

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

WHAT IS UNDERSTOOD BY THE TERM 'STALKING'?

1.1 The Oxford dictionary defines stalking as “the action of pursuing or approaching (wild animal, enemy) stealthily”.¹ The term stalker in relation to the pursuit by one person of another is not defined. The concept of stalking seems to have evolved and has taken on an artificial meaning with harassment of another person as the central theme. The concept of stalking has expanded from originally referring to prowling to include the use of electronic and telephonic mechanisms to survey or harass a person. If one were to define stalking broadly in a modern context, it would refer to any type of harassing and intimidating conduct that causes a person to fear for his or her safety. In its report on stalking the Law Reform Commission of Hong Kong states that stalking, like shoplifting and vandalism, is a description rather than a legal concept.² Further, that although stalking is not a new phenomenon it is only recently that such behaviour has been labelled a separate and distinct class of anti-social behaviour.

Question

1. What constitutes or should constitute “stalking” in the South African legal context?

METHODS EMPLOYED BY STALKERS

1.2 Stalking involves “a series of discrete, individual acts, each one building upon the next”.³ It is not a single occurrence but involves a course of conduct that extends over a period of time. The methods employed by stalkers to harass a victim can involve a series of actions which in isolation may be unlawful, such as making obscene telephone calls, using threatening language and committing acts of violence. On the other hand, stalkers frequently exhibit behaviour which

¹ The Pocket Oxford Dictionary: Oxford University Press 1983.

² The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 4.

³ KL Walsh “Safe and Sound at last? Federalized Anti-Stalking Legislation in the United States and Canada” (1996) 14:2 Dickinson Journal of International Law, 373 at 381 as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 5.

is perfectly legal and socially acceptable in isolation. This apparently harmless conduct, such as following someone or sending gifts, can be intimidating if done persistently and against the will of another person. Taken together, and in the context of the relationship between the stalker and the victim, seemingly innocuous behaviour becomes wrongful and dangerous.⁴

1.3 A typical stalker would engage in a series of acts that, viewed collectively, present a pattern of behaviour that annoys or alarms the person at whom the conduct is directed. Occasionally, a stalker may become more threatening and violent as time passes. The stalking activity may escalate from what may initially be annoying, alarming but lawful behaviour to the level of dangerous, violent and potentially fatal acts. Stalking may therefore be a precursor to crimes such as assault, wounding, criminal intimidation, sexual offences and even murder.

1.4 Methods employed by stalkers are varied and include excessive telephone calls, unsolicited calls made at inconvenient times, especially in the early morning hours or at work, sending of unwanted electronic messages, postcards or facsimiles and keeping the victim under surveillance.

1.5 An obsessed stalker makes declarations of love, gives voice to obscenities or threats. Surveillance takes a number of forms. The stalker may watch or spy on the victim, or he may simply loiter or lie in wait outside the victim's home, school, or place of work or recreation regularly. Some stalkers convey their knowledge of the details of the victim's movement so as to let the victim know that he or she is being watched.

1.6 In order to please or harass the victim, the stalker may persistently send, or leave at the doorstep, unwanted gifts or bizarre and fear-instilling objects.

1.7 Some stalkers repeatedly threaten to harm the victims or their new partners, children or pets. Those showing a violent disposition may even sexually or physically assault their victims. Damage to property is also common to these stalkers. They may slash tyres, daub paint, scratch paintwork or vandalise property.

1.8 This behaviour may be accompanied by the disclosing of intimate facts about the victim to his or her friends or colleagues, making false accusations, intercepting the victim's mail,

4

Manitoba Law Reform Commission **Report on stalking** 1997.

ordering goods on behalf of the victim without the latter's knowledge or consent, and bringing spurious legal actions.⁵

1.9 The difficulty of predicting what a stalker might do to his or her victim, and when, poses a problem in developing an effective response to the menace of stalking.

“Some stalkers may never escalate past the first stage. Others jump from the first stage to the last stage with little warning. Still others regress to previous stages before advancing to the next. It is not uncommon to see stalkers intersperse episodes of threats and violence with flowers and love letters. . . . A few stalkers will progress to later stages in only a few weeks or even days. In other cases, stalkers who have engaged in some of the most serious stalking behaviours may go months or even years without attempting a subsequent contact.”⁶

Questions

2. Does the above exposition accurately reflect the modus operandi of a stalker?
3. Are there other methods which need to be highlighted for the purpose of this investigation?

WHO STALKS?

1.10 There is no monolithic concept of stalking and a single prototype of a stalker does not seem to exist. Stalkers range from cold-blooded killers to lovesick teens and may exhibit a variety of psychological syndromes⁷ such as erotomania,⁸ schizophrenia,⁹ paranoia,¹⁰ manic

⁵ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 7.

⁶ KL Walsh “Safe and Sound at last? Federalized Anti-Stalking Legislation in the United States and Canada” (1996) 14:2 Dickinson Journal of International Law, 373 at 381 as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 8.

⁷ R A Lingg **Stopping Stalkers: A Critical Examination of Anti-Stalking Statutes** (1993) 67 St.John's L.Rev.347 at 351,n.25 as quoted in **Report on stalking**.

⁸ Loosely defined as a delusional disorder in which the individual truly believes that he or she is loved by another person who may not even know of his or her existence.

⁹ Defined in the Pocket Oxford Dictionary: Oxford University Press 1983 as ‘mental disease marked by disconnection between thought, feelings, and actions’.

depression,¹¹ and obsessive-compulsive disorder. A stalker may be trying to re-establish a prior relationship, be trying to establish a new relationship with someone whom he or she thinks is already in love with him or her or would be if the victim would the stalker a chance or may be a serial murderer or rapist who has compiled certain criteria for an “ideal victim” and is seeking that victim out.

1.11 On the one hand Stearns¹² describes the underlying psychodynamics of stalking as follows:

“An identifiable prototype of a stalker does not exist; people stalk for a multitude of reasons. The mental state of individuals who engage in stalking remains a largely unexplored and uncertain area of psychology. However, approximately seventy percent of stalkers suffer from some mental defect. Ascertaining the mental defects that plague stalkers remains integral to formulating an effective approach towards stalking. Once the defect is identified, treatment can be mandated which may prevent the stalker from engaging in his deadly game of cat and mouse. Without treatment, the stalker’s behaviour may never cease until he kills the object of his obsession.”

1.12 On the other hand the New South Wales Law Reform Commission found that although many stalkers act irrationally, and demonstrate little understanding of the effect of their behaviour, most offenders in New South Wales were not psychotic or delusional.¹³

1.13 Stalking is gender-neutral behaviour, with both male and female perpetrators and victims. However, women seem to be the primary victims and men the primary perpetrators. In the US, 75 – 80% of all stalking cases involve men stalking women.¹⁴

10 Defined in the Pocket Oxford Dictionary: Oxford University Press 1983 as ‘mental derangement with delusions of grandeur, persecution’.

11 Defined in the Pocket Oxford Dictionary: Oxford University Press 1983 as ‘relating to mental disorder with alternating periods of elation and depression’.

12 “Stalking stuffers: A revolutionary law to keep predators behind bars” 1995 **Santa Clara LR** 1027 1029 as quoted by JMT Labuschagne in his submission to the Commission.

13 New South Wales Law Reform Commission Discussion Paper 45 **Apprehended Violence Orders: Part 15A of the Crimes Act** November 2002, at pp 141.

14 The National Victim Center, “Stalking – Questions and Answers” (No 43, 1995) at

1.14 A review of the literature on stalking reveals that there are at least five different categories of stalkers, namely delusional erotomanics, borderline erotomanics, “former intimate” stalkers, sociopathic stalkers, and stalkers with false victimisation syndromes.¹⁵

Delusional erotomanics

1.15 “Erotomania” is described as a delusional disorder in which the individual truly believes that he or she is loved by another who may not even know of his or her existence. The erotomaniac typically fantasizes the existence of an idyllic romantic love with someone who is of a higher social status¹⁶ or in a position of authority relative to him or her. The erotomaniac seeks to establish an intimate relationship with his or her object of fantasy. The primary motivator is not to cause harm.

Borderline erotomanics (or “love obsessives”)

1.16 These are individuals who have developed intense emotional feelings towards other individuals whom they know do not reciprocate their feelings. They tend to vacillate between feelings of love and hate towards their victims. They may express significant narcissistic or abandonment rage when their victims do not return their affection.¹⁷

Former intimate stalkers

1.17 These individuals have had some personal or romantic relationship with the victim. They engage in stalking behaviour when the relationship breaks down or when they feel mistreated by the victim. They stalk their victim in an attempt to resurrect the broken relationship or to seek revenge.¹⁸ Anecdotal evidence suggests that 70 – 80% of stalking cases involve “former

<http://www.nvc.org/ddir/info43.htm> as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 9.

¹⁵ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 10.

¹⁶ The Hollywood actress Meg Ryan recently obtained a restraining order against John Hughes, who is described as having deep delusions that involve the belief that he is married to Meg Ryan: http://www.news24.com/News24/Entertainment/Abroad/0,,2-1225-1243_1157985,00 2003/05/08.

¹⁷ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 11.

¹⁸ N Diacovo “California’s Anti-stalking Statute: Deterrent or False Sense of Security?” (1995) 24

intimate” stalkers and furthermore that they are prone to follow through with threats of harm and therefore pose the greatest potential threat of violence to the victim. According to research by Prof Lourens Schlebusch, head of medical psychology at the University of Natal’s Nelson R Mandela School of Medicine, this is one of the most common forms of stalking. He is quoted as saying that stalking is on the increase in South Africa and the most likely stalker is an ex-lover or friend.¹⁹ He attributes this increase to relationship stress and easier accessibility to the victim through internet, e-mail and cellphones.²⁰

Sociopathic stalkers

1.18 Stalking behaviour is a common characteristic of serial murderers and serial rapists. Sociopathic stalkers are distinguished by the fact that they do not seek to initiate or maintain an interpersonal relationship with their victim. They first formulate the characteristics of the “ideal victim” and then seek out individuals who fit the criteria. They stalk one victim after another in a serial fashion.²¹ In May 2002 the police arrested a rape suspect who was accused of stalking, abducting and raping at least several schoolgirls in Johannesburg. Police analysed four case dockets over a seven-month period where the circumstances were similar.²²

Persons with false victimisation syndromes

1.19 This kind of stalker greatly admires the victim and may go to great lengths to imitate his or her habits and life style. When the stalker feels that he or she does not measure up to this individual and believes that he or she is wronged or rejected by him or her, the stalker takes revenge by harassment. The behaviour is rationalized by claiming that he or she is the victim and that it is the individual targeted by the stalker who is at fault. Such stalkers are usually of the

Southwestern University Law Review 389 at 396 as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 11.

¹⁹ Sunday Times ‘Stalking is a growing menace in SA’ 18 May 2003 as at 27 May 2003
<http://www.sundaytimes.co.za/2003/05/18/news/durban/ndbn05.asp>.

²⁰ Ibid.

²¹ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 11.

²² http://www.news24.com/News24/South_Africa/Gauteng/0,,2-7-829_1190268,00.html on 2003/05/08.

same sex as their victims.²³

Other categories of stalkers

Disgruntled clients of private organisations or public bodies

1.20 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:

- (a) 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;
- (b) lodging repeated oral and written complaints on frivolous or vexatious matters which are without substance or even malicious;
- (c) following the responsible officer or staff;
- (d) visiting the home of the officer after finding out his or her address by following the officer home; and
- (e) intercepting or threatening to intercept the officer or his or her staff near their place of work or on the street.²⁴

These stalkers are vengeful over some real or imagined grievance.

Clients of counselling staff

1.21 Not only is the counsellor often stalked or harassed but the risk extends to the family members of counselling professionals.²⁵ Prof Schlebusch is quoted²⁶ as saying:

²³ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 10.

²⁴ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 12.

²⁵ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 13.

²⁶ Sunday Times 'Stalking is a growing menace in SA' 18 May 2003 as at 27 May 2003
[Http://www.sundaytimes.co.za/2003/05/18/news/durban/ndbn05.asp](http://www.sundaytimes.co.za/2003/05/18/news/durban/ndbn05.asp).

“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.”

In the same article in the Sunday Times, Prof Saths Cooper, vice-chairman of the Health Professions Council of South Africa, said the personal details of some professionals had to be removed from the roll to prevent them from being harassed.

Cyberstalkers

1.22 Internet users may be subjected to a campaign of electronic harassment. The cyberstalker can forge an e-mail header so as to create an online digital persona. Online harassment includes:

- (a) sending unwanted e-mails which are abusive, threatening or obscene;
- (b) blocking the recipient's e-mail with a large number of junk e-mails (“spamming”);
- (c) sending computer viruses;
- (d) impersonating the victim online and sending abusive e-mails in the victim's name; and
- (e) putting the victim's name on sex newsgroups inviting persons to call the victim or to come to his or her home.²⁷

1.23 In 2001 a Los Angeles woman was ordered to stand trial on extortion, witness intimidation, violating a restraining order, making harassing telephone calls and cyber-stalking charges. She had *inter alia* set up a website featuring herself and her former lover in bondage and included pictures of his house, car and directions to his home.²⁸ Locally an ex-husband who stalked his wife and bombarded her with SMS messages has made the headlines.²⁹ In terms of a final domestic violence order the ex-husband may not harass, threaten or communicate with his ex-wife.

Debt collectors

²⁷ Ibid.

²⁸ http://www.news24.com/News24/Technology/Infotech/0,,2-13-45_1123537,00.html as on 2003/05/08.

²⁹ Sunday Times 11 Nov 2001 Durban News 'My husband stalked me' accessed on 27 May 2003 at <http://www.Sundaytimes.co.za/2001/11/11/news/durban/ndbn09.asp>.

1.24 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.³⁰

Questions

4. Does any other category of stalker exist?
5. In your opinion are any of the above categories adequately dealt with in terms of existing law?
6. Should this investigation include all of the above categories? Please elaborate.

WHO IS STALKED?

1.25 Stalking knows no boundaries and affects people from all walks of life. Stalking of celebrities³¹ attracts much media attention; however, the majority of victims of stalking are ordinary people who are harassed at their place of work or in a domestic context.

IMPACT OF STALKING BEHAVIOUR ON VICTIMS

1.26 The impact stalking has on its victims is manifold. Some report significant disruption to their daily functioning irrespective of exposure to associated violence; others report a restriction on their social activity and that it leads to increased work absenteeism. Other consequences are a reduced enjoyment of life, the economic impact related to upgrading security systems, changing telephone numbers, screening calls or even moving house or changing jobs.

1.27 As observed by the Manitoba Law Reform Commission, stalking interferes with the

³⁰ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 14.

³¹ For example Hollywood actors Richard Gere, Nicole Kidman and Meg Ryan (see <http://www.news24.com/News24/entertainment/Abroad>; <http://www.news24.com/News24/Offbeat/Entertainment>) and popstar Britney Spears (see <http://www.news24.com/News24/entertainment/Abroad> and locally, popular SABC 1 television weather presenter Jabulani "weatherman" Sithole (see <http://www.news24.com/News24/Backpage/HotGossip> all at 2003/05/08.

following interests of an individual:³²

- (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 of 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.

Invasion of privacy

1.28 One of the primary concerns in relation to the invasion of privacy of a person being stalked is the acquisition or use of personal information about that individual. The unlawful collection of personal data falls within the realm of data protection.

1.29 By following or observing a victim in the street or other places which are accessible to the public, the stalker is unlikely to obtain any personal information about his or her victim. Seeking to maintain contact by making telephone calls or sending letters or gifts also does not give the pursuer access to personal information.

1.30 However, a person's privacy may be intruded upon by subjecting the person to unlawful surveillance. If the concept of "private life" is used then stalking could arguably amount to an interference with privacy.

1.31 Article 8 of the European Convention on Human Rights describes privacy as the right to respect for an individual's private life. The European Court of Human Rights has not given an exhaustive definition of the notion of "private life" under Article 8. However, in **Niemietz v Germany** the Court held that:³³

³² Manitoba Law Reform Commission Stalking (Report No 98 1997) p5 – 6 as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 20.

³³ Series A No 251-B, para 29 (1992) as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 25.

“it would be too restrictive to limit the notion [of private life] to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of ‘private life’ should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that . . . it is not always possible to distinguish clearly which of an individual’s activities form part of his professional or business life and which do not.”

1.32 One of the many aspects of privacy is freedom from interference with an individual’s private space. In the light of the European Court decision in **Niemietz v Germany**, which extended the concept of private life to include the establishment and development of personal relationships, it is arguable that the idea of private space is no longer confined to those areas in which the person has some exclusive rights of occupancy where secrecy or confidentiality can be maintained.³⁴

Question

7. Does stalking have an impact on the victim’s psychological, interpersonal and/or occupational functioning?
8. Does stalking affect the victim’s activities or social interaction, or should the victims of stalking be more resilient in dealing with nuisance behaviour?
9. Do the actions that constitute stalking necessarily invade a person’s privacy?

THE EXTENT OF THE PROBLEM

³⁴ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 27.

1.33 The South African Police maintain statistics on the types and numbers of offences committed. However they do not keep any statistics pertaining to stalking, as stalking is not an offence under existing law. Police regularly receive complaints from people who claim that they are being followed or persistently harassed. However, unless the stalking entails individual actions which are criminal in nature, the police are unable to provide redress.

1.34 According to Prof Schlebush, stalking is on the increase. In recent months he has treated five victims of stalkers. The cases include: A butcher who secretly videotaped himself raping his unconscious lover; the wife of a prominent businessman, who started stalking one of his colleagues after the couple had experienced marital problems; and a husband who suspected his wife was being unfaithful to him and constantly checked her underwear and car mileage and monitored her cellphone calls and messages.³⁵ He is of the opinion that the fact that stalking was not classified as a crime in South Africa has deterred victims from exposing the perpetrators. In his view the only time we learn of cases of stalking is when they are reported in the media or victims approach therapists for help. Stalking is an old behaviour but a new crime, not only in South Africa but worldwide.³⁶

1.35 The Commission is unaware of any study which focuses solely on the extent to which stalking is a problem in South Africa. However statistics collected by the Department of Justice and the Consortium on Violence against Women³⁷ reflect a high percentage of requests for domestic violence interdicts based on identified stalking, harassment or other elements of domestic violence which could form part of a pattern of stalking, such as, for example, intimidation, damage to property, physical, sexual, emotional, verbal or psychological abuse. The Department of Justice and Constitutional Development's statistic totals per year and per regional office reflect that there were 15 931 applications for domestic violence protection orders for the year 2001, of which 4 464 were not granted, 1157 set aside and 998 amended.

Unfortunately the departmental statistics do not reflect the remedies that were sought.

³⁵ Sunday Times 'Stalking is a growing menace in SA' 18 May 2003 as at 27 May 2003
[Http://www.sundaytimes.co.za/2003/05/18/news/durban/ndbn05.asp](http://www.sundaytimes.co.za/2003/05/18/news/durban/ndbn05.asp).

³⁶ Sunday Times 'Stalking is a growing menace in SA' 18 May 2003 as at 27 May 2003
[Http://www.sundaytimes.co.za/2003/05/18/news/durban/ndbn05.asp](http://www.sundaytimes.co.za/2003/05/18/news/durban/ndbn05.asp).

³⁷ Parenzee, Artz & Moul: **Monitoring the implementation of the Domestic Violence Act First Research Report 2000 – 2001**: Institute of Criminology University of Cape Town.

Question

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

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

2.1 In South Africa a person may, depending on the actions of the stalker, have recourse to civil law or criminal law remedies. However, since public and individual interests may overlap and even be identical, the same conduct may be a crime, a delict or a breach of a fundamental right as contained in the Bill of Rights of the Constitution of the Republic of South Africa.³⁸ This leaves the complainant with a choice as to which remedy to pursue and with the option of pursuing more than one remedy if need be.

THE CIVIL LAW

2.2 Various civil law remedies are available to a person being stalked.

2.3 A delictual claim aims at indemnifying a person for loss suffered. The normal remedies available to the victim of a delict are an action for damages and an application for an interdict restraining a person from committing or continuing his or her wrongful conduct. An applicant is in principle entitled to an interdict, not only where the respondent is committing or continuing to commit a delict or wrongful act, but also where the respondent threatens to commit a wrongful act.³⁹

2.4 An interdict is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm.⁴⁰ In this instance the interdict would be prohibitory, ordering the respondent to desist or refrain from doing a particular act. Three requisites exist for the granting of a high

³⁸ Act 108 of 1996.

³⁹ Van der Walt & Midgley **Delict Principles and Cases** Second Edition Butterworths Durban 1997 at pp 178.

⁴⁰ Van Winsen, Cilliers & Loots **The Civil Practice of the Supreme Court of South Africa** Fourth Edition Juta & Co, Ltd 1997 at pp 1063.

court

interdict, namely a clear right, an actual or threatened invasion of the right and the absence of another suitable remedy. A further requisite, namely that a balance of convenience favours the granting of the interdict, exists where a temporary interdict is sought i.e. pending an action between the respective parties.

2.5 The purpose of a constitutional remedy is to vindicate a constitutional right and to enforce constitutional values.⁴¹

2.6 A binding over of persons to keep the peace is regulated in terms of section 384 of the Criminal Procedure Act 56 of 1955, which section is retained in terms of the Criminal Procedure Act 51 of 1977. Pursuant to a complaint on oath that any person is conducting him or herself violently towards, or is threatening injury to the person or property of another or that he or she has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, in public or in private, a magistrate may order such person to appear before him or her and if necessary may cause the person to be arrested and brought before him or her. After conducting an enquiry the magistrate may order the person against whom the complaint is made to give recognizances with or without sureties to the amount of R2000 for a period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his or her person or property. This order may be accompanied by an order of costs. In the event that the recognizances are not observed it may be declared forfeited and any such declaration of forfeiture, will have the effect of a judgment in a civil action in the magistrate's court of the district.

2.7 Harassment, and more pertinently sexual harassment, is addressed by means of the Labour Relations Act 66 of 1995, the Employment of Educators Act 76 of 1998, the Further Education and Training Act 98 of 1998 and the Municipal Systems Act 32 of 2000. The primary object of these statutes is the prevention of sexual harassment in the workplace and to provide disciplinary methods for non-compliance by officials bound by the specific Acts. An official who is being stalked and is bound by these statutes would have to exhaust the appropriate internal

⁴¹ Van der Walt & Midgley **Delict Principles and Cases** Second Edition Butterworths Durban 1997 at pp 48.

remedy before being allowed to proceed with a civil claim.

2.8 A domestic violence protection order is aimed at preventing further incidences of domestic violence. Currently only the Domestic Violence Act 116 of 1998 (hereinafter the Domestic Violence Act) specifically addresses the phenomenon of stalking. The Domestic Violence Act provides that a person may acquire a protection order in order to prevent further incidences of domestic violence against a person with whom the complainant has been in a domestic relationship.⁴² The term 'domestic violence' is widely defined and includes stalking and harassment.

EVALUATION OF THE CIVIL LAW RESPONSE

2.9 Relying solely on civil remedies to address stalking has its limitations. To obtain an interdict, for example, notice must be given to the stalker. This may be problematic as a victim may not know the stalker's name. The police cannot be called upon solely to assist the victim in finding out the identity and address of the stalker. The victim might have to retain a private investigator to stalk the stalker in order to find out where he or she lives so that a writ can be served on the stalker. Even if the stalker is known to the victim, many victims are discouraged from seeking a civil remedy because the civil procedures are cumbersome, expensive and less appropriate where emergency protection is required.

2.10 If a dispute of fact arises which is relevant to the proof of one of the essential requirements for an interdict, the matter may be referred to oral evidence. If the dispute is still not resolved the court may dismiss the application. The applicant will have to bear the initial cost of bringing the application, which if not done personally, will entail the retention of an attorney and an advocate. In order to resolve a dispute of fact the applicant may also have to

⁴²

"Domestic relationship" means a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they share or recently shared the same residence"

call an expert to testify on his or her behalf to prove that the applicant is being subjected to psychological terror or that the person has suffered damage and the quantum thereof. The

process entails initial costs which on their own are prohibitive. However, if successful the respondent may be ordered to pay the applicant's legal costs in addition to damages. A case in point is the matter between Independent Newspapers operations manager Noel Seymour and journalist Paul Kirk where Kirk was ordered to pay Seymour's legal costs in addition to R60 000 damages following a week-long civil trial in which it was found that Kirk had conducted "cowardly acts of terror against him and his family". A punitive costs order reported to be in excess of R200 000 was also made against Kirk.⁴³ Nonetheless, if the respondent is a proverbial man of straw there is no point in launching a delictual action against a stalker in order to obtain recompense for the damage caused as this would only result in the applicant incurring legal expenses for his or her own account.

2.11 An order to keep the peace seems to have fallen into a state of disuse, largely due to the impractical nature of the sanction provided by section 384 of the Criminal Procedure Act 1955.⁴⁴

2.12 The procedure followed to obtain a Domestic Violence Protection Order is reasonably simple and this is generally an inexpensive remedy. The scope of the Act does elicit concern though. Although the Domestic Violence Act follows a progressive and innovative approach, peace officers may only arrest a person at the scene of an incident of domestic violence, without a warrant, if they reasonably suspect the person of having committed an offence containing an element of violence against a complainant.⁴⁵ Stalking and harassment usually precede violence, and for this reason a stalker or harasser would not be liable for arrest for stalking or harassment where there is no violence. The victim bears the burden of proof when seeking a protection order and, if granted, the stalker's or harasser's action will constitute an offence only once the protection order has been contravened.⁴⁶ A matter of further concern is that a protection order can only be acquired if the stalker or harasser and the complainant are in a domestic relationship. Persons falling outside of this definition, for example strangers or work colleagues,

⁴³ Daily News 'Newspaper man welcomes damages award' June 10 2003.

⁴⁴ South African Law Commission Commission Paper 509 **Domestic Violence** (Project 100) Minority report 1998.

⁴⁵ Section 3 of the Domestic Violence Act follows on the amendment of section 40(1) of the Criminal Procedure Act, 1977, by the addition of paragraph (q).

⁴⁶ The offence being contravention of the protection order and not stalking or harassment per se.

do not fall within the reach of the Domestic Violence Act. Consequently there is no recourse in terms of this Act.

2.13 In the final analysis one could always reason that interdicts are mere pieces of paper – they will not stop a determined stalker. Restraining orders cannot stop a bullet, knife or car. Protection orders have a limited effect because they penalize perpetrators only after the orders are breached. In other words, they can do nothing to protect the victim until the harm they are designed to protect against has already occurred.

Questions

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

THE CRIMINAL LAW

2.14 Stalkers may employ unlawful means to harass their victims. For example, a stalker may make telephone calls that are of an obscene or menacing character, threatening the victim with injury to his or her person or property, or inflict violence on the victim or the victim's family members. Such conduct can be restrained and penalised by means of the existing criminal law. However, stalkers may seek to stay outside the bounds of the criminal law in order to avoid arrest and prosecution. They may therefore engage in behaviour which is apparently harmless and entirely lawful when viewed in isolation.⁴⁷

⁴⁷

2.15 Stalking behaviour involves a series of discrete and often unrelated acts. These acts are performed individually and at different times and in different locations. Stalking is therefore different from most crimes. Existing criminal law focuses primarily on the punishment of specific

prohibited acts. It is only where an aspect of stalking behaviour constitutes a criminal act that the criminal law may be invoked to restrain or punish the stalker. Criminal law therefore treats stalking as a precursor to a crime or as evidence of its *mens rea* instead of a crime in its own right.

2.16 As stated above stalking may be a precursor to the commission of a crime or may include one or numerous criminal actions. A few of these crimes will briefly be discussed below, but should not be seen as an exhaustive list of crimes associated with stalking.

2.17 The integrity of the physical person is one of a trinity of interests of human personality which is protected by South African law. The other protected interests are the dignity of the person and the reputation of the person. In South African Law these interests are protected both through civil actions for damages and by way of the criminal sanction. At criminal law violations of reputation and dignity are respectively prosecuted as defamation and *crimen injuria*.⁴⁸

Common Assault

2.18 Violation of the interest of the physical person is prosecuted as assault. Assault consists in unlawfully and intentionally applying force to the person of another; or inspiring a belief in that other that force is immediately to be applied to him or her. The fundamental principle is that every person's body is inviolate.⁴⁹ The law punishes not only the actual infliction of force upon the person of another but also the mere inducement in the mind of the victim of an apprehension that he or she is to be assaulted. The law is therefore capable of punishing the inducement of mere emotional distress, unaccompanied by any psychological harm of physical trauma.

⁴⁸ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 407.

⁴⁹ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 406.

2.19 The application of force may be direct or indirect, for example where a person instructs someone else to strike the victim and the person does so.⁵⁰ An example is where a woman's ex-husband posted her name and home address on the Internet, urging men to gang rape her, and

men began to show up at her house.⁵¹ 'Force' does not connote any degree of violence, and the slightest contact may suffice.

2.20 The gist of assault where there is no application of force is the inspiring in the victim of a belief that force is immediately to be applied to him or her. The person often will, but need not necessarily, suffer actual emotional fear. Apprehension may be awakened by acts or gestures or words.

Assault with intent to do grievous bodily harm

2.21 The crime of common assault has no provision for grading the harm caused by the assault. The punishment which may be imposed is at the discretion of the court, which can of course set the punishment in relation to the seriousness of the injury and harm inflicted. Nevertheless the South African law has created a version of the crime of assault which identifies serious assaults under the appellation of 'assault with intent to do grievous bodily harm'. No specified punishment is prescribed for this form of assault, which, as in the case of common assault, is left to the discretion of the court.⁵²

Crimen injuria

2.22 *Crimen injuria* consists in unlawfully, intentionally and seriously impairing the dignity of another.⁵³ It is very difficult to lay down a general definition of what acts, what exact form of

⁵⁰ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 420.

⁵¹ [Http://www.angelfire.com/ga/random/internetstalking.html](http://www.angelfire.com/ga/random/internetstalking.html) accessed on 2 June 1999.

⁵² Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 431.

⁵³ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 492.

conduct, or what extent of repetition of objectionable conduct would constitute *crimen injuria*. The criminal or innocent character of the acts would depend upon very many circumstances, such as the place where the acts are committed, the time of commission, the relation between the parties, age⁵⁴ and social standing, etc. The prevailing view is that dignity is a composite concept embracing the human claim to respect for the individual's sense of self-respect, mental

tranquillity and privacy.⁵⁵ The concepts of self-respect, mental tranquillity and privacy are judged both objectively and subjectively: objectively in that the law accepts that each person is entitled to them; subjectively in that it depends upon the particular person and the circumstances whether it can be said that the person's dignity has in fact been impaired.

2.23 In addition to the standard considerations, there is a special consideration which applies in the case of *crimen injuria*, namely that in order to be considered liable to punishment an *injuria* must constitute a serious invasion of the dignity of the complainant. Thus a trifling impairment of dignity is not unlawful in criminal law, whether or not it constitutes an actionable *injuria* in civil law. For example trespass founds a civil action for *injuria*, but it does not constitute *crimen injuria* in the absence of further conduct which is of itself criminal.⁵⁶

2.24 The persistent repetition of conduct may push it over the borderline between *injuria* and *crimen injuria*; to stare at a woman, for instance, is scarcely injurious, but to follow her and rudely stare persistently at her may be.⁵⁷

2.25 The elements of liability in the case of *crimen injuria* committed by invasion of another's privacy are somewhat different in that it is not necessary that the invasion of privacy involve an insult to the dignity of the victim; the crime is committed by the act of intentionally invading the privacy of another.⁵⁸ The right to privacy is recognized as including a right not to have

⁵⁴ An act may be aggravated by the fact that it is committed in respect of a young person. In **R v S** 1955 3 SA 313 (SWA) at 316 for instance, the court emphasised that the complainant was a young girl, who had been accosted in her home by a strange man.

⁵⁵ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 493.

⁵⁶ **R v Farukayi** 1951 SR 235, 1951 (2) PH H129 (SR).

⁵⁷ **R v Meer** 1923 OPD 77.

⁵⁸ **S v A** 1971 (2) SA 293 (T) as quoted in Milton JRL **South African Criminal Law and**

information concerning the private affairs of the person disclosed to others. Milton describes 'peeping toms', eavesdropping and 'shadowing' as actions which constitute invasion of privacy and which are consequently punishable as *crimen injuria*.⁵⁹

Defamation

2.26 Defamation consists in the unlawful and intentional publication of matter concerning another which tends to injure his or her reputation.⁶⁰ Defamatory matter may take the form of words, written or spoken, acts or omissions which tend to diminish the esteem in which the person to whom it refers is held by others. It may reflect upon the complainant's moral character, or upon his or her capacity for his or her occupation or some special undertaking, or it may attribute some quality to him or her which tends to diminish the willingness of others to associate with him or her even though there can be no question of his or her being to blame for the presence of that quality.⁶¹ Milton refers to a particular case involving the defamation of a private individual as serious and therefore actionable, namely **S v F**⁶² in which X circulated to a number of people a derogatory letter concerning Y, his ex-mistress, together with a photograph of her in the nude.

Malicious injury to property

2.27 Malicious injury to property consists in unlawfully and intentionally damaging the property of another.⁶³ Ordinarily the law regards damage to property as a matter for civil redress, and not

Procedure (Volume II) Common Law Crimes (third edition) Kenwyn: Juta 1996 at pp 513.

⁵⁹ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 514.

⁶⁰ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 520.

⁶¹ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 534.

⁶² 1967 (3) SA 407 (SWA).

⁶³ Milton JRL **South African Criminal Law and Procedure (Volume II) Common Law Crimes** (third edition) Kenwyn: Juta 1996 at pp 766.

the appropriate subject of criminal proceedings. However, when the damage is malicious it is appropriate to punish at criminal law. Milton notes that some difficulty surrounds those cases where a person destroys property not from motives of gain but out of spite or ill-temper. However, he finds that it would be appropriate to charge the person with theft or malicious injury to property.⁶⁴

64 *Ibid.*

Trespass to land

2.28 The Trespass Act 6 of 1959 criminalises the actions of any person entering onto any land or into any building without permission unless the person has a lawful reason to do so.

2.29 In addition to a stalker committing one or more of the above offences, a stalker may commit any number of other offences such as loitering, contravention of telephone and post office statutes, public nuisance, breach of the peace, etc.

EVALUATION OF THE CRIMINAL LAW RESPONSE

2.30 The inadequacy of traditional criminal remedies seems to lie in the fact that stalkers typically engage in behaviour which is threatening to the victim but which may not constitute a crime. Prosecuting a stalker for trespassing, for example, will not necessarily provide a remedy unless the stalker enters private property.⁶⁵ In South Africa, little can be done to deter or punish a stalker until he or she actually causes direct harm to an individual or an individual's property.⁶⁶

2.31 Although existing criminal laws cover some aspects of stalking behaviour, they do not address stalking as an independent phenomenon. They treat stalking behaviour piecemeal and deal with it as isolated incidents. The police usually focus upon a particular aspect of the stalker's conduct and seek to bring it within an existing provision of the criminal law. Existing criminal law deals mainly with single incidents of criminal behaviour such as murder, robbery, theft or assault. It is far less developed in dealing with behaviour such as stalking, which is continuous and where the whole is worse than the sum of the parts or any individual part.

2.32 The criminal justice system fails to deal with stalking mainly "because it has tended to chop up the continuous film of persistent misbehaviour into individual, discrete snapshots".⁶⁷

⁶⁵ South African Law Commission **Domestic Violence** (Project 100) **Discussion Paper 70** (1997).

⁶⁶ Clark & Van der Walt 'Stalking: Do we need a Statute?'(1998) **South African Law Journal** 729 at 731.

⁶⁷ House of Commons Hansard 17 Dec 1996, col 788 as quoted in The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 77.

Questions

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

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

CHAPTER 3: THE WAY FORWARD: POSSIBLE OPTIONS FOR REFORM

3.1 Various options for law reform present themselves following the above exposition of the current remedies available to a person who is stalked. These options will briefly be sketched below and should in no way be seen as exhaustive.

REFORM OF THE CIVIL LAW

3.2 With the exception of the domestic violence protection order, civil remedies are unattainable for the so-called 'man on the street' as a victim of stalking. The costs involved in civil litigation are prohibitive. The majority of South Africans do not have ready access to money for retention of a lawyer and even less for an application to the High Court for an interdict. They are faced with very limited options. The most accessible recourse seems to be in terms of the Domestic Violence Act, 1998, whereby a protection order may be obtained. In view of the shortcomings of this remedy as stated above, it is deemed apt to explore the option of expanding the Domestic Violence Act to include the option of a personal protection order against persons who are not in a domestic relationship with the applicant and the option of enacting separate but similar legislation to the Domestic Violence Act for the last-mentioned purpose.

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

3.3 Some jurisdictions have specific legislation which deals comprehensively with protection orders. Western Australia has the Restraining Orders Act 1997 (WA), which provides for violence restraining orders to protect against acts of personal violence, and misconduct restraining orders to prevent intimidating or offensive behaviour, property damage and disorderly conduct. The distinction between the two orders is based on the defendant's behaviour, and not on the relationship between the applicant and the defendant. Under the Protection Orders Act 2001 (ACT), applicants may obtain a domestic violence order or a personal protection order.

3.4 Adopting a similar approach to the Domestic Violence Act, 1998 or by combining the two concepts, both domestic and personal, could be beneficial in that it would provide a central

legislative basis for protection orders. This could be seen as recognition of the importance of

protection orders as a means of combating violence, abuse and harassment. However a drawback of doing this could be creating the perception that protection orders have been “sidelined” from more serious issues and crimes. This may give the impression that violent actions which prompt the issuing of protection orders are somehow taken less seriously and that consequently stalking is seen as less serious.

3.5 One also needs to bear in mind that much has been written about the unique nature of domestic violence as opposed to violence in other relationships. Domestic violence also involves issues of financial dependence, physical and emotional power and control, and shared emotional history, which sets it apart from non-domestic abuse. These differences may justify separate legislation dealing with domestic and personal violence protection orders only. A dual approach is followed in the Northern Territory, Queensland, South Australia and Victoria.⁶⁸

3.6 The focus of the criminal law is to punish the offender after the commission of an offence has been proved beyond reasonable doubt. While the imposition of criminal sanctions following a breach of the law is a necessary element in our society, it is not always sufficient to protect those who fear for their safety. A person may fear violence at the hands of another in circumstances where the conduct of that person may either not amount to criminal conduct, or may not be able to be proved to the criminal standard. A classic example is obsessive behaviour, such as constant telephone calls or sending disturbing, unsolicited gifts or messages. In domestic situations, it is possible for patterns of intimidation and abuse to continue for years without there being enough corroborating evidence to support a criminal conviction. To alleviate fear in these circumstances, a system of restraining or protection orders operates in every Australian State and Territory, and in many overseas jurisdictions.

3.7 Protection Orders are preventative measures: they are granted based on indications of past behaviour but essentially go to preventing future conduct. However, the question arises whether such orders prevent future conduct.

⁶⁸ Domestic Violence Act 1992 (NT), Justices Act 1928 (NT), Domestic Violence (Family Protection) Act 1989 (Qld), Peace and Good Behaviour Act 1982 (Qld), Domestic Violence Act 1994 (SA), Summary Procedure Act 1921 (SA), and the Crimes (Family Violence) Act 1987 (Vic).

Option 2: Amended and adapted section 384 of the Criminal Procedure Act, 1955

3.8 The procedure envisaged in section 384 of the Criminal Procedure Act, 1955 is informal, inexpensive and provides a summary way of gaining access to a magistrate's court. Following an order of the magistrate the respondent is to be brought before the court forthwith. This process does not necessitate service of the order, fixing of a return date or filing of opposing affidavits etcetera. In order to apply this simple procedure to the needs of a person being stalked, this section could be amended accordingly. For example, if the respondent admits the allegations brought against him or her or is found guilty of such transgression the magistrate could be empowered to make one or more of the following orders: issue a restraining order or impose such sentence as the magistrate deems justified, which sentence may be postponed or wholly or partly suspended on condition, for example, that the respondent submits to psychological treatment, anger management or counselling.⁶⁹

REFORM OF THE CRIMINAL LAW

Option 3: Enact independent legislation criminalising stalking

3.9 It could be argued that a different conceptual and legal framework is needed for separate acts of harassment which constitute stalking by treating a "series" of these acts as a more serious crime, rather than a stream of unrelated minor offences.⁷⁰

3.10 A series of stalking homicides galvanized public opinion in Australia in the early 1990s when it was recognized that the criminal law had no offence which targeted stalking behaviour. Most Australian jurisdictions have now introduced legislation creating the criminal offence of stalking. This legislation only addresses stalking and is commonly known as "anti-stalking" legislation. In New South Wales stalking is defined as the following of a person about, watching, frequenting of the vicinity of, or an approach to, a person's place of residence, business or work

⁶⁹ A similar suggestion was made pertaining to domestic violence in the South African Law Commission Commission Paper 509 **Domestic Violence** (Project 100) Minority report (1998).

⁷⁰ The Law Reform Commission of Hong Kong Report on **Stalking** October 2000 pp 78.

or any place that a person frequents for the purpose of any social or leisure activity.⁷¹ Stalking in the Northern Territory includes the following: loitering outside where the other person is; interfering with property of the other person; keeping the other person under surveillance or acting in any way that could reasonably be expected to arouse the other person's apprehension or fear.⁷² The South Australian provision is similar to that of the Northern Territory, but it also includes giving or leaving offensive material.⁷³ In Queensland stalking includes the following: loitering near, watching or approaching another person or their place of work, residence or where they visit, telephoning, interfering with property, giving or leaving offensive material, harassing, intimidating, or threatening another person.⁷⁴

3.11 The United States of America initially promoted legislation of this nature following a spate of celebrities being stalked by crazed fans. Currently 49 states and the District of Columbia have enacted stalking laws, and several have amended their statutes.⁷⁵ Canada and the United Kingdom have enacted similar legislation aimed at combating stalking and harassment.

3.12 Section 562 of the New South Wales Crimes Act⁷⁶ provides that it is an offence to stalk or intimidate another person: A person who stalks or intimidates another person with the intention of causing the person to fear physical or mental harm is liable to imprisonment for 5 years, or to a fine of 50 penalty units or both.

3.13 Stalking has only been recognised as a criminal offence in comparative jurisdictions relatively recently, in addition to the aforementioned jurisdictions there is similar legislation in Ireland and New Zealand.⁷⁷

⁷¹ JA Riordan (Editor in Chief) **The Laws of Australia (Title 17 Family Law)** Sydney: the Law Book Company 1995.

⁷² **The Laws of Australia** paragraph [46].

⁷³ **The Laws of Australia** paragraph [46].

⁷⁴ **The Laws of Australia** paragraph [72].

⁷⁵ Clark & Van der Walt 'Stalking: Do we need a Statute?'(1998) **South African Law Journal** 729 at 733.

⁷⁶ New South Wales Law Reform Commission Discussion Paper 45 **Apprehended Violence Orders: Part 15A of the Crimes Act** November 2002, at pp 134.

⁷⁷ See the Protection from Harassment Act 1997 (UK); Non-Fatal Offences Against the Person

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

3.15 In New South Wales the stalking and intimidation offence was inserted into the Crimes Act in 1993 by way of the Crimes (Domestic Violence) Act 1993 (NSW). Originally it only applied to people who were in a domestic relationship and in the context of domestic violence. In 1994 this limitation was removed, recognising that stalking and intimidation can occur regardless of whether or not the parties are in a domestic relationship by way of the Crimes (Threats and Stalking) Amendment Act 1994 (NSW). In 1999, the offence was expanded again. Previously, the offender had to cause fear of “personal injury”, which failed to recognise that stalking, as an expression of power and control, may not aim to arouse fear of physical violence. As amended, it is an offence to cause fear of “physical or mental harm”.⁷⁸

Questions

17. Does stalking present a problem which deserves intervention? If so, should this intervention be legislative?
18. Indicate which of the options described would in your opinion be the most suitable to address the phenomenon of stalking
19. Do other legislative or non-legislative options exist which would be more appropriate to address the phenomenon of stalking?
20. Persistent unwanted attention may have a significant impact on a person’s life, although no fear of harm is caused. What should the threshold be? In other words should one exclude behaviour which is merely irritating or annoying?
21. Some jurisdictions include behaviour causing detriment. In Queensland “detriment” includes prevention or hindrance from doing an act a person is lawfully entitled to do, for example changing a bus route or form of transport from that which he or she would ordinarily use to travel to work. Should an offence of stalking or intimidation cover behaviour causing detriment or distress, or should it be limited to behaviour causing fear?

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

⁷⁸

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

22. If in your opinion the criminal law option is the appropriate response, how would you define stalking and should an exception be made for freedom of the press regarding news-gathering and news-reporting activities? In other words, should news organisations be exempted by way of a specific defence?
23. Is it necessary to provide for defences and exclusions, for example that stalking does not include acts done for a legal purpose, or does this state the obvious?

Lex certa

3.16 The offence of stalking is by nature imprecise, as behaviour which is otherwise considered quite ordinary becomes threatening in context. Stalking is difficult to define as a concept, some actions falling within the ambit of stalking may constitute a legitimate pursuit of a love interest but seen in a different context could engender immense fear in the object of the attention. It is difficult to define at what point the behaviour warrants criminal sanction. Consequently it is difficult to set clear parameters in legislation.

Question

24. In describing stalking as an offence an element of vagueness seems to be inevitable. Do you foresee any difficulty in terms of the legal requirement that a law should reflect with certainty which actions constitute a criminal offence, failing which no crime exists?

CONCLUSION

3.17 No legal intervention will prevent all forms of stalking, but it is essential that the legal system provide the greatest protection and remedies possible.

3.18 Admittedly prevention is a difficult issue, requiring a comprehensive response extending beyond legislation. Any evidence that violence is not being effectively prevented could point to the need for better implementation of the legislation, for more legal or community support

services, or greater community education, rather than faults with the law.

3.19 Prior to the Domestic Violence Act there was limited protection available for people who feared that they would become victims of violent activity in the immediate future. While the general criminal law prohibited personal violence offences it became glaringly apparent that the criminal law alone was insufficient to deter violence in interpersonal relationships. The criminal law of course only applies after the violence has occurred, and conviction can only be secured if the offence is proved beyond reasonable doubt. Consequently this does little to deter future violence.

3.20 The Commission also takes heed of the view that twentieth-century lawmakers have been spurred into action by a moral panic surrounding “celebrity stalking”, and have hastily enacted anti-stalking laws, creating a legal shell waiting to be filled.⁷⁹

3.21 The issues raised in the issue paper need to be debated thoroughly. The comments of all parties who are interested, experienced in or affected by stalking in whatever form are therefore of vital importance to the Commission. Respondents are welcome and once again encouraged to raise issues which have not been addressed and which would serve the purpose of delineating the scope of this investigation.

⁷⁹

Orit Kamir ‘Every breath you take: stalking narratives and the Law’ (2001) 10 **Griffith LR**.