004/may/06/ukcrime.rosiecowan1; both accessed 27 April 2008.

2 Offence of harassment

(1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

(3) In section 24(2) of the [1984 c. 60.] Police and Criminal Evidence Act 1984 (arrestable offences), after paragraph (m) there is inserted –

“(n) an offence under section 2 of the Protection from Harassment Act 1997 (harassment).”.

3 Civil remedy

(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

(3) Where –

- (a) in such proceedings the High Court or a county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and
- (b) the plaintiff considers that the defendant has done anything which he is prohibited from doing by the injunction,

the plaintiff may apply for the issue of a warrant for the arrest of the defendant.

(4) An application under subsection (3) may be made –

- (a) where the injunction was granted by the High Court, to a judge of that court, and
- (b) where the injunction was granted by a county court, to a judge or district judge of that or any other county court.

(5) The judge or district judge to whom an application under subsection (3) is made may only issue a warrant if –

- (a) the application is substantiated on oath, and
- (b) the judge or district judge has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction.

(6) Where –

- (a) the High Court or a county court grants an injunction for the purpose mentioned in subsection (3)(a), and

(b) without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction,
he is guilty of an offence.

(7) Where a person is convicted of an offence under subsection (6) in respect of any conduct, that conduct is not punishable as a contempt of court.

(8) A person cannot be convicted of an offence under subsection (6) in respect of any conduct which has been punished as a contempt of court.

- (9) A person guilty of an offence under subsection (6) is liable –
- (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

4 Putting people in fear of violence

(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

(3) It is a defence for a person charged with an offence under this section to show that –

- (a) his course of conduct was pursued for the purpose of preventing or detecting crime,
- (b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
- (c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

- (4) A person guilty of an offence under this section is liable –
- (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

(5) If on the trial on indictment of a person charged with an offence under this section the jury find him not guilty of the offence charged, they may find him guilty of an offence under section 2.

(6) The Crown Court has the same powers and duties in relation to a person who is by virtue of subsection (5) convicted before it of an offence under section 2 as a magistrates' court would have on convicting him of the offence.

5 Restraining orders

(1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence under section 2 or 4 may (as well as sentencing him or dealing with him in any other way) make an order under this section.

(2) The order may, for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which –

- (a) amounts to harassment, or
- (b) will cause a fear of violence,

prohibit the defendant from doing anything described in the order.

(3) The order may have effect for a specified period or until further order.

(4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.

(5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.

(6) A person guilty of an offence under this section is liable –

- (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
- (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

6 Limitation

In section 11 of the [1980 c. 58.] Limitation Act 1980 (special time limit for actions in respect of personal injuries), after subsection (1) there is inserted –

"(1A) This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997."

7 Interpretation of this group of sections

(1) This section applies for the interpretation of sections 1 to 5.

(2) References to harassing a person include alarming the person or causing the person distress.

(3) A "course of conduct" must involve conduct on at least two occasions.

(4) "Conduct" includes speech.

12 National security, etc

(1) If the Secretary of State certifies that in his opinion anything done by a specified person on a specified occasion related to –

- (a) national security,
- (b) the economic well-being of the United Kingdom, or
- (c) the prevention or detection of serious crime,

and was done on behalf of the Crown, the certificate is conclusive evidence that this Act does not apply to any conduct of that person on that occasion.

(2) In subsection (1), "specified" means specified in the certificate in question.

(3) A document purporting to be a certificate under subsection (1) is to be received in evidence and, unless the contrary is proved, be treated as being such a certificate.

ANNEXURE E: Canada

In Canada, "criminal harassment" is the legal term that is used to criminalise stalking behaviour. The provision concerning criminal harassment was added to Canada's *Criminal Code* in 1993. The Canadian legislation follows the US model by requiring fear on the part of the victim. The offender must know that that the victim was harassed, or be reckless or wilfully blind as to whether the victim was harassed.

A *Handbook for Police and Crown Prosecutors on Criminal Harassment* elaborates on the requirement that the complainant must feel fear:¹⁷

- 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).

CANADIAN CRIMINAL CODE

264 Criminal harassment

(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."

¹⁷ South Africa Law Reform Commission (SALRC), "Stalking", Discussion Paper, Project 130, November 2004 at paragraph 3.104, quoting A Handbook for Police and Crown Prosecutors on Criminal Harassment, 1999, pages 28 -29, as quoted in R Mc Call, Online Harassment and Cyberstalking: Victim Access to Crisis, Referral and Support Services in Canada Concepts and Recommendations, Victim Assistance Online Resources, 2003.



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