



REPORT ON STALKING



South African Law Reform Commission: Project 130

Stalking

Report: November 2006

## **TO MRS BS MABANDLA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973 as amended), for your consideration, the Commission's Report on Stalking.

A handwritten signature in black ink, appearing to read 'Y Mokgoro', with a stylized flourish at the end.

Y Mokgoro  
Chairperson: South African Law Reform Commission  
2006

## SOUTH AFRICAN LAW REFORM COMMISSION

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

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# List of Sources

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

British and Irish Legal Information Institute – UK harassment law. Available at <http://www.bailii.org>.

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

Carte Blanche. 'Stalkers' 30 January 2005. Available at <http://www.carteblanche.mnet.co.za>. (accessed on 14 February 2006)

Combrinck H & Skepu Z *Bail in Sexual Assault Cases: Victims' Experiences* (2003).

Cyber-stalking.net: Cases that started Online and were Pursued Offline. Available at <http://www.cyber-stalking.net/pschopathology4.htm> (accessed on 10 December 2003).

Cyber-Stalking.net: legislation Canada. Available at [http://www.cyber-stalking.net/legal\\_canada.htm](http://www.cyber-stalking.net/legal_canada.htm). (accessed on 10 December 2003).

Cyber-stalking.net: Overview on U.S.Federal Statutes or Laws Pertaining to Cyberstalking. Available at [http://www.cyber-stalking.net/legal\\_usfederal.htm](http://www.cyber-stalking.net/legal_usfederal.htm). (accessed on 10 December 2003).

Cyber-stalking.net: State Colorado Civil Code S1708.7. Available at [http://www.cyber-stalking.net/legal\\_state\\_california.htm](http://www.cyber-stalking.net/legal_state_california.htm) (accessed on 29 April 2004).

'Cyberstalking and Harassment'. Available at [http://www.wiredpatrol.org/cyberstalking\\_harassment/canada/ca-stalkinglaw.html](http://www.wiredpatrol.org/cyberstalking_harassment/canada/ca-stalkinglaw.html) (accessed on 10 December 2003).

Du Toit, et al, Commentary on the Criminal Procedure Act Juta & Co 1978.

Goode M 'Stalking: Crime of the 90s?' (1995) 19 **Criminal Law Journal** 201.

Hitchcock J.A. Cyberstalking. Volume 17, Issue 4 (2000). Available at <http://www.infotoday.com/lu/ju100/hitchcock.htm> (accessed on 10 December 2003).

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

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

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

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

Metropolitan Action Committee on Violence Against Women and Children 'Statistics Sheet: Stalking and Criminal Harassment'. Available at [http://www.metrac.org/new/stat\\_sta.htm](http://www.metrac.org/new/stat_sta.htm) (accessed on 10 December 2003).

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

Milton JRL **South African Criminal Law and Procedure (Volume II) Common law crimes** (third edition) Kenwyn: Juta 1996.

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

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

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

ND Council for Abused Women 'Stalking Laws and Definitions'. Available at <http://www.ndcaws.org/stalkingharassment/stalkinglaws.asp> (accessed on 22 January 2004).

Ogilvie E 'Stalking: Legislative, Policing and Prosecution Patterns in Australia' Australian Institute of Criminology Research and Public Policy Series No.34 (2000).

Shorter Oxford English Dictionary (2nd edition) Oxford University Press 2002.

Parenzee,P., Artz,L. and Moulr,K. 2001 *Monitoring the Implementation of Domestic Violence Act: First Report.* Institute of Criminology, University of Cape Town: South Africa.

Perumal D N 'Stalking the Stalker: The judicial pursuit of a remedy in a multi-cultural society' paper delivered during the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference of 14 – 17 March 2005.

Petherick W 'Cyberstalking: Obsessional pursuit and the digital criminal'. Available at [http://www.crimelibrary.com/criminal\\_mind/psychology/cyberstalking/5.html?sect=19](http://www.crimelibrary.com/criminal_mind/psychology/cyberstalking/5.html?sect=19) (accessed on 10 December 2003).

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

Reid Meloy J, 'The psychology of Stalking Behaviour' in *The Psychology of Stalking: Clinical and Forensic Perspectives* 267, 276 (J.Reid Meloy ed., 1998) as cited in Cal.Crim.L.Rev.1 (Oct 200) par 9. Available at: <http://www.boalt.org/CCLR/v3/v3royackersnf.htm>.

Sager K.L & Boesse R 'Redefining Privacy in California? The "Anti-Paparazzi" Legislation. Available at <http://library.lp.findlaw.com/articles/file/00010/005746/title/Subject/topic/Injury%20> (accessed on 12 February 2003).

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

South African Law Commission **Domestic Violence** (Project 100) **Research Paper** April 1999.

South African Law Commission **Domestic Violence** (Project 100) **Response by Project Committee on Domestic Violence to Minority Report Paper 505** (1998).

South African Law Commission **Domestic Violence** (Project 100) **Minority Report** (1998).

South African Law Reform Commission **Privacy and Data Protection** (Project 124) **Discussion Paper 109** (2006).

South African Law Reform Commission **Sexual Offences: the Substantive Law** (Project 107) **Discussion Paper 85** (1999).

South African Law Commission **Sexual Offences: Process and Procedure** (Project 107) **Discussion Paper 102** (2001).

South African Law Reform Commission **Stalking** (Project 130) **Issue Paper 22** (2003).

South African Law Reform Commission **Stalking** (Project 130) **Discussion Paper 108** (2004).

The Citizen 'Looking over your shoulder'. Available at: <http://www.citizen.co.za> (accessed on 14 February 2006).

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

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

The National Center for Victims of Crime Stalking Resource Center: Legislation updates. Available at <http://www.ncvc.org/src/Legislation/updates/summer2002.html> (accessed on 12 February 2003).

The National Center for Victims of Crime Stalking Resource Center: Legislation State Summary. Available at <http://www.ncvc.org/src/Legislation/state/summary.html> (accessed on 12 February 2003).

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

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

US Department of Justice **Report on Cyberstalking: A New Challenge for Law Enforcement and Industry** 1999. Available at: <http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm> (accessed on 10 December 2003).

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

WWLIA.Org 'Stalking'. Available at <http://wwlia.org/ca-stalk.htm> (accessed on 10 December 2003).

# Legislation and Cases

Act to Amend the Criminal Code and the Young Offenders Act, RSC C-126 S264(1)(2)(1993)(Can)

Age of Majority Act 57 of 1972

Arms and Ammunition Act 75 of 1969

Bail Act 1978 (NSW)

Births and Deaths Registration Act 51 of 1992

Cal. Civil Code (Cal)

Canadian Criminal Code.

Children's Act 38 of 2005

Convention on the Elimination of Discrimination Against Women.

Convention on the Rights of the Child

Correctional Services Act 11 of 1998

Crimes Act 1900 (NSW)

Crimes Act 1958(Vic)

Crimes Act 1900 (ACT)

Crimes (Domestic Violence) Act 1993 (NSW)

Crimes (Family Violence) Act 1987(Vic)

Crimes (Threats and Stalking) Amendment Act 1994 (NSW)

Criminal Code (Qld)

Criminal Code, RSC 1985, c1 C-46 (Canada)

Criminal Code Act 1899 (Qld)

Criminal Code Act (NT)

Criminal Code Act 1924 (Tas)

Criminal Code Compliance Act 1913 (WA)

Criminal Law Consolidation (Stalking) Amendment Act, No 7 of 1994(South Aus)

Criminal Law Consolidation Act 1935 (SA)

Criminal Law (Sexual Offences) Amendment Bill [50 – 2003]

Criminal Procedure Act 56 of 1955

Criminal Procedure Act 51 of 1977

Debt Collectors Act 114 of 1998

Domestic Violence Act 116 of 1998

Dutch penal code

Family Law Act 1996 (UK)

Firearms Control Act 60 of 2000

Intimidation Act 72 of 1982

Malicious Communications Act 1998 (UK)

Mental Health Act 18 of 1973

Mental Health Care Act 17 of 2002  
Non Fatal Offences against the Person Act 1997(Ire)  
Peace and Good Behaviour Act (1982) (Qld)  
Penal Code (Cal)  
Protection from Stalking Act 2002 (Kans)  
Public Order Act 1986 (UK)  
SB 346 2002 (North Cal)  
S.F. 3172 2002 (Minnes)  
Telecommunications Act 1984 (UK)  
The Constitution of the Republic of South Africa, 1996.  
The Firearms Act 1996 (NSW)  
The Interstate Stalking Act 1996 (US)  
The Protection from Harassment Act 1997 (UK)  
The Stalkers Bill May 1996 (UK)  
The Violence Against Women Act (VAWA), Title IV of the Violent Crime Control and Enforcement Act 1994 (USA)  
United States Model Antistalking Code.  
Universal Declaration of Human Rights (1948)  
Witness Protection Act 112 of 1998  
West Virginia Computer Crime and Abuse Act 2002  
**Bernstein v Bester** NO 1996 (2) SA 751 (CC).  
**Brink v Kitshoff** 1996 (4) SA 197 (CC).  
**Dendy v University of the Witwatersrand, Johannesburg** 2005 (9) BCLR 901 (W).  
**Gunes and Tunc v Pearson** (1997) 21 A Crim 297.  
**Long v State** 931 S.W.2d 285, 290n.4 (Tex. Crim. App. 1996).  
**Minister of Safety and Security and Another v Carmichele** 2004(3) SA 305 (SCA).  
**Omar v The Government of the Republic of South Africa and Others** Case No: CCT47/04 decided on 7 November 2005.  
**R v Jopp and another** 1949 4 SA 11 (N).  
**R v Meer** 1923 O.P.D. 77.  
**Rutenberg v Magistrate, Wynberg and Another** 1997 (4) SA 735 (C).  
**S v Baloyi ( Minister of Justice and Another Intervening)** 2000 (2) SA 425 (CC).  
**S v Gabathole** 2004 (2) SACR 270 (NC).  
**S v Masiya** Case No: SHG 94/04 2005-07-11 Regional Court Lydenburg.  
**S v Masiya** Case No: CC628/2005 TPD.  
**S v Motshari** 2001 (1) SACR 550 (NC).  
**S v Nyalungu** Case No: CC94/04 2004-03-15 TPD Pretoria.  
**S v Seweya** 2004 (1) SACR.  
**State v Rucker**, 1999 Kan. LEXIS 410 (1999).  
**Williamson v Helleux** 1978 (2) SA 348 (T).

# Summary of Recommendations

1. The Commission's investigation into stalking is aimed at addressing the growing and complex problems relating to stalking. The object is defining stalking behaviour in a South African context and identifying appropriate legal remedies to prevent or reduce harm brought about by such behaviour.
2. In South Africa the Domestic Violence Act, 116 of 1998 (hereafter the 'Domestic Violence Act'), defines stalking, albeit it restrictively, for the civil law. It provides recourse to a person who is stalked only if he or she is in a domestic relationship with the stalker. In contrast with statutes elsewhere the Domestic Violence Act creates an artificial distinction by separately defining what is essentially stalking behaviour under the headings of harassment and stalking.
3. Internationally the legal understanding of stalking has evolved from the dictionary definition of pursuing or approaching a wild animal stealthily. It has taken on an artificial meaning, with harassment of another person as its form. The Commission recommends that, as has been done in the United Kingdom and Canada, the broader term harassment should be used to address "stalking" behaviour.
4. The Commission is inclined to the view that the existing civil law framework may not provide adequate recourse to victims of stalking who are not in a domestic relationship and that it would not be a viable solution to place non-domestic stalking parasitically within the ambit of the existing Domestic Violence Act. Consequently the Commission recommends that legislation i.e. the Protection from Harassment Bill should be enacted to specifically cater for a civil remedy for stalking and thereby provide legislative recourse to victims of stalking as understood in the broader sense.
5. The Commission recommends that the civil remedy for stalking should, with the exception of domestic violence specific provisions, mirror the civil remedy provided for in the Domestic Violence Act, i.e. a protection order against harassment (as defined in the Bill), coupled with a suspended warrant of arrest. The primary focus of this Bill is to interrupt the stalker's pattern of behaviour before physical harm to the victim occurs.
6. In order to align the proposed Bill with the Domestic Violence Act the Commission recommends that the lists found in the definitions of 'harassment' and 'stalking' in the Domestic Violence Act should be combined and reflected in the proposed definition of harassment.
7. The proposed Bill defines harassment as engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant. Harm is not restricted to physical harm. It is sufficient for the complainant to experience harm, defined as mental, psychological or physical harm or to have the belief that harm may be caused.
8. The Commission recommends that direct or indirect conduct should be included in the definition of harassment. By including indirect conduct in the definition of harassment the perpetrator is prohibited from using a third party to continue the stalking. Some other examples of indirect conduct are the spreading of malicious rumours or the placement of false advertisements regarding the victim.
9. The Commission is of the opinion that the question as to whether a person has been stalked should not turn on a technical count of the number of acts done. The circumstances surrounding a single act may be sufficient to constitute harassment.
10. The Commission recommends that harassment should be defined by way of a closed list of conduct. The conduct contained in the list has to be coupled to unreasonableness for it to constitute harassment. The essence of the definition of harassment is the unreasonable, non-physical, low-key intrusion which has to be illustrated by the listed behaviour.

11. The Commission agrees that the general rule should be that a victim or complainant of harassment should seek a remedy in his or her own name. However, circumstances may prevail that make it difficult or impossible to do so. The Commission deems it necessary to provide an avenue by which application for redress can be made on behalf of those victims of stalking who are unable to do so in their own name. In order to avoid possible abuse of the process the Commission recommends that an application for a protection order may only be brought on behalf of an adult with his or her written consent, unless the victim is in the opinion of the court unable to provide the required consent. The Commission also recommends that an application may be brought for a protection order by or on behalf of a child.

12. In order to keep abreast with international instruments to which South Africa is party, such as the Convention on the Rights of the Child, and section 28 of our Constitution, the Commission recommends that 'child' be defined in the definitions clause as "a person under the age of 18 years".

13. The Commission recommends that upon consideration of a final protection order the court be granted the power to order that the respondent be subjected to an assessment, including an assessment of the risk for future violence. After such assessment the court may, if satisfied that the stalker demonstrates the potential to benefit from the instruction or treatment, make participation or completion of the recommended instruction or treatment within a prescribed period part of the conditions of the protection order. Non-compliance with this order would activate the suspended warrant of arrest accompanying the protection order. This recommendation ties in with submissions made by mental health experts that the rehabilitation of a stalker would only be successful where there is a very clear consequence for non-compliance of a protection order, namely arrest and conviction for the breach of the order.

14. The Commission confirms that an order for psychiatric or behavioural intervention would only be justified on a return date for a final protection order or after conviction pursuant to a breach of a protection order as a further condition of release. The Commission recommends that if the court is satisfied that the respondent is in need of mental health care it may order the respondent to submit to a psychiatric or psychological assessment and if deemed necessary order the respondent to submit to whichever care, treatment, rehabilitation or instruction it deems appropriate. Where this care, treatment and or rehabilitation are provided for in terms of the Mental Health Care Act, 17 of 2002, the cost will be borne by the State.

15. The Commission recommends that conviction for the offence of breaching a protection order be met with a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment. The Commission also recommends that a false statement made by a complainant regarding a breach of a protection order be an offence and should be met with a fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment.

16. In order to prevent malicious applications for protection orders in terms of the proposed legislation, the Commission has inserted a provision in the draft Bill which allows the court to make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably.

17. The Commission has also considered whether provision needs to be made in the Bill for the seizure of firearms or dangerous weapons in the possession of alleged stalkers. The Firearms Control Act, 60 of 2000 (the 'Firearms Control Act'), provides that the State may seize any firearm or ammunition in possession of a person where such person is by reason of any physical or mental condition, incapable of having proper control of any firearm or ammunition or presents a danger to himself or herself or to any other person. However the Commission is mindful that circumstances may arise where the seizure of a firearm has not been effected in terms of the Firearms Control Act and that it might also be necessary to seize dangerous weapons, the seizure of which is not provided for in that Act. The Commission therefore recommends that a court be given the discretion to order the seizure of a firearm or a dangerous weapon on granting an interim or final protection order and that such seizure be further dealt with in terms of the Firearms Control Act. The Commission also recommends that the Firearms

Control Act be amended to ensure that a court is obliged to enquire and determine whether a person found guilty of breaching a protection order in terms of the Protection from Harassment Bill is unfit to possess a firearm.

18. The Commission recommends that policy directives be issued by the South African Police and Prosecuting Authority regarding harassment as defined in the proposed Bill. It also recommends that these directives should emphasise the seriousness of certain incidences of harassment and the safety of the victim specifically in relation to bail proceedings. It is essential that intervention by victims and officials of the criminal justice system is early and aggressive. Risk assessment guidelines should be compiled which include identifying immediate safety concerns, which include threats of violence, threats of suicide or a history of mental illness or head trauma of the alleged stalker. Although victims of harassment should be assisted to obtain legal redress against harassment, they also need to be empowered to take responsibility for self-protection.

19. Based on its completed investigations into sexual offences and domestic violence the Commission is of the opinion that harassment does not always fall within the framework of sexual offences or domestic violence. Consequently the Commission does not recommend that the policing of harassment should be relegated to a unit specifically dealing with sexual offences or domestic violence unless the framework of such unit is expanded to specifically cater for it.

20. The Commission endorses an inter-sectoral training approach and recommends that the Departments of Justice and Constitutional Development, Safety and Security, Health, Education and Social Development liaise on the development and presentation of training in this regard.

21. In general, the Commission notes that it would serve little purpose legislatively to categorize stalkers according to the manner in which they stalk. The Commission also does not recommend that debt collectors and complaining clients should be categorized as stalkers per se. This recommendation does not however preclude the leading of evidence on which category the stalker falls into as this evidence could prove beneficial in determining an appropriate sentence and rehabilitation for the perpetrator.

22. Although stalking is not recognised by name as a crime in South Africa, stalking behaviour is addressed by way of a number of existing offences, such as assault, *crimen injuria*, trespassing or malicious damage to property. The Commission does not recommend the enactment of a specific offence of stalking. It is of the opinion that an improved understanding of and application of the existing law would acknowledge the rights of certain victims of stalking to redress in terms of the criminal law and provide immediate intervention. The Commission is of the view that, specifically in respect of stalking behaviour, the realities of modern life can be addressed in a more timely fashion through the common law. However in making this recommendation the Commission identifies a need for the development of practical mechanisms by relevant government departments to effectively utilise the existing common law crimes in cases of stalking behaviour. This may include:

- Public statements by the Department of Justice and Constitutional Development and the South African Police Service to make the public aware of the applicability of existing common law crimes to certain stalking behaviour coupled with the assurance that our existing criminal law will indeed be used for this purpose; and
- implementation of practical measures by the Department of Justice and Constitutional Development and the South African Police Service to ensure effective intervention with regard to stalking which may include the successful prosecution of stalkers through the training of and development of guidelines and protocols for prosecutors, judicial officers, police officers and other key personnel in handling cases of stalking behaviour.

23. It is evident that obtaining legal intervention by way of a protection order such as is proposed in the proposed Bill or by way of the criminal law may trigger a stalker to intensify the stalking behaviour and thereby place the victim at greater risk. The Commission recommends that where a stalker has been charged criminally

the immediate and future safety of the victim should be made more prominent in the court's consideration of whether or not the release of the accused on bail will be in the interests of justice.

24. The Commission recommends that the determination of appropriate bail conditions should also be made with a clear awareness of the victim's need for protection against potential or further harm, violence, intimidation or harassment by the accused or third persons. The aim of criminal intervention should be to interrupt the pattern of behaviour before physical harm ensues. In relation to bail proceedings the Commission recommends that the Criminal Procedure Act be amended to give particular attention to a victim's views regarding his or her safety.

25. When considering sentencing in relation to stalkers it is important to bear in mind that these persons do not form part of a homogenous group. The differences are illustrated by comparing a former intimate partner with a delusional erotomaniac or a person with a false victimisation syndrome. The Commission recommends that the presiding officer be allowed to exercise his or her discretion in imposing a fitting sentence.

26. The Commission agrees that constitutionally and practically it is inappropriate to seek to subject every alleged stalker to mental observation in terms of the Criminal Procedure Act 51 of 1977. The Commission confirms that the existing powers of courts in criminal matters are adequate in relation to referral, evaluation and ordering of an accused to submit to instruction or treatment and that if deemed necessary such referral will be made by a court in terms of the relevant sections of the Criminal Procedure Act.

27. Once an accused has been convicted and sentenced the complainant would no longer be protected by bail conditions imposed on the perpetrator. Despite this a victim of stalking will not be left totally vulnerable as the court may make the suspension of the whole or part of the sentence subject to similar conditions. The victim will also be able to apply for a protection order against the stalker.

# Chapter 1:

## Introduction

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# Introduction

## Background

1.1 In January 2003 the Minister for Justice and Constitutional Development approved the inclusion of an investigation into stalking in the programme of the South African Law Reform Commission (hereafter referred to as the 'Commission'). This approval was granted pursuant to a recommendation by the Commission, contained in the Discussion Paper on Sexual Offences: The Substantive Law<sup>1</sup>, that in keeping with numerous foreign jurisdictions,<sup>2</sup> a separate investigation be conducted to ascertain the need to enact comprehensive legislation prohibiting stalking.

1.2 The Discussion Paper on Sexual Offences: the Substantive Law inter alia briefly explored the necessity of addressing the phenomenon of stalking within the broader framework of sexual offences.<sup>3</sup> The Commission concluded that including stalking in legislation specifically aimed at criminalising specific sexual conduct would not afford all victims of stalking the protection that they deserve and hence that a separate investigation was needed. This recommendation endorsed the finding made in the Commission's Research Paper on Domestic Violence that stalking is an identified form of abuse. However the Commission found that although stalking is often associated with domestic violence, it is a problem that is much broader than the domestic sphere.<sup>4</sup> The Commission recommended that the inclusion of the term harassment in the definition of domestic violence would accommodate acts amounting to stalking, but found that an investigation into the criminal law response to stalking was needed.<sup>5</sup>

1.3 The Commission has to date released an issue paper and a discussion paper on Stalking. The discussion paper on Stalking was accompanied by draft legislation and workshops were conducted in five provinces. Recommendations contained in the discussion paper were informed by a group of selected experts versed in behavioural medicine and criminal prosecutions, under the guidance of Ms Seedat, the project leader of the investigation.

1.4 This report contains the final recommendations of the Commission and is accompanied by draft legislation. The report and draft legislation, once approved by the Commission, will be handed to the Minister for Justice and Constitutional Development for her consideration.

## The challenge of addressing stalking within a multi-cultural society

1.5 In striving to provide a legal remedy which essentially provides protection or recourse against stalking within a multi-cultural society, it was inevitable that the efficacy of proposed legal remedies would be conceptualised as a clash between culture and cultural rights on the one hand and the equality rights of women on the other.<sup>6</sup> International studies on the prevalence of stalking and local studies on stalking within a domestic context have shown that stalking victims are disproportionately female.<sup>7</sup> During workshops held in Natal and Nelspruit a few participants indicated that rural communities were highly opposed to any 'western' intrusion in

1 South African Law Reform Commission **Sexual Offences: the Substantive Law** (Project 107) **Discussion Paper 85** (1999).

2 Comprehensive 'anti-stalking' legislation has been enacted in most Australian jurisdictions, 49 states in the United States of America, including the District of Columbia, Canada and the United Kingdom.

3 South African Law Reform Commission **Sexual Offences: the Substantive Law** (Project 107) **Discussion Paper 85** (1999).

4 South African Law Reform Commission **Domestic Violence** (Project 100) **Research Paper** (1999).

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

6 'Stalking the Stalker: The judicial pursuit of a remedy in a multi-cultural society' paper delivered by Devina Nadarajan Perumal during the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference of 14 - 17 March 2005 at pp1.

7 In Canada 80% of stalking victims are women, followed by 75% in the United Kingdom.

their personal and private matters. They took the view that within certain cultural contexts, a legal intervention, such as the issuing of a protection order in domestic disputes, would make the situation more dangerous for the woman concerned. One participant in the Nelspruit workshop indicated that in certain cultures dating or courting practices include behaviour which is defined as stalking – he stated that it was expected of the recipient of his attention to rebuff him – and that the rebuff would cause him to intensify his pursuit. It was felt that making stalking behaviour actionable would be tantamount to imposing western ideas on sectors of society that do not conform to the western model.

1.6 In arguing that the preservation of culture and customary law appear to be of a lesser order in relation to the right to equality, Ms Perumal<sup>8</sup> refers to Madam Justice O'Regan in **Brink v Kitshoff**<sup>9</sup> where she states that gender discrimination in our society has "resulted in deep patterns of disadvantage" which are "particularly acute in the case of black women, as race and gender discrimination overlap" and added that it was a "key message of the Constitution that all such discrimination needs to be eradicated from our society". Traditional leaders have also taken the stance that they will not deal with issues concerning violence against women. They justify their stance by citing the irreconcilable link between the constitutionally guaranteed right to participate in one's culture and the guarantee of gender equality.<sup>10</sup> Justification for pursuing a legal remedy for victims of stalking lies in the fact that the right to assert certain constitutional rights includes the right to resist the imposition of the same rights for example, cultural practices that violate the principles of equality and non-discrimination. The Commission is of the opinion that it is imperative to provide effective legal recourse against stalking inter alia to women who wish to enforce the right not to embrace cultural practices which amount to stalking. In so doing the Commission has borne in mind that a woman wishing to enforce this right may be placed in further physical danger and may depending on the dynamics of the situation she finds herself in, need remedies arising out of either or both the civil and criminal law.

## Problem statement

1.7 The Commission's investigation into stalking is aimed at addressing the growing and complex problems relating to stalking. The object is defining stalking behaviour in a South African context and identifying appropriate legal remedies to prevent or reduce harm brought about by such behaviour.

1.8 Jurisdictions across the globe are now beginning to take legal action against stalking behaviour, recognising it as a public problem which merits attention. The effects of stalking upon an individual may have behavioural, psychological and social consequences. Specific risks to the victim include a loss of personal safety, the loss of a job, insomnia, and a change in work or social habits. It is contended that these effects have the potential to produce a drain on criminal justice resources, the health care system and the economy. Accordingly it is in the best interests of society to take swift action when cases are presented to them.<sup>11</sup>

1.9 A more detailed exposition of the origin and background to this investigation can be found in the issue paper<sup>12</sup> and discussion paper.<sup>13</sup>

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8 Ibid.

9 1996 (4) SA 197 (CC).

10 "The notion of equality is foreign to us" Chief Nonkonyana (C Walker 'Women, "Tradition" and Reconstruction' (1994) 61 Review of African Political Economy 347 at 348 as cited in the paper 'Stalking the Stalker: The judicial pursuit of a remedy in a multi-cultural society' delivered by Devina Nadarajan Perumal during the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference of 14 - 17 March 2005 at pp2.

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

12 South African Law Reform Commission **Stalking** (Project 130) **Issue Paper 22** (2003) at pp vii.

13 South African Law Reform Commission **Stalking** (Project 130) **Discussion Paper 108** (2004) at pp vii.

## General comment

1.10 The Commission has attempted to channel the practical reality facing victims of stalking into workable and enforceable legislative reforms. The aim of this legislative intervention is to protect victims of stalking by providing a mechanism which primarily focuses on interrupting this type of behaviour before physical harm ensues. In so doing due regard has been given to the rights of the stalker.

1.11 The Commission, the project leader and researcher assigned to this investigation wish to publicly thank Ms Perumal and Professor Schlebusch of the University of KwaZulu-Natal, Advocate Lawrence of the National Prosecuting Authority, Ms Helene Combrinck of the University of the Western Cape and Professor Burchell of the University of Cape Town and all participants at the workshops for their valuable contributions in response to the discussion paper. The Commission particularly wishes to acknowledge the contribution made by victims of stalking who related the circumstances of how they have been stalked, the impact on them and their families and their frustration at the absence of a legal remedy to stop the stalking.

## Financing and costing

1.12 In developing its recommendations to provide victims of stalking with adequate recourse to the law, the Commission has been mindful that the focus of proposals for law reform should firstly be on identifying ways in which the existing legal framework can be applied to legal problems. Consequently the option of enacting new legislation should only be acted upon where this cannot be done. The Commission acknowledges however that irrespective of whether the solution lies in amending existing law or introducing new law it is imperative to cost such provisions and to ensure that it is financially viable to promote such legislative measures.

1.13 In this investigation the Commission is inclined to the view that the existing civil law framework may not provide adequate recourse to victims of stalking who are not in a domestic relationship and that it would not be a viable solution to place non-domestic stalking parasitically within the ambit of the existing Domestic Violence Act. Consequently the Commission recommends that legislation specifically catering for a civil remedy for stalking should be enacted. Determining the financial implications (to the State) of this proposed piece of legislation is a precondition for obtaining Cabinet approval to introduce the draft legislation to Parliament. If the promulgation and subsequent implementation of this legislation is to become a reality a proper costing of the proposals contained in the Bill and an indication of availability of funding to implement the proposals is imperative. In this instance it is the responsibility of the Department of Justice and Constitutional Development to determine the cost of the proposed Bill and to prepare the accompanying Cabinet memorandum.

# Chapter 2:



## Determining a Legal Remedy for Stalking

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# Determining a Legal Remedy for Stalking

## Introduction

2.1 No dictionary definition of stalking in relation to persons exists. However jurisdictions around the globe have enacted legislative measures to address stalking behaviour in relation to people, thereby recognising it to be a public problem which merits attention. A person being stalked in South Africa may have recourse to the civil and or criminal law depending on the actions of the stalker. South African civil law, by way of the Domestic Violence Act 116 of 1998,<sup>14</sup> defines stalking and provides recourse to persons being stalked with the proviso that the person being stalked is in a domestic relationship with the stalker. The Domestic Violence Act defines stalking as “repeatedly following, pursuing or accosting the complainant”.<sup>15</sup> Stalking is however not recognised as a crime in South Africa. The 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 a stalker.

2.2 Some of the remedies identified in the Issue Paper to address stalking behaviour within the existing legal framework were a delictual claim, a High Court interdict, constitutional applications, a binding over of persons to keep the peace, adapting the Domestic Violence Act to provide protection orders to victims of stalking who are not in a domestic relationship<sup>16</sup> and various criminal charges such as assault, attempted rape or murder and malicious damage to property.

2.3 The Commission found that relying on civil remedies to address stalking behaviour has its limitations; that the process of obtaining a High Court interdict is cumbersome, expensive and less appropriate where urgent protection is required; and that a binding over of persons to keep the peace had largely fallen into a state of disuse. It also found that although Domestic Violence Protection Orders are easily accessible and relatively inexpensive, the protection orders are only available to persons in a domestic relationship. Further that, a peace officer may only arrest a person at a scene of domestic violence, without a warrant, if he or she reasonably suspects the person of having committed an offence containing an element of violence against a complainant. Stalking usually precedes violence and consequently in these circumstances an arrest without a warrant cannot be effected.

2.4 The Commission noted that the existing criminal law focuses primarily on the punishment of specific prohibited acts whereas stalking behaviour involves a series of discrete and often seemingly unrelated acts which may or may not be illegal. The Commission found that although existing criminal laws cover some aspects of stalking behaviour, they do not address stalking as an independent phenomenon where the whole is worse than the sum of the parts of any individual act. The Commission concluded that in terms of the criminal law little can be done to deter or punish a stalker until he or she actually causes or threatens to cause immediate direct harm to an individual or an individual’s property.

2.5 The Commission suggested four ways in which stalking could be addressed within the existing framework of the law. The options were to expand the Domestic Violence Act to include non-domestic stalking; enact similar legislation to the Domestic Violence Act; amend and adapt section 384 of the Criminal Procedure Act 56 of 1955 which provides for peace orders; or to enact independent legislation criminalising stalking.

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14 Hereafter referred to as the ‘Domestic Violence Act’.

15 Section 1(xxiii).

16 The Domestic Violence Act currently only provides recourse to persons in a domestic relationship.

## Expanding the Domestic Violence Act to include non-domestic stalking

2.6 The Commission found that expanding the Domestic Violence Act to include stalking by persons who are not in a domestic relationship with the victim would provide a central legislative basis for protection orders and might reflect the importance of protection orders as a means of combating violence, abuse and harassment. One of the benefits of expanding the Domestic Violence Act or enacting similar legislation to the Domestic Violence Act would be that the burden of proof, a balance of probabilities, is less onerous than is required in criminal law and that although such an order may not prevent future conduct, it may buy the complainant some time in which he or she can reassess the situation and decide on what to do. The Commission cautioned that the unique nature of the Domestic Violence Act could militate against the inclusion of personal protection orders as domestic disputes involve issues of financial dependence, physical and emotional power and control and shared emotional history, which sets it apart from non-domestic abuse.

## Amending and adapting section 384 of the Criminal Procedure Act 56 of 1955

2.7 The Commission explained in the Issue Paper that the procedure to obtain a binding over of the peace order is informal, inexpensive and provides a summary way of gaining access to a Magistrates court. The Commission proposed that the peace order could be amended to provide that on a finding of guilt the presiding officer could be empowered to issue a restraining order or to impose a sentence, which sentence may be postponed or wholly or partly suspended on condition for example that the respondent submits to psychological treatment, anger management or counselling.

## Enactment of independent legislation criminalising stalking

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

## Proposals in Discussion Paper 108

2.9 In Discussion Paper 108 the Commission concluded that existing civil and criminal law remedies are insufficient or inadequate to deal with what is understood to constitute stalking in the broader sense and as legislated for in comparative jurisdictions. After evaluating the above options the Commission recommended the enactment of specific legislation addressing stalking, with the primary focus on interrupting the pattern of behaviour before physical harm ensues. It also recommended that the actions of third parties used to stalk the victim be addressed. The Commission proposed that a two-prong approach should be followed, namely independent legislation criminalising stalking coupled with obtaining a protection order similar to the procedure followed in the Domestic Violence Act. The Commission reasoned that by providing both a civil and a criminal remedy, a victim of stalking would be able to access speedy intervention by way of a protection order and have the option of laying a charge of stalking at the same time.

2.10 With regard to the civil remedy for stalking the Commission proposed that the Domestic Violence Act be mirrored in order to provide the remedy of a protection order to persons being stalked who are not or have not been in a domestic relationship with the person stalking them. The Commission reasoned that one of the advantages of mirroring provisions in the Domestic Violence Act would be that the implementation of similar procedures would be less fraught with difficulty as the implementation hurdles which faced the Domestic Violence Act have to a large extent been overcome. A further advantage identified by the Commission was that

training and sensitising officials to the application of the legislation and the effects and impact of stalking could be incorporated into existing curricula dealing with sexual offences and domestic violence.

## Exposition of comment

### Expanding the Domestic Violence Act to include non-domestic stalking or enacting separate legislation mirroring the Domestic Violence Act

2.11 The majority of the workshop participants in Pretoria, Cape Town, Durban, Nelspruit and Bloemfontein held the view that the Domestic Violence Act was developed for a specific purpose and that the dynamics of stalking outside of a domestic relationship are not the same as those within a domestic relationship. They were also of the view that expanding the Act to include non-domestic stalking would water down the specific nature of the Act and would create confusion.

2.12 However, participants in the Cape Town workshop noted that in its present form the Domestic Violence Act provides recourse to a person being stalked where only the stalker feels that a relationship exists and pursues the relationship, for example as is the case with erotomaniac stalking. They contend that this would constitute a "perceived relationship", albeit it so perceived on the part of the stalker. The participants in the Durban workshop disagree with this point of view and state that a relationship would only be perceived as such if the parties had a one night stand for example. In their view collegial relationships or a one-sided feeling that a relationship exists does not constitute a "perceived relationship" for purposes of the Domestic Violence Act. Magistrate Singh further contends that an application for a protection order under a "perceived relationship" would not provide immediate relief to the applicant as a magistrate would grant a return date but not an interim order.

2.13 Participants in the Cape Town workshop state that the benefit of a civil procedure such as is provided for in the Domestic Violence Act is that the hearings are held sooner than criminal hearings and in the case of malicious allegations being made by a complainant an alleged stalker is given the opportunity of being heard sooner than is possible in criminal trials. However the use of this procedure presupposes that the identity of the stalker is known to the complainant, failing which the complainant would not be able to institute proceedings.

2.14 One participant in the Durban workshop stated that on its own the Domestic Violence Act does not provide adequate recourse to victims of domestic violence who are stalked, as an application for a protection order is often used as a cooling off period by the police and that criminal proceedings are suspended pending the outcome of the application for the protection order. Another participant voiced the opinion that the Domestic Violence Act was not that helpful as it contains no rehabilitative facet for the offender. They are of the opinion that these challenges need to be borne in mind when seeking an appropriate remedy for non-domestic stalking.

2.15 A number of respondents agree<sup>17</sup> with the proposal that the Domestic Violence Act be mirrored in order to provide the remedy of a protection order to persons being stalked who are not or have not been in a domestic relationship with the person stalking them. However the Saartjie Baartman Legal Advice and Training Project notes that there are certain provisions currently included in the draft Bill that are directly derived from the Domestic Violence Act, and these provisions may accordingly not be applicable in the context of stalking.

2.16 Mr Nation Mthemjame and Mr Rashid Patel<sup>18</sup> recommend that an interim protection order should only be allowed for stalking if it is preceded by a criminal charge and a sworn statement by a complainant establishing

17 Beaty Naude, Department of Criminology, UNISA; Melville Cloete, SAPS Legal Services Western Cape; G.A.J.F Gous, Magistrate Middleburg; Qetywayo Masoa; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; Nonlanhla Mlangeni, O.V.V. Welfare; Ancois Venter, Department of Justice; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Lesbian and Gay Equality Project; ATKV Randburg; Sgi Nkabi, SAPS Guguletu; National Commissioner, South African Police Service; Saartjie Baartman Legal Advice and Training Project; Adv Dalene Barnard, Director of Public Prosecutions Kwazulu-Natal; Saartjie Baartman Legal Advice and Training Project.

18 Rashid Patel & Company.

a basis of urgency. Mr Patel contends that domestic violence protection orders have been discriminatory and prejudicial to men and have given rise to serious repercussions and unfairness. He suggests that applying for a protection order against stalking or harassment maliciously or erroneously should be included in the Act as a criminal offence. The National Commissioner of Police agrees that the draft Bill should guard against being abused for personal vendettas. Mr Patel cautions the Commission to avoid the danger of erring on the side of leniency towards victims of stalking to the detriment of alleged perpetrators. Peter Goldsmid of Southern Exposure agrees that civil and criminal remedies should be made available to victims of stalking but in so doing the constitutional rights of the alleged perpetrators must be respected.

2.17 Some respondents<sup>19</sup> express concerns around mirroring provisions in the Domestic Violence Act when in their view the Domestic Violence Act is still experiencing implementation problems, while others<sup>20</sup> contend that problems facing the Domestic Violence Act have to a large extent been overcome. In this regard Adv Natasha van Wyngaardt<sup>21</sup> suggests that to avoid the same problems experienced in implementing the Domestic Violence Act<sup>22</sup> an implementation plan should precede the date of promulgation of the Stalking Bill.

2.18 Senior Superintendent Anneke Pienaar<sup>23</sup> remarks that where an alleged victim of stalking is being stalked by a person with whom he or she is in a domestic relationship, such victim would be able to apply for any one of or both protection orders in terms of the Domestic Violence Act and the proposed Stalking Bill. She suggests that this could lead to abuse of the systems and confusion if the definition of stalking in the 'Stalking Act' differs from the definition contained in the Domestic Violence Act.

### **Amending and adapting section 384 of the Criminal Procedure Act 56 of 1955: Binding over to keep the Peace**

2.19 A substantial number of participants in the workshops held in Pretoria,<sup>24</sup> Cape Town,<sup>25</sup> Durban,<sup>26</sup> and Nelspruit<sup>27</sup> were of the opinion that although certain actions which form part of stalking behaviour could be addressed by binding a person over to keep the peace, this remedy is not structured to address repetitive behaviour or to address stalking as such. The opinion was also held that the peace order in its present form is a petty administrative matter which is not appealable or reviewable,<sup>28</sup> has become a rubber stamp procedure,<sup>29</sup> has not proved effective in practice,<sup>30</sup> and is not taken seriously.<sup>31</sup>

2.20 A few participants<sup>32</sup> however suggested that section 384 of the Criminal Procedure Act could and should be made more effective. They commented that the procedure could undergo a name change and be extended to *inter alia* include the option of instructing the police to investigate any criminal elements which form part of the behaviour brought before the court. This would enable the police to arrest a stalker. They contend

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19 Lesbian and Gay Equality Project; Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court.

20 Nonlanhla Mlangeni, O.V.V. Welfare.

21 SAPS Legal Services Uitenhage.

22 The implementation of the Domestic Violence Act was delayed by a year as the Act could not be implemented without regulations.

23 Unit Commander, FCS Detective Service.

24 Held on 27 September 2004.

25 Held on 4 October 2004.

26 Held on 6 October 2004.

27 Held on 25 October 2004.

28 Durban workshop.

29 Pretoria workshop.

30 Pretoria and Cape Town workshops.

31 Durban workshop.

32 Ibid.

that amending and adapting the peace order will ensure that the procedure remains inexpensive and will give the traditionally marginalised access to justice.

2.21 Professor Burchell also considers the amendment of section 384 of the Criminal Procedure Act a viable option.<sup>33</sup> He states that the binding over procedure already exists and is used quite extensively in neighbour disputes. He argues that the section already covers not just any person 'conducting himself violently towards, or is threatening injury to the person or property of another' but also someone who has 'used language or *behaved in a manner* towards another *likely to provoke a breach of the peace* or assault . . .'. In his opinion the italicized words are broad enough to include harassing or stalking behaviour.

2.22 He states that an increase in the surety amount to cover more serious cases of stalking or harassment would improve the effectiveness of the binding-over order and suggests that publicity surrounding the scope of section 384 in covering binding-over orders for harassment or stalking would assist in facilitating the use and effectiveness of this remedy. He further suggests that it may be advisable to make provision in section 384 for the judicial officer issuing the binding-over order to order the respondent to submit to psychiatric or psychological treatment.

2.23 Professor Burchell's views in this and related requests were debated at some length by the Commission. Some members considered that the option of enhanced protection through existing criminal remedies, rather than the enactment of a further statute criminalising conduct in exact terms, is a preferable option.

2.24 A number of participants feel that as a binding over order is presently not taken seriously, adapting or amending section 384 of the Criminal Procedure Act would result in stalking also not being taken seriously<sup>34</sup> and that this procedure would prove inappropriate where the identity of a stalker is unknown or where a stalker is indigent.<sup>35</sup> The participants at the Nelspruit workshop<sup>36</sup> were uniformly opposed to adapting or amending section 384 of the Criminal Procedure Act. They contended that in so doing the objective the legislature sought to achieve with this section would be frustrated.

## Existing criminal law remedies

2.25 Participants of the workshops in Pretoria, Nelspruit, Durban, Cape Town and Bloemfontein concur that the offence of *crimen injuria* does not cover all instances of stalking and is therefore not an appropriate remedy. Participants of the Pretoria workshop noted that in practice the offence of *crimen injuria* is only invoked where the offence is coupled with a racial bias or together with other primary offences and is therefore not considered an effective remedy for use in stalking incidents. A number of respondents identified the fact that acts of stalking are seen and dealt with by the authorities individually and not as a pattern of behaviour as an obstacle to obtaining redress in terms of the existing criminal law.<sup>37</sup>

2.26 Conversely Professor Burchell is of the opinion that the existing common law crimes of *crimen injuria*, assault (in its various forms) and extortion (or attempted extortion) are appropriate remedies for addressing the criminal nature of stalking or behaviour of a harassing nature. He notes that where the behaviour is not addressed by the aforementioned, that it could possibly fall under the provisions of the Trespass Act 6 of 1959. He comments that "the current criminal law does not treat stalking merely as a 'precursor to a crime or as evidence of its *mens rea*' but rather as criminal in its own right. He notes that *crimen injuria* can be committed where there is an invasion of privacy, or an impairment of the complainant's dignity, and the courts have given a broad

33 Opinion submitted to the Commission in this regard.

34 Durban workshop.

35 Cape Town workshop.

36 Held on 25 October 2004.

37 Discussion Paper 108, para 2.44.

meaning to dignity, which includes not just self-esteem, privacy and reputation but also individual autonomy.<sup>38</sup> He refers to the following examples of wrongful intrusion acknowledged in the common law (both civil and criminal) which have been emphasized by the Constitutional Court in **Bernstein v Bester** NO<sup>39</sup> which would in his opinion be applicable to cases of stalking:

‘... entry into private residence, [**S v I** 1976 (1) SA 781 (RA); **S v Boshoff** 1981 (1) SA 393 (T) at 396]; the reading of private documents, [**Reid-Daly v Hickman** 1981 (2) 315 (ZA) at 323]; listening in to private conversations, [**S v A** 1971 (2) SA 293(T); **Financial Mail (Pty) Ltd v Sage Holdings Ltd** 1993 (2) SA 451 (A) at 463]; the shadowing of a person, [**Epstein v Epstein** 1906 TH 87.]’

2.27 He states that an impairment of the right to move freely or freedom of association could also fall within the ambit of individual dignity. Furthermore, that:

“stalking/harassment often results in psychological harm and the causing of a single instance of harm to one’s personality interests would be sufficient for a conviction of *crimen injuria*, provided the appropriate intention to cause such harm can be established. The conduct of peeping toms and eavesdropping private detectives falls within the traditional ambit of *crimen injuria*. The conduct of a harasser or stalker (especially in the form of following, watching, monitoring, keeping the complainant under surveillance or unwanted contacting the complainant by telephone, mail, fax or e-mail) would clearly fall within the scope of the impairment of the complainant’s privacy or dignity.”

2.28 He notes that there is some evidence that the impairment of privacy or dignity has to be ‘serious’ in order to give rise to a successful prosecution for *crimen injuria* but notes that the persistent nature of the conduct invading the complainant’s privacy or dignity would serve to establish any required element of seriousness and even one instance of ‘watching’ could be enough to give rise to successful prosecution for *crimen injuria*, and the persistency of the conduct taken into account in aggravation of sentence. Furthermore, that the criminal sanction for *crimen injuria* applies even where the victim is unaware that his or her privacy is being invaded. This conclusion flows from the objective reasonableness aspect of the test for determining dignity, which has recently been regarded in **Dendy v University of the Witwatersrand, Johannesburg**<sup>40</sup> as in keeping with constitutional parameters.

2.29 Professor Burchell further agrees with the late Professor Labuschagne<sup>41</sup> that the South African common-law definition of assault is dynamic enough to apply to incidents of tele-terrorism,<sup>42</sup> including silent telephone calls where fear is instilled in the recipient. In his submission to the Issue Paper on Stalking<sup>43</sup> Professor Labuschagne contended that the protection of the bio-psychological autonomy of a person should form the foundation upon which punishment is based. He averred that the English courts seem to be moving in a similar direction in relation to the crime of assault. He stated that tele-terrorism and the development of psychiatry necessitates an adaptation or extension of the application of the crime of assault. He also noted that as a result of such an extension, the crime of indecent assault could be perpetrated over a telephone. This would in turn have the effect that the content of the current form of the crime indecent assault would be absorbed into the crime of assault.

2.30 Professor Labuschagne<sup>44</sup> further referred to the Court of Appeal in **R v Chan-Fook** ([1994] 2 ALL ER 552) where Thomas J found that:

38 Burchell J **Personality Rights and Freedom of Expression – The Modern Actio Injuriarum** (1998) 139 and 328 as quoted in opinion by Professor Burchell.

39 1996 (2) SA 751 (CC).

40 2005 (9) BCLR 901 (W) at para [29].

41 Labuschagne J M T ‘Teleterrorisme, psigiatriese besering en die organise aard van die misdaad aanranding’ (1998) **Obiter** 175.

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

43 See paragraph 3.21 and further of the Issue Paper on Stalking.

44 *Ibid.*

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

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

2.32 Professor Labuschagne<sup>45</sup> reasoned that the fact that a person in this present day and age is capable of invading and terrorising another person's privacy and bio-psychological integrity by way of a telephone or another method of distance-connection, such as facsimiles, television or computers ought to have an effect on the interpretation or reinterpretation of the content of certain crimes, and particularly the crime of assault.

2.33 Professor Labuschagne<sup>46</sup> quoted Lord Steyn where he states that the private law has acknowledged that a clear distinction between body and mind does not exist. In **Bourhill v Young** ([1942] 2 All ER 396 4020) Lord Macmillan explains that:

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

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

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

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

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

"The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the possibility of immediate personal violence. As a matter of law the caller may be guilty of an assault: whether he is or not will depend on the circumstance and in particular on the impact of the caller's potentially menacing call or calls on the victim".<sup>47</sup>

2.37 Professor Burchell concludes that once harassment or stalking reaches the point where physical harm is inflicted, one would no longer be looking at harassment or stalking but rather the offence of assault, assault with intent to do grievous bodily harm, or attempted murder.

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45 Ibid.

46 Ibid.

47 Ibid.

## Enactment of specific legislation to address stalking

2.38 A significant number of respondents and workshop participants indicated that it is important to have separate and specific legislation for stalking.<sup>48</sup> The majority of the respondents and the workshop participants agree<sup>49</sup> that the best possible approach to address stalking would be to incorporate both a criminal definition of stalking as well as a proactive (civil) remedy aimed at prohibiting anticipated future conduct in legislation.

2.39 Adv Natasha van Wyngaardt<sup>50</sup> remarks that both a civil and criminal remedy are necessary, firstly to allow intervention before the stalking behaviour becomes more serious and secondly where the stalking behaviour is of a serious nature to afford recourse to victims during the time between reporting the matter to the authorities and finalisation thereof.

2.40 The Commission on Gender Equality is of the opinion that many victims are intimidated by the legal system and would be wary of pressing criminal charges against their stalker, especially where the stalker is known. It adds that navigating the criminal law system can be a complex and time consuming process which many victims would rather avoid, whereas applying for a civil protection order, provides more immediate relief. However, it argues that allowing a victim to choose between a civil and or criminal remedy allows victims to choose their own remedy giving them a sense of empowerment over an otherwise frightening situation, it also allows a victim to press criminal charges at a later date if the situation worsens. The majority of the participants of the Pretoria workshop; the Lesbian and Gay Equality Project; a number of participants of the CapeTown workshop, the collective participants of the Durban, Bloemfontein and Nelspruit workshops agree that different remedies should be available to be used depending on the individual situation and that those remedies should not exist to the exclusion of other remedies.

2.41 Some participants of the Durban workshop state that independent legislation should not be restricted to stalking behaviour only but be made broadly applicable to people who instil fear for example threats of assault of an immediate nature and that the court must be enabled to order reparation for damages for emotional hurt (restorative justice) and provide protection from future harassment.

2.42 Lizemarié Faber<sup>51</sup> and Elsabe Krafft<sup>52</sup> explain that if the Bill provides for a civil and a criminal remedy, a perpetrator can then be charged with the crime of stalking and not only with contravention of the order prohibiting stalking. Ms Faber asserts that when a victim is being stalked by an unknown stalker the victim may then go to the police and open a case of stalking that can be investigated like a robbery or housebreaking case.

48 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Qetywayo Masoa; Melville Cloete, SAPS Legal Services Western Cape; Sohana Moodley, National Prosecuting Authority; Neil Thompson, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; L.M Jacobs, NICRO; Marina Voges, Regional Court, Bloemfontein; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Zwelakhe S Mthembu, SANGOCO; Nation Mthemjame; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; Mareile Kröning, Childline, Mpumalanga; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; ATKV Randburg; Sgt Nkabi, SAPS Guguletu; Commission on Gender Equality; F.C. Muller, Department of Justice; Nelia Schutte, FAMSA, Limpopo; Connie Khantsi-Sefo, State Attorney; Mrs D Milton, Bezuidenhouts Inc; Germa Wright, Society of Advocates; H.P Ferreira, Magistrate, Witbank; National Commissioner, South African Police Services; Germa Wright, Society of Advocates; majority of workshop participants in Pretoria.

49 Ibid.

50 SAPS Legal Services Uitenhage.

51 Magistrate's Office, Bloemfontein.

52 National Prosecuting Authority.

2.43 Although opposed to the enactment of criminal legislation, Senior Superintendent Anneke Pienaar<sup>53</sup> is of the opinion that a protection order against stalking is a “must”. In her words “a need to have, not a nice to have”. However a few respondents<sup>54</sup> point out that intervention can only take place by way of a protection order, if the perpetrator is known. They claim that where the stalker is unknown a criminal remedy, enabling the police to investigate the matter, must be available.

2.44 The Gender Project of Lawyers for Human Rights and Nelia Schutte<sup>55</sup> express their concern that protection orders may not be enough to deal with stalkers who, in many cases, will continue or intensify their behaviour once a protection order has been granted. The Gender Project comments that a protection order may keep someone from continuing with harassing acts. However there is no guarantee as perpetrators can easily violate the order. It further reports that research in the United States of America has found that restraining orders had no effect in cases of very serious stalking and obsessive stalkers continued their behaviour. The Gender Project explains that the California anti-stalking law was initiated by a municipal court judge who was frustrated by the law’s inability to protect four women who were murdered, despite having obtained restraining orders against their assailants. In the Gender Project’s opinion, stalking behaviour frequently escalates into violence and protection orders do not protect victims adequately. The Gender Project suggests that the best remedy to address the broad range of stalking offences is by enacting new legislation to specifically address stalking as a crime which has penalties so that victims are able to seek protection and perpetrators are held accountable.

2.45 A few respondents<sup>56</sup> were of the opinion that a criminal law remedy on its own, in the form of a separate Act rendering acts of stalking punishable by the law would be sufficient. Some participants of the Cape Town workshop suggest that a dual system of civil and criminal remedies will create confusion and that the solution is to criminalise stalking thereby enabling the police to make an independent assessment of the behaviour and the prerogative to take the matter further. They argue that stalking is serious and needs the decisive intervention of the criminal law. They comment that due to the nature of stalking a civil response will create more problems for the victim. Once a protection order is served the perpetrator may become more aggressive and that the order only comes into effect once the order is violated. They further state that protection orders are provocative by nature and may trigger greater harm to the complainant, particularly if the stalker is mentally ill. These respondents are of the opinion that bail conditions can provide the victim with similar protection to a protection order.

## Evaluation of comment and recommendation

### Expanding the Domestic Violence Act to include non-domestic stalking or enacting separate legislation mirroring the Domestic Violence Act

2.46 The Commission shares the view that the expansion of the Domestic Violence Act to partially apply to matters of stalking that are not of a domestic nature may cause confusion due to the specificity of the Domestic Violence Act, and therefore does not recommend the expansion of the Domestic Violence Act to include stalking of persons other than those in domestic relationships.

2.47 The Commission confirms its provisional recommendation that a civil remedy for stalking should mirror the civil remedy provided for in the Domestic Violence Act. Some of the benefits of mirroring the Domestic Violence Act include considerations of expediency and cost and the fact that the complaint needs to be substantiated only by the civil (balance of probabilities) rather than the criminal (beyond reasonable doubt) standard of proof. Another benefit of this remedy is that non-compliance of a protection order is an offence which depending on the circumstances of the breach could lead to the immediate arrest of the stalker.

53 Unit Commander, FCS Detective Service.

54 Wilma van der Bank, SAPS; Sarika Uys, National Prosecuting Authority; Connie Khantsi-Sefo, State Attorney.

55 FAMSA, Limpopo.

56 National Commissioner, South African Police Service; individual participants of the Cape Town Workshop.

2.48 The Commission agrees that, in order to avoid confusion, careful consideration should be given to the terminology used and manner in which stalking is defined and how the content thereof relates to the existing definitions of stalking and harassment contained in the Domestic Violence Act. It also agrees that the provisions in the Domestic Violence Act should not be mirrored in its entirety in stalking legislation.

2.49 In order to prevent malicious applications in terms of the proposed legislation, the Commission proposes that the provision in the Domestic Violence Act which allows the court to make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably be included in the mirrored legislation. The Commission also recommends that a false statement regarding a breach of a protection order should be met with sanction.

2.50 The Commission recommends that a person applying for a protection order in terms of the proposed legislation may not already be in possession of or be in the process of obtaining a domestic violence protection order for stalking. This recommendation is aimed at preventing possible abuse which may arise from the dual application for a protection order against stalking in terms of the Domestic Violence Act and the proposed legislation by victims of stalking who are in a domestic relationship with the person stalking them. However the Commission is of the opinion that in practice a victim of stalking who is or was in a domestic relationship with the stalker will, due to the specific nature and scope of the Domestic Violence Act, invariably make an application for a protection order in terms of that Act.

2.51 The Commission does not recommend that obtaining redress by way of a protection order should be preceded by the laying of a criminal charge.

2.52 The Commission will address the content of the proposed Bill<sup>57</sup> together with the suitability of mirrored clauses under the detailed discussion of the Bill in Chapter 3 of this Report.

### **Amending and adapting section 384 of the Criminal Procedure Act 56 of 1955: Binding over to keep the Peace**

2.53 Section 384 is an administrative enquiry of a quasi-judicial nature, and is not a trial, and consequently no conviction follows upon such an enquiry.<sup>58</sup> The so-called "peace order", as it is implemented at present, is in fact no order, but merely a warning issued in written form by the clerk of the court to the person complained against that a complaint has been lodged and should he or she not refrain from the actions complained of, the magistrate may initiate an enquiry.

2.54 The essence of the enquiry in section 384 is reflected in **Williamson v Helleux**<sup>59</sup> as follows:

- (a) The Magistrate acts as an administrative officer, and not as a court of law, even though his or her actions can lead to an enquiry of a quasi-judicial nature. Strictly speaking, there is no lis between the complainant and the person against whom the complaint is laid.
- (b) The complainant cannot insist on the other person appearing before the Magistrate. This rests wholly within the Magistrate's discretion.
- (c) When the Magistrate does order the person complained against to appear, he or she must "enquire and determine upon such complaint".
- (d) There is no prescribed procedure to be followed, except that witnesses may testify under oath, although this does not necessarily have to happen. A wholly informal procedure may be followed as long as the

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57 See Annexure A.

58 **Williamson v Helleux** 1978 (2)SA 348 (T).

59 1978 2 SA 348 (T).

requisites of natural justice are complied with. It does not form part of the *audi alteram partem* rule at common law.

- (e) Legal representation is excluded, and witnesses cannot be forced to attend the hearing.
- (f) When the Magistrate makes a finding, he or she can only order the person complained against to give recognisances under the section. Where the Magistrate's decision to make an order or not is honestly exercised, this decision is unassailable.
- (g) The recognisances are limited to the general condition that the person complained against "shall keep the peace towards the complainant and shall refrain from doing or threatening injury to his person or property". No provision exists for including therein a prohibition against specified conduct or committing specifically described acts.

2.55 In the abovementioned case Coetzee J noted that the origin of this section is to be found in the English law where there is a twofold power to bind over – one to keep the peace and the other, to be of good behaviour; that the power to bind over to keep the peace depends upon evidence that the complainant was in danger of personal violence from another by reason of threats or of an actual assault. The second power is much wider but that was omitted from our statute. He therefore found that the magistrate may merely bind a person over

"to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property".

2.56 Hence only personal physical violence and injury were contemplated. He proceeded to interpret the words "behaved in a manner towards another" restrictively to direct physical behaviour towards the complainant, which is moreover not lawful, such as for instance rude and insulting gestures directed at him in particular. He further found that an order binding over the respondent to refrain from any other conduct as a component of keeping "*the peace towards the complainant*" could not be made as that would amount to the assumption of the kind of jurisdiction which English magistrates exercise under the Justice of the Peace Act 1361. The words "used language or behaved in a manner towards another likely to provoke a breach of peace towards the complainant" would therefore not be broad enough to include harassing or stalking behaviour which does not amount to direct personal physical violence or injury.

2.57 In 1998 the South African Law Reform Commission Project Committee on Domestic Violence considered<sup>60</sup> the appropriateness of extending section 384 of the Criminal Procedure Act to remedy domestic violence behaviour following recommendations to this effect contained in a Minority Report<sup>61</sup> to the Commission.

2.58 The Committee on Domestic Violence rejected the recommendations in the Minority Report and found that "the issue of Domestic Violence is such that it must be dealt with by a specific Act that is effective, and not with an archaic Act that will have to be dramatically amended to grant any semblance of relief."<sup>62</sup> It noted that experience has shown that many magistrates apply different practices in different courts, resulting from uncertainty and individual interpretations of the process to be applied. It further noted that in many situations of domestic violence (including stalking) the parties are not equally situated and that the woman's life is often in danger. It concluded that the unique nature of domestic violence calls for specialised legislation and that this approach is reflected in the legislation enacted in numerous foreign jurisdictions. The Commission is of the opinion that similar arguments hold true for non-domestic stalking.

2.59 While it is true that behaviour which constitutes stalking may include a breach of the peace (as is the case with domestic violence), it cannot be said that stalking is synonymous with a breach of the peace.

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60 South African Law Commission Paper 505 **Domestic Violence** (Project 100) **Response by Project Committee on Domestic Violence to Minority Report** (Internal document) (1998).

61 South African Law Commission Paper 509 **Domestic Violence** (Project 100) **Minority Report** (Internal document) (1998).

62 South African Law Commission Paper 505 **Domestic Violence** (Project 100) **Response by Project Committee on Domestic Violence to Minority Report** (Internal document) (1998).

Furthermore, breach of the peace cases come to a prosecutor one at a time making it difficult to collate all the information to present the court with a picture of just how widespread the behaviour is. Stalking often does not reside in a discrete act but in a pattern of persistent, unwanted and potentially threatening behaviour. Where individual behaviours are taken out of context they may be seen as trivial. The granting of a peace order also does not give an indication of what the person's previous course of action and behaviour have been. Without this knowledge the presiding officer is unlikely to make a realistic assessment of the risk that a person poses to other people.

2.60 The Commission is of the opinion that although a lengthy amendment to section 384 of the Criminal Procedure Act, including increasing the surety amount and providing for psychiatric or psychological intervention, might make it effective in certain instances of stalking, it would deny a remedy to victims of stalking who are not subjected to personal physical violence and injury and would deny the specific problem that exists in respect of stalking. Section 384 in its existing or amended form would not provide a remedy where the identity of the stalker is unknown or is indigent. Where a stalker's identity is unknown and he or she has not committed a definable offence the police will be unable to assist in determining his or her identity or whereabouts. Where an order is breached, such breach merely results in the forfeiture of the recognizance and amounts to a civil judgement. The Commission consequently does not agree that an amendment or amplification of section 384 of the Criminal Procedure Act would provide victims of stalking with an effective remedy.

### Existing criminal law remedies

2.61 Professor Burchell cogently argues the appropriateness of existing criminal law remedies, namely *crimen injuria* and assault, in relation to stalking behaviour. His opinion that too narrow a view has been taken in respect of the remedies these offences offer and that clear authority for the use of a prosecution of *crimen injuria* in cases of invasion of privacy has been disregarded corresponds with an exposition of the crime of *crimen injuria* in a training note<sup>63</sup> compiled by Justice College. This note acts as a guide for prosecutors. Contrary to comment received in this regard the use of this offence by law enforcement authorities is not restricted to use only in conjunction with other primary offences or when coupled with an offence with a racial bias. Practices, based on prioritization, inappropriate understanding or interpretation and or application of the law, which have developed and taken root in certain areas and which restrict the policing of or prosecution of *crimen injuria*, assault or any other common law crime to specific circumstances do not provide just reason to dispel the appropriateness of this area of law. Clearly the Commission's preliminary conclusion that existing common law remedies are not appropriate or effective remedies for use in stalking incidents is in need of re-evaluation.

2.62 The Constitution specifically acknowledges the continuing value and role of the common law in section 39(2) of the Constitution. In **Carmichael v Minister of Safety and Security**<sup>64</sup> the Constitutional Court held that "(t)he courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. The Court held that this is not a purely discretionary obligation but a general one where the common law is deficient in promoting the section 39(2) objectives. Clearly the common law is a living and developing body of law and not a closed entity from the past."<sup>65</sup>

2.63 Recently some courts have been pro-actively involved in applying and developing the common law. In **S v Nyalungu**<sup>66</sup> the accused who had raped the complainant with the knowledge that he was HIV positive was charged and found guilty of attempted murder. This judgment confirmed the Commission's recommendation in its Fifth Interim Report on Aspects of Law Relating to Aids<sup>67</sup> that existing common law crimes should be utilized to

63 Note SO.4 Justice College Edition 2005.

64 2001(4)SA 938 CC at 955A.

65 Thomas PH The South African Common Law into the Twenty-First Century **TSAR** 2005(2) 292.

66 Case number CC94/04 2004-03-15 TPD Pretoria.

67 See pages 283 - 284.

address harmful HIV related behaviour and consequently that a statutory crime to this effect was not necessary. The Commission found that the common law provides a flexible and comprehensive approach to dealing with HIV-related harmful behaviour in that any one of a range of crimes is available under which such behaviour could be prosecuted.<sup>68</sup> In the recent case **S v Masiya**<sup>69</sup> the regional court invited argument on whether the common law definition of rape allowed a prosecution and conviction on a count of rape where the complainant had been subjected to anal sexual penetration. The magistrate found that the formulation of crimes, especially common law crimes, must take into account the rights of victims and of society at large to be protected against anti-social behaviour and to be provided with adequate (if necessary criminal) redress when their rights have been infringed. The court found that the common law definition of rape as it currently stands is unconstitutional, ordered the development of the definition and convicted the accused of rape. The High Court<sup>70</sup> confirmed the unconstitutionality of the common law definition of rape and the extension of this common law crime.

2.64 The debate on whether the existing criminal law is sufficient or whether a specific crime is needed to combat stalking is not unique to South Africa. Although stalking is a specific crime in all 50 US States where it is classified as either a felony (serious crime) or misdemeanour, and in most parts of Australia,<sup>71</sup> it is not specifically legislated against in many European jurisdictions – notably in Scotland, Germany, Austria, Switzerland and Spain.<sup>72</sup> Furthermore where specific legislation has been in place for some time, debate still centres on the framing and effectiveness of anti-stalking statutes. The most common opinion about the appropriateness of introducing a statutory offence of stalking in Scotland is that such an offence would not make dealing with this type of behaviour any easier, and that the difficulties of framing legislation to encompass the myriad potential ways of stalking and harassing victims would be counter-productive.<sup>73</sup>

2.65 It could be argued that enacting legislation which specifically criminalises stalking behaviour would make the law easier for the general public to access. However the defining character of stalking and harassment in policing terms is its perceived complexity. In an attempt to retain some modicum of flexibility some foreign jurisdictions have criminalised stalking in such an open ended way that it is not clear what exactly is criminalised. In Queensland, contrary to the intention of the legislator, charges of stalking are mostly brought to address disputes or altercations between neighbours.<sup>74</sup> Legislatively defining a crime binds the state to proving the exact elements of the crime. Where the behaviour does not fit the definition and the conduct consequently does not satisfy the elements of the crime, the state will be unable to prove the crime.

2.66 In Scotland it was found that opposition to the creation of a statutory offence of stalking was generally on the grounds that it is unnecessary; that it would prove insufficiently flexible; and that offenders would inevitably find ways of working around it.<sup>75</sup> Those who did support the introduction of new legislation tended to do so not because they believed that the current law is flawed but because they felt that such a move would increase the visibility and heighten awareness of the offence.<sup>76</sup>

2.67 By advocating reliance on existing legal provisions to deal with cases of stalking, the Commission runs the risk that it will be accused of not taking the issue sufficiently seriously. The Commission however is of the opinion that an improved understanding of and application of the existing law would acknowledge the rights

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68 See page 275.

69 Case number: SHG 94/04 2005-07-11 Regional Court Lydenburg.

70 Case number: CC628/2005 TPD.

71 The Scottish Parliament The Information Centre Research Note 10 August 2000 Stalking and Harassment 4.

72 Smartt, U (2001) The Stalking Phenomenon: Trends in European and International Stalking and Harassment Legislation, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 9/3 209 as quoted in The Scottish Parliament The Information Centre Research Note 10 August 2000 Stalking and Harassment 24.

73 Ibid pp73.

74 Conversation with Heather Douglas, part-time Commissioner, Queensland Law Reform Commission.

75 Smartt at pp73.

76 Ibid.

of certain victims of stalking to redress in terms of the criminal law and provide immediate intervention as they would not have to wait for the enactment of specific legislation in this regard. The Commission is of the view that, specifically in respect of stalking behaviour, the realities of modern life can be addressed in a more timely fashion through the common law. The Commission does not recommend the enactment of a specific offence of stalking. However in making this recommendation the Commission identifies a need for the development of practical mechanisms by relevant government departments to effectively utilise the existing common law crimes in cases of stalking behaviour. This may include:

- Public statements by the Department of Justice and Constitutional Development and the South African Police Service to make the public aware of the applicability of existing common law crimes to certain stalking behaviour coupled with the assurance that our existing criminal law will indeed be used for this purpose; and
- implementation of practical measures by the Department of Justice and Constitutional Development and the South African Police Service to ensure effective intervention with regard to stalking which may include the successful prosecution of stalkers through the training of and development of guidelines and protocols for prosecutors, judicial officers, police officers and other key personnel in handling cases of stalking behaviour.

## Enactment of specific legislation to address stalking

2.68 From the personal accounts related to the Commission by victims of stalking, it is apparent that stalking takes many forms and that a standard remedy would not be suitable to address all incidences of stalking. Civil intervention may on its own not be sufficient to deal with all instances of stalking, for example where the stalker is unknown or in instances where physical harm is imminent; and criminal intervention on its own does not provide protection from anticipated or future harm and may be deemed to be too blunt and lengthy a process to embark on. The Commission takes note of the comment<sup>77</sup> that protection orders or interdicts have been known to further incense stalkers, provoking them to embark on more invasive means of stalking and therefore does not believe that a civil remedy on its own will provide sufficient recourse to all victims of stalking. The Commission is of the opinion that different remedies should be available to be used depending on the individual situation and that those remedies should not exist to the exclusion of other remedies. However, the Commission does not agree that access to the criminal justice system should be impeded by the prerequisite of first obtaining a protection order. This would effectively exclude all complainants who do not know the identity of their stalkers from obtaining adequate recourse via the law and place or leave those who are in need of immediate intervention in grave or further danger.

2.69 The Commission recommends that a specific civil remedy be enacted for stalking and that this remedy should mirror the civil remedy provided for in the Domestic Violence Act. It further recommends that, where appropriate, existing crimes such as *crimen iniuria* and assault should be harnessed to address specific instances of stalking behaviour.



# Chapter 3:

## Towards Legislative Reform: Enactment of Specific Legislation to address Stalking

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# Towards Legislative Reform: Enactment of Specific Legislation to address Stalking

## Introduction

3.1 A draft Stalking Bill was included in Discussion Paper 108. The Commission invited comment on the Bill and the legislative approach to be followed. This chapter sets out the comments received on the various issues raised in Discussion Paper 108 and the Commission's final recommendations relating to:

- how stalking should be defined;
- the necessity of categorising stalkers and their methodology;
- procedural matters such as arrest by peace officers without warrant, application by third persons for protection orders on behalf of victims of stalking, the necessity of mental evaluation and or treatment of stalkers, the need of a suspended warrant of arrest accompanying a protection order, seizure of firearms and dangerous weapons and bail; and
- specific exclusion of persons or organizations from prosecution.

## Defining stalking

### Overview

3.2 Generally the concept of stalking seems to have evolved from the dictionary definition of pursuing or approaching a wild animal stealthily. It has taken on an artificial meaning with harassment of another person as its form.

### Proposals in Discussion Paper 108

3.3 With the aim of arriving at a common understanding of stalking within a South African context, Discussion Paper 108 stated that the general tendency in comparative jurisdictions is to include harassment and intimidation within the definition of stalking.<sup>78</sup> A consultative meeting of experts<sup>79</sup> endorsed this view and consequently the Commission provisionally recommended that harassment and intimidation be incorporated into the definition of stalking.<sup>80</sup>

3.4 The Commission also recognised that stalking involves "a series of discrete individual acts, each building upon the next"<sup>81</sup> and that consequently a single act would not constitute stalking. The Commission recommended that an element of repetition be included in a definition of stalking. This would entail repeated

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78 Discussion Paper 108 at pp11.

79 Held on 20 January 2004.

80 Discussion Paper 108 at pp11.

81 Issue Paper 22 at pp1.

conduct or a course of conduct or a series of actions that are carried out with some regularity during a certain period showing evidence of a continuity of purpose.

3.5 The Commission further found that many jurisdictions require proof that a person intentionally committed prohibited acts rather than requiring proof that the perpetrator intended to cause a reaction on the part of the victim.<sup>82</sup> It noted that the benefit of this approach was that the behaviour becomes the defining factor, and not whether it was the intention of the perpetrator to cause the victim to experience the behaviour as flattering, fear-instilling or merely irritating or annoying. The Commission made the preliminary recommendation that proof of the intention on the part of the perpetrator to engage or cause another person to engage in a course of conduct would suffice.

3.6 Alternately the Commission proposed that persistent unwanted attention that causes one to fear or which causes detriment or distress, should be the point at which mere unwanted attention or annoying behaviour becomes criminal behaviour. It suggested that the parameters of stalking could be defined by the effect and the nature of the behaviour rather than the number of incidences. The Commission requested guidance on the approach to be followed.

3.7 Based on the recommendations of the consultative meeting of experts the Commission concluded that a definition of stalking within the South African legal context could include the following elements:<sup>83</sup>

- (1) *repeated* conduct or a course of conduct which indicates it is not a single action, but a series of actions that are carried out with some regularity during a certain period;
- (2) *directed towards* a specific person or category of persons or a person's relatives, acquaintances, work colleagues or property;
- (3) *unwanted* conduct, which means that the victim does not welcome these actions and moreover that he/she has made this clear to the perpetrator (verbally, in writing, or through body language);
- (4) *disruptive* not only means that the victim finds the actions emotionally burdensome and detrimental (subjective element), but also that a reasonable person would experience the same thing in a similar situation (objective element); The intention of the perpetrator is irrelevant: even if he is not aware of the disruptiveness of his actions, the perpetrator can still be guilty of causing physical or mental anguish if the victim finds these actions as undesirable and disruptive to his or her social world and any normal person would do so in the same circumstances
- (5) *Intention* on the part of the perpetrator to engage or cause another person to engage in a course of conduct that includes the following:
  - (a) watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
  - (b) making contact, including by telephone whether or not conversation ensues, or through the use of any technology;
  - (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant";
  - (d) following, pursuing or accosting the complainant;
  - (e) uttering or conveying a threat, real or implied, or causing a complainant to receive a threat, any other harassing and intimidating conduct."

82 Discussion Paper 108 at pp6.

83 Discussion Paper 108 at pp13.

3.8 The following clause was included in the draft Bill giving effect to some of the above recommendations:

## 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 conviction to XXX.

(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.

## Harassment and intimidation

### *Exposition of comment*

3.9 The majority of the respondents to the Discussion Paper agree that harassment and intimidation should be incorporated in the definition of stalking.<sup>84</sup> Mrs Milton<sup>85</sup> reasons that the benefit of including harassment and

84 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Sr/Supt Anneke Pienaar, Unit Commander, FCS Detective Service; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Melville Cloete, SAPS Legal Services Western Cape; Gashiena van der Schaff, United Sanctuary Against Abuse (USAA); Sohana Moodley, National Prosecuting Authority; Neil Thompson, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; F.C. Muller, Department of Justice; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; Pearce Mokoena, Botshabelo Hospital; Marina Voges, Regional Court, Bloemfontein; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; F.C. Muller, Department of Justice; Nelia Schutte, FAMSA, Limpopo; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal; ATKV Randburg; Sgf Nkabi, SAPS Guguletu; Lesbian and Gay Equality Project.

85 Bezuidenhouts Inc.

intimidation into the definition is that it could affect the seriousness of the action and would have bearing on the punishment.

3.10 However Mr Neil Thompson of the National Prosecuting Authority is of the opinion that stalking and intimidatory behaviour should resort under an overarching prohibition against harassment. In this regard the Commission on Gender Equality makes reference to the British Prevention of Harassment Act in which harassment is prohibited without making reference to the term 'stalking'.

3.11 The Saartjie Baartman Legal Advice and Training Project submits that it may be useful to draw a distinction between situations where the perpetrator's actions amount to a violation of privacy or disruption of the victim's life without the component of threat or inducing fear, and where the perpetrator's actions have the additional element of inducing fear or threat.<sup>86</sup> It suggests that the first form of conduct could be referred to as 'harassment' and the second as 'stalking', and that the latter should be regarded as the more serious of the two actions. In this regard it refers to the Domestic Violence Act which it notes makes a distinction along these lines in its definitions of 'stalking' and 'harassment'. Stalking is defined as "repeatedly following, pursuing or accosting the complainant", whereas harassment is defined as "engaging in a pattern of conduct that induces the fear of harm to a complainant including a list of actions constituting harassment". The Saartjie Baartman Legal Advice and Training Project regards it a complicating factor that in terms of this Act, stalking is defined (broadly) as disruptive conduct violating the privacy of the complainant without the element of inducing fear or apprehension of violence, while harassment contains the element of inducing fear of harm. The Saartjie Baartman Legal Advice and Training Project suggests that the Commission consider the introduction of two offences, based on the above distinction.

3.12 Three of the workshops<sup>87</sup> held on Discussion Paper 108 considered the possibility of expanding the Intimidation Act 72 of 1982<sup>88</sup> to address stalking behaviour. Participants of the workshop in Pretoria decided that expanding the Act which was specifically aimed at "the act of intimidation to derive a benefit" would create confusion or lead to generalizing. Cape Town participants commented that stalking often stops short of intimidation – although the acts themselves may be intimidating. The Cape Town participants also stated that in terms of the Intimidation Act, intimidation must have an end benefit for it to be intimidation and that not all intimidating stalking behaviour had an identifiable end benefit. Participants in Durban were also not in favour of expanding the Act as they were of the opinion that the Intimidation Act was created for a specific purpose which did not include personal matters.

3.13 The Saartjie Baartman Legal Advice and Training Project submits that the statutory offence of intimidation as contained in section 1 of the Intimidation Act has recently been employed in the Western Cape to prosecute gang members who had acted to intimidate the victim of a sexual assault (where the perpetrator of the sexual assault was a fellow gang member). It is of the opinion that such prosecution practice may capture the concerns regarding intimidation of victims or witnesses by persons other than the accused and recommends that the use of this provision should be encouraged.

### ***Evaluation and recommendation***

3.14 As stated above the legal understanding of stalking has evolved to take on an artificial meaning with harassment of another person as its form. All Australian states have anti-stalking legislation sanctioning behaviour

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86 See eg the provisions of the New South Wales Crimes Act cited in Discussion Paper 108 in fn 221 at p 88; the UK Protection from Harassment Act 1997 (Par 3.84 – 3.87) at pp 93-94; the Dutch provisions as described in Par 3.113 – 3.114 at pp 102.

87 Pretoria, Cape Town and Durban.

88 Hereafter referred to as the 'Intimidation Act'.

calculated to harass, threaten or intimidate,<sup>89</sup> The Protection from Harassment Act 1997 prohibits harassment and putting people in fear of violence in England and Wales and prohibits harassment in Scotland and Ireland. Although informally referred to as an 'anti-stalking' law, this Act does not use or define the term stalking.<sup>90</sup> Similarly in Canada 'criminal harassment' is the legal term for stalking.<sup>91</sup> Not all forms of harassment are addressed in anti-stalking legislation. Prohibited harassing conduct is usually accompanied by an additional element of inducing the belief that harm may be caused or of fear or threat.<sup>92</sup>

3.15 In the course of its investigation into Domestic Violence the Commission, in keeping with international precedent, recommended that the inclusion of harassment in the definition of domestic violence would accommodate acts amounting to stalking.<sup>93</sup> However during the parliamentary process 'stalking' was included in the definition of 'domestic violence' by name and both 'stalking' and 'harassment' were individually defined, although essentially describing the same phenomenon, i.e. harassing behaviour. Section 1 of the South African Domestic Violence Act defines 'harassment' as "engaging in a pattern of conduct that induces the fear of harm to a complainant including – repeatedly watching, or loitering. . ." and 'stalking' means "repeatedly following, pursuing, or accosting the complainant." The Commission is of the opinion that the separation of the one concept of harassment into 'stalking' and 'harassment' is unnecessarily complicating. It is of the opinion that the term 'harassment' is more inclusive of a wider understanding of stalking and recommends that the overarching term 'harassment' be used. The term 'harassment' is wide enough to address both situations identified by the Saartjie Baartman Legal Advice and Training Project, namely conduct which amounts to a violation of privacy or disruption of the victim's life without the component of threat or inducing fear, and where the perpetrator's conduct has the additional element of inducing fear or threat.

3.16 The Commission explored the possibility of extending the application of the Intimidation Act to intimidation of victims or witnesses by persons other than the accused. In light of two recent cases dealing with intimidatory conduct by persons during the commission of an offence, namely **S v Motshari**<sup>94</sup> and **S v Gabathole**,<sup>95</sup> the Commission has reached the conclusion that the courts are loathe to apply the Act to situations falling outside of the primary objective of this Act, namely to 'bring security legislation into line with the new dynamic situation developing in South Africa in order to ensure normal and free political activities'.<sup>96</sup>

3.17 In both **S v Motshari** and **S v Gabathole**, the court expressed concern regarding the constitutionality of certain provisions in the Act on the grounds that the accused has no choice but to disclose the basis of his or her defence before the close of the State case and directly or indirectly placing the onus on the accused of establishing his or her innocence which could probably render a trial unfair.

89 Criminal Code (Qld) s 359A; Criminal Code 1913 (WA) ss 338D and 338E; Crimes Act 1900 (NSW) ss 562A and 562B; Crimes Act 1958 (Vic) s 21A; Criminal Law Consolidation Act 1935 (SA) s 19AA; Criminal Code Amendment (Stalking) Act No 65 of 1995 (Tas); Criminal Code 1983 (NT) s 189.

90 Discussion Paper 108, para 3.84.

91 Section 264 of the Canadian Criminal Code.

92 Section 264 of the Canadian Criminal Code "... engage in conduct ... that causes that other person ... to fear for their safety or the safety of anyone known to them"; Section 2 of the US Model Antistalking Code "course of conduct ... that would cause a reasonable person to fear bodily injury to himself ... of to fear the death of himself ..."; Section 21A(2) of the Victorian Crimes Act 1958, "... reasonably be expected to arouse apprehension or fear in the victim for their own safety or that of another"; Section 359B of the Queensland Criminal Code (QLD) "... cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against the property of ...; or causes detriment ...".

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

94 2001 (1) SACR 550 (NC).

95 2004 (2) SACR 270 (NC).

96 In review proceedings of both cases the convictions for contravention of the Intimidation Act were overturned. In **S v Motshari**, Judge Kgomo held that the provisions of the Intimidation Act were not applicable to a quarrel between live-in lovers taking place within the confines of their dwelling not involving riotous behaviour pertaining to an assembly of people or a security situation or some industrial action. So to, Judge Majiedt found in **S v Gabathole** that the Intimidation Act was not meant to be applied to less serious matters such as threats uttered during a housebreaking.

3.18 In view of the existing uncertainty around the scope and constitutionality of the Intimidation Act the Commission does not recommend the application of or expansion of this Act to stalking behaviour either to address stalking behaviour by a specific person or persons associated with such a person, e.g. gang members.

## Repetition

### **Exposition of comment**

3.19 A large number of the respondents support the inclusion of an element of repetition.<sup>97</sup> Mareile Krning<sup>98</sup> points out that 'repetition' entails repetition of the same act. She suggests that the word 'pattern' should be used to indicate that the nature of the conduct is ongoing but is not necessarily the same over a period of time. In a similar vein J.G Liebenberg<sup>99</sup> and F.C. Muller<sup>100</sup> suggest that the words "course of conduct" should be used. Lizemarié Faber of the Magistrate's Office in Bloemfontein and the Lesbian and Gay Equality Project agree that the behaviour needs to reflect more than one act, but not necessarily the same act. Nation Mthemjame proposes that in addition to the requirement that there be more than one act, that the acts should not be too far removed in time from one another.

3.20 A few respondents<sup>101</sup> comment that in addition to acts that are repeated, a single act should be sufficient where it is protracted as is provided for in clause 2(a) of the proposed Bill, which prohibits stalking "on any one occasion if the conduct is protracted or on more than one occasion". Benita Nel<sup>102</sup> agrees that the circumstances around a single incident could amount to stalking. Mrs Milton<sup>103</sup>, and L.M Jacobs of NICRO state that one must make provision for an incident that might be once off, but very dangerous and or harmful (life threatening). To this end the Lesbian and Gay Equality Project suggest that the definition should allow, possibly with a different burden of proof, for the possibility that an act could be stalking even if it occurred only once.

3.21 Professor Burchell cautions that the omission of a definition of 'protracted conduct' could potentially give rise to an infringement of the *ius certum* rule. He adds that it would seem that a protracted act would be one that extends over some period of time, i.e. prolonged, however the words in the definition of 'conduct' in the proposed Bill could potentially include once-off conduct of a brief (or even momentary) nature. He avers that it would be difficult to know with reasonable certainty when the proposed legislation is being contravened. He further notes that the Domestic Violence Act qualifies the concept of stalking by using the word 'repeatedly' and the definition of harassment contains reference to 'pattern of conduct' and that this may give rise to a potential

97 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Sr/Supt Anneke Pienaar, Unit Commander, FCS Detective Service; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbalu Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Melville Cloete, SAPS Legal Services Western Cape; Gashiena van der Schaff, United Sanctuary Against Abuse (USAA) ; Sohana Moodley, National Prosecuting Authority; Neil Thompson, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Pearce Mokoena, Botshabelo Hospital; Malefu Ragolile, Department of Social Development; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMS, Limpopo; Zwelakhe S Mthembu, SANGOCO; R.J. Smith, Department of Correctional Services; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Maloko Mamabolo, SALGA; Connie Khantsi-Sefo, State Attorney; B.D Madonsela, Magistrate Eerstehoek; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal; Marina Voges, Regional Court, Bloemfontein; ATKV Randburg; Sgt Nkabi, SAPS Guguletu; Commission on Gender Equality.

98 Childline, Mpumalanga.

99 Magistrate, Barbeton.

100 Department of Justice.

101 Sarika Uys National Prosecuting Authority; Commission on Gender Equality.

102 Lifeline, Nelspruit.

103 Bezuidenhouts Inc.

conflict with the proposed definition of stalking. He suggests that one way of limiting the risk of a challenge to the definition of 'conduct' is to exclude any reference to a protracted act so emphasizing the repetitive nature of the conduct proscribed and to use the adjective 'unlawful' conduct to emphasize that it is the unreasonableness of the conduct that is in issue.

### **Evaluation and recommendation**

3.22 The United Kingdom requires that harassing behaviour must involve "conduct on at least two occasions"<sup>104</sup> and the United States Department of Justice interprets "repeatedly" as meaning two or more occasions.<sup>105</sup> The Canadian Criminal Code provides that if the conduct is watching, prowling, or "besetting" a place where a person is visiting, lives or works, or if there is threatening conduct, one incident would suffice in getting a conviction. However where the conduct is "following" or "communicating", the conduct has to be "repeated", i.e. has to happen more than once for it to constitute criminal harassment. In Queensland the offence of stalking has been amended to allow that conduct on one protracted occasion is sufficient. The inclusion of the word protracted followed a Supreme Court decision in Victoria in which McDonald J found in the matter of **Gunes and Tunc v Pearson**<sup>106</sup> that 'course of conduct' encompassed conduct that was engaged in on more than one occasion, or one protracted incident. McDonald J held that ". . . a 'course of conduct' which includes keeping the victim under surveillance, may comprise conduct which includes keeping the victim under surveillance for a single protracted period of time or on repeated separate occasions."<sup>107</sup>

3.23 Typically though stalking is not a disconnected or detached act but is comprised of a series of actions or conduct which is carried out with some regularity showing evidence of a continuity of purpose.

3.24 The Commission agrees that use of the word 'repetition' on its own should be avoided as it would restrict the conduct to a recurrence of the same acts. Consideration was given to the applicability of the words 'series', 'course of conduct' and 'pattern' to describe actions which are carried out with regularity showing evidence of a continuity of purpose. However, bearing the development of Queensland's stalking legislation in mind the Commission is reluctant to accept that a single occasion cannot provide proof of harassment. It is the view of the Commission that whether or not a single instance will amount to stalking will depend on the context in which the behaviour occurs. The Commission recommends that harassing behaviour should not be restricted to a pattern of behaviour or a protracted act. It is of the opinion that where there is proof of harm or the reasonable belief that harm may be caused a once-off incident could amount to stalking.

3.25 In order to avoid a Constitutional challenge based on overbreadth or vagueness the Commission is of the opinion that the prerequisite that an act has to at least be protracted should be excluded from the definition of harassment.

104 Section 7 of the Protection from Harassment Act 1997.

105 US Model Antistalking Code.

106 (1997) 21 A Crim 297.

107 Ibid at 306.

## Intent

### **Exposition of comment**

3.26 An overwhelming majority of the respondents agree that a definition of stalking should include a general intent requirement.<sup>108</sup> In other words that it would be sufficient to prove that a person intentionally committed prohibited acts and not that he or she intended for the victim to fear harm.<sup>109</sup> Where the intention is to cause fear this intention should be seen as an aggravating factor and consequently weigh heavier on the sentence.<sup>110</sup>

3.27 Some respondents<sup>111</sup> observe that stalking conduct or behaviour may not necessarily give rise to fear and that the emphasis should not be placed on the fear, detriment or distress experienced by the victim. Lizemarié Faber<sup>112</sup> comments that people respond differently to certain behaviour and if certain conduct does not cause fear in a victim, but disrupts that person's life it should also be considered illegal. She adds that where a victim is being kept under surveillance the victim will not be fearful until he or she becomes aware of the surveillance. She argues that the lack of knowledge of the stalking behaviour on the part of the victim does not make the conduct legal. Sarika Uys<sup>113</sup> and Elna Ferrera<sup>114</sup> recommend that stalking behaviour which does not cause fear or detriment but amounts to an invasion of privacy should also be addressed. Sarika Uys suggests that a sub-clause be added in clause 2(1)(c), namely conduct "that violates one's right to privacy and/or one's personal sphere". She motivates her suggestion by stating that stalking conduct could be irritating but does not always cause distress or instil fear in the victim. In a similar vein L.M Jacobs of NICRO comments that discomfort, invasion of privacy, disruption of the personal/private sphere, should also be incorporated in clause 2(1)(c). Enrico Brits<sup>115</sup> endorses this comment but states that fear must not be a prerequisite.

3.28 Marina Voges of the Regional Court in Bloemfontein notes that the prerequisite of fear is unnecessarily restrictive. She proposes that subclause 2(1)(c)(ii) should be amended as follows "causes detriment or distress to or invades the privacy of another".

3.29 F.C. Muller<sup>116</sup> and Adv Natasha van Wyngaardt<sup>117</sup> make the point that irrespective of the intention of the stalker the prohibited acts will give rise to a reaction on the part of the victim and that the victim will testify to the acts and the consequences for his or her private life.

108 Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbalu Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Melville Cloete, SAPS Legal Services Western Cape; Sohana Moodley, National Prosecuting Authority; Neil Thompson, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; Pearce Mokoena, Botshabelo Hospital; Connie Khantsi-Sefo, State Attorney; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; B.D Madonsela, Magistrate Eerstehoeek; Nelia Schutte, FAMSA, Limpopo; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; Mareile Kröning, Childline, Mpumalanga; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal; ATKV Randburg.

109 Cape Town Workshop on Stalking.

110 Mrs D Milton, Bezuidenhouts Inc.

111 F.C. Muller, Department of Justice; Lizemarié Faber, Magistrate's Office, Bloemfontein; Sarika Uys, National Prosecuting Authority; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; Germa Wright, Society of Advocates; Jacqueline Fourie, Magistrate's Court, Welkom.

112 Magistrate's Office, Bloemfontein.

113 National Prosecuting Authority.

114 Magistrate's Court, Welkom.

115 National Prosecuting Authority.

116 Department of Justice.

117 SAPS Legal Services Uitenhage.

3.30 Senior Superintendent Anneke Pienaar, the Commander of the South African Police Service Family Violence Child Protection and Sexual Offences (FCS) Unit states that it is difficult to determine a person's motive as a person's motive can change over a period of time. Sarika Uys of the National Prosecuting Authority agrees and comments that motive is irrelevant to prove guilt and that all that is necessary is to prove the intent to commit the categorised acts, which is an objective test.

3.31 Sophie Giorgi<sup>118</sup> and Marina Voges<sup>119</sup> submit that the element of intent should be reflected as the intention to engage in an act of stalking or to engage in stalking conduct and that the prohibited acts of stalking or conduct should be defined separately. Nico van der Merwe<sup>120</sup> agrees that the prohibited acts should specifically be set out in the Act.

3.32 However, some respondents<sup>121</sup> comment that the prohibited acts must result in a specific reaction such as fear of harm or violence. The Commission on Gender Equality and a number of respondents<sup>122</sup> remark that focusing on the effect of the behaviour sends a message to stalkers that otherwise legal behaviour, such as sending flowers or watching a person in public, will not be tolerated where it causes fear and detriment to the victim. However, the Lesbian and Gay Equality Project and workshop participants at the Durban workshop on stalking disagree with this point of view. The Lesbian and Gay Equality Group explains that if a specific reaction must ensue then victims who may not necessarily be or have the ability to be aware of the act, due to their intellectual, psychological or other capacity, will not be protected against stalking. This includes vulnerable groups such as children and mentally incapacitated persons.

3.33 The Saartjie Baartman Legal Advice and Training Project points out a conflict between the Commission's recommendation to include the element of intent in relation to certain acts as opposed to the intent to cause a specific reaction and the draft Bill where one of the elements of the offence of stalking is that the conduct must be likely to have a specific impact (causing apprehension or fear of violence to, or against property of, the complainant or another person) or must cause a particular result (i.e. detriment or distress on the part of the complainant or another person).

3.34 The Saartjie Baartman Legal Advice and Training Project notes that the recommendation of the Commission that the subjective experience of the victim should not be a determining factor, where it is immaterial that the victim may be unaware of being stalked is at variance to the offence of assault where, with regard to a threat to assault, if the victim did not form the impression that he or she would be touched or beaten then the crime (in this form) is not committed, even though it was the accused's intention to attack the victim. The Saartjie Baartman Legal Advice and Training Project suggests that the above variances need to be considered after which it may be necessary to depart from the general principles of liability in order to meet the specific exigencies presented by stalking.

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118 National Prosecuting Authority.

119 Regional Court, Bloemfontein.

120 Du Toit Smuts & Mathews Phosa Inc.

121 Nthabiseng Motsau Prosecutor, Soweto Magistrate Court; Gashiena van der Schaff, United Sanctuary Against Abuse (USAA); L.M Jacobs, NICRO; Commission on Gender Equality.

122 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Adv Natashia van Wyngaardt, SAPS Legal Services Uitenhage; Melville Cloete, SAPS Legal Services Western Cape; Gashiena van der Schaff, United Sanctuary Against Abuse (USAA); Sohana Moodley, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; Connie Khantsi-Sefo, State Attorney; L.M Jacobs, NICRO; Ancois Venter, Department of Justice; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMSA, Limpopo; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; ATKV Randburg; Sgt Nkabi, SAPS Guguletu; Lesbian and Gay Equality Project.

3.35 The Saartjie Baartman Legal Advice and Training Project recommends that the subjective perception of the victim should play a role in determining liability. It states that the crime of assault is committed by the act, gesture or words causing a belief or apprehension that the attack will occur. It is not necessary that the victim should also have experienced any *emotion of fear*; if the victim is “a stouthearted chap who faces the apprehension with stoic calm and fortitude”, the crime is still committed. The test is whether the threatened party believes that the conduct of the accused will immediately cause some sort of contact with his body. The victim’s fear of attack need not be a reasonable one.

3.36 The Saartjie Baartman Legal Advice and Training Project disagrees that an objective standard be used, as is done by using the words ‘reasonably’ and ‘likely’ in Clause 2(1)(i) and endorses the approach currently adopted in relation to the offence of assault, i.e. that the subjective response of the victim should be considered.

3.37 The Commission on Gender Equality and participants of the workshop held in Cape Town recommend that the apprehension brought about by the conduct must have both an objective and a subjective standard and as such should be incorporated into the language of the act. In particular, the Commission on Gender Equality states that sections 2(1)(c)(i) and (ii), which utilize the language “reasonably arising in all the circumstances” may need further clarification in this regard. It suggests that the concept of a “reasonable person in those same circumstances” could be incorporated as a measure of objectivity. Participants of the Cape Town workshop favour a subjective approach. Hayley Galgut of the Women’s Legal Centre points out that the recent Anita Ferreira<sup>123</sup> case, by stating that one should place oneself in the position of the victim, gives credence to using a subjective approach. Senior Superintendent Anneke Pienaar<sup>124</sup> agrees that the test should be subjective, namely dependent on the feelings, emotions or thoughts of the individual victim.

3.38 Professor Burchell notes that the specific exclusion of the need for proof of intention that the complainant be aware that the conduct is directed at him or her is compatible with common-law principles. In other words the accused cannot raise the defence that he did not know or foresee that the complainant would realize that the conduct was directed at him or her. He also comments that the exclusion of any offence of error in objecto i.e. mistake as to the identity of the complainant would meet common-law approval.

3.39 He points out that the exclusion of proof of intention to cause apprehension, fear, detriment or distress is in essence a form of strict liability (or no fault liability) regarding an essential element of the actus reus of stalking. In this regard he refers to **S v Coetzee**<sup>125</sup> where O’Regan J emphasized that strict liability unjustifiably and unreasonably infringes the right of the accused to freedom and security of person and states that it is likely that the Constitutional Court will not regard this form of strict liability in keeping with Constitutional norms. He states that this conclusion is bolstered by the common-law courts presumption that, in interpreting the scope of statutory criminality, fault (usually in the form of intention) is required. He further states that knowledge of unlawfulness (at least in the form of subjective foresight of the possibility of the unlawfulness of the conduct) is also a part of intention and has to be established by the prosecution.

### **Evaluation and recommendation**

3.40 In so far as the *mens rea* element is concerned,<sup>126</sup> stalking legislation in other jurisdictions requires an intention by the accused either to cause harm, to intimidate, or to arouse fear or apprehension of a threat

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123 Case No: 245/03, Judgement delivered on 1 April 2004 (unreported).

124 Unit Commander, FCS Detective Service, South African Police Service.

125 1997 (3) SA 527 (CC) at para [178].

126 Law Reform Commission New South Wales Report 103 (2003) **Apprehended violence orders** at par 12.11.

to safety, or to frighten the victim.<sup>127</sup> In some Australian States, the prosecution must prove that the accused actually had such an intention.<sup>128</sup> In some jurisdictions, it is sufficient to prove intent if the accused knows, or ought reasonably to know in the circumstances, that his or her conduct would be likely to cause harm or arouse the fear in the victim.<sup>129</sup> In South Australia, an offence is committed where the accused is recklessly indifferent as to whether his or her actions generate fear in the victim.<sup>130</sup> In Queensland it is immaterial whether the accused intended the victim to be aware of the stalking, or if the accused mistook the identity of the victim.<sup>131</sup>

3.41 Under the provisions of the model antistalking code<sup>132</sup> a defendant must engage purposefully in activity that would cause a reasonable person to fear, and the defendant must have knowledge, or should have knowledge, that the person toward whom the conduct is directed will be placed in reasonable fear. In other words, if a defendant consciously engages in conduct that he knows or should know would cause fear in the person at whom the conduct is directed, the intent element of the model code is satisfied.

3.42 A suspected stalker often suffers under a delusion that the victim actually is in love with him or that, if properly pursued, the victim will begin to love him. Therefore, a stalker actually may not intend to cause fear; he instead may intend to establish a relationship with his victim. Nevertheless, the suspected stalker's actions may cause fear in his victim. The view is held that as long as a stalker knows or should know that his actions cause fear, the alleged stalker can be prosecuted for stalking.<sup>133</sup> In some instances, a stalker may be aware, through a past relationship with the victim, of an unusual phobia of the victim's and use this knowledge to cause fear in the victim.<sup>134</sup>

3.43 The requisite mental state of the victim differs between jurisdictions.<sup>135</sup> In Victoria, for example, the victim had to have actually feared for his or her safety in order to ground the offence.<sup>136</sup> This provision was repealed by the Crimes (Stalking) Act 2003 (Vic), which no longer requires proof of the actual effect of the stalking on the victim.

3.44 Antistalking legislation essentially censures what would otherwise be considered to be legitimate behaviour. Justification for doing so is primarily based on the nature of the behaviour coupled with the subjective perception of the victim. The Commission therefore agrees that the subjective perception of the victim should play a role in determining liability. The Commission agrees that where the victim's subjective perception plays a role, similar to the common law offence of assault, the victim's fear need not be reasonable. Further that the behaviour of the stalker is still punishable even though the constitution of the victim is more robust than that of most people in such circumstances.

3.45 Clause 2 of the draft Bill in the Discussion Paper was modeled on the Queensland Criminal Code (Qld). The amended Queensland Criminal Code captures intentionally directed conduct that occurs on one (if protracted), or (otherwise) on more than one, occasion that, reasonably in the circumstances, would cause

127 Criminal Code (Qld) s 359B(a); Crimes Act 1958(Vic) s21A(2); Crimes Act 1900 (ACT) s 34A(1); Criminal Law Consolidation Act 1935 (SA) s 19(1)(b); Criminal Code (NT) s 189(1)(b); Criminal Code (WA) s 338E; Harassment Act 1997 (NZ) s 21(1); California Penal Code s 646.9(a); Protection from Harassment Act 1997 (England and Wales) s 4; United States Model Anti-Stalking Code; Canadian Criminal Code s 264 and Irish Republic Non Fatal Offences against the Person Act 1997 s 10(2).

128 Crimes Act 1900(ACT) s 34A(1) and Criminal Code (NT) s 189(1)(b).

129 Crimes Act 1958(Vic) s 21A(3); Criminal Code (Qld) s 359B(d) and s 359C(4); Protection from Harassment Act 1997 (England and Wales) s 1(1) and s 4(1); United States Model Antistalking Code s 2.

130 Criminal Law Consolidation Act 1935 (SA) s 19(1)(b).

131 Criminal Code (Qld) s 359C(1).

132 US Department of Justice A Model Antistalking Code for the States <http://www.ojp.usdoj.gov/ocom/94Guides/DomViol/appendb.htm> at pp3.

133 US Department of Justice A Model Antistalking Code for the States at pp3.

134 Ibid at pp4.

135 Law Reform Commission New South Wales **Apprehended violence orders Report 103** (2003) at par 12.11.

136 Crimes Act 1958 (Vic) s 21A(2).

apprehension or fear or causes detriment. The requirement that the accused must know that his or her conduct was “likely to cause apprehension or fear of violence” was criticized as too narrow.<sup>137</sup> Following the amendment to the Code it is immaterial whether the stalker’s conduct actually causes apprehension or fear. All that is required is that it ‘would cause the stalked person’ apprehension or fear. Often a stalker does not intend to cause fear of physical injury or psychological damage. Often the intention is to maintain control over an ex-partner and his or her new partner or gain attention. Following a person about, watching them or repeatedly telephoning or writing to the person may not be done with the intention of causing physical or mental harm but may have a devastating effect on the person. The Commission recommends that the proposed Bill be amended to provide that the conduct engaged in must found a reasonable belief that harm may be caused. It is argued that the test should be based on the subjective perception of the complainant regardless of whether harm is caused or whether the conduct occurs out of love, delusion, or harassment.<sup>138</sup> Nevertheless the Commission is of the view that a reasonable belief of harm will not exist unless the conduct is branded as unreasonable and therefore recommends that the stalking behaviour itself should be unreasonable.

3.46 The Commission concurs with the majority of the respondents that the motive of the stalker should not serve any purpose other than to act as an aggravating factor in consideration of sentence.

## Unwanted conduct

### *Exposition of comment*

3.47 A number of respondents<sup>139</sup> make the point that a victim of stalking may be kept under surveillance without being aware of it and would therefore not be able to indicate that the conduct is unwanted until they become aware of it. They recommend that this requirement be deleted. Elna Ferrera<sup>140</sup> comments that if all the other elements are in place and the conduct is unwanted it should be enough. The Commission on Gender Equality agrees that if the stalker’s behaviour fits the definition of stalking as laid out in the Bill, this should constitute prima facie evidence of the fact that the behaviour was unwanted.

3.48 It explains that by putting the burden on the victim to show that the conduct was unwanted, a stalker would be able to challenge an accusation of stalking simply by questioning whether the victim clearly communicated to the stalker that his or her actions were unwanted. In addition, it argues that there may be some instances where the stalker’s actions are so stealthy and covert – such as entering a home without the victim’s knowledge, intercepting the victims phone, mail, or email messages, spying on the victim from large distances, etc. – that the victim is unaware of the extent of the stalker’s actions and who the stalker is. It emphasizes that the fact that the victim has not yet communicated his or her objections to the stalker does not make the stalker’s actions any less harmful or dangerous.

### *Evaluation and recommendation*

3.49 The Commission agrees that the element of unwanted conduct is not necessary to establish whether stalking has taken place. Where the other elements co-exist they should jointly constitute prima facie evidence of the fact that the behaviour was unwanted. Proof to the contrary would provide the accused with a defence to the charge.

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137 Law Reform Commission New South Wales **Apprehended violence orders Report 103** (2003) at par 12.17.

138 Ibid at par 12.18.

139 Sophie Giorgi, National Prosecuting Authority; Lizemarié Faber, Magistrate’s Office, Bloemfontein; Sarika Uys, National Prosecuting Authority; Germa Wright, Society of Advocates; Jacqueline Fourie, Magistrate’s Court, Welkom; Marina Voges, Regional Court, Bloemfontein; ATKV Randburg.

140 Magistrate’s Court, Welkom.

## Disruption

### *Exposition of comment*

3.50 Marina Voges of the Regional Court in Bloemfontein submits that it is enough to show that the complainant subjectively experienced the conduct of the perpetrator as harmful or unsettling. Sarika Uys<sup>141</sup> and Jacqueline Fourie<sup>142</sup> state that disruption should include invading the privacy rights and or private sphere of the victim's life. Germa Wright of the Society of Advocates adds that the disruption need not only be emotionally burdensome but could be brought about by plain irritation and frustration.

### *Evaluation and recommendation*

3.51 The Commission concurs that the conduct does not have to physically harm the victim, but that it is sufficient for the victim to have a reasonable belief that harm may be caused. But for the subjective perception of the victim and the intent of the accused antistalking legislation essentially censures what would in certain circumstances otherwise be considered to be legitimate behaviour. The Commission is of the opinion that it is unnecessary to prove a disruption to the life of the victim. It is enough to show that the conduct was unreasonable and gave rise to a reasonable belief of harm. Mere irritation and frustration would not suffice.

## Appropriate criminal penalty

### *Exposition of comment*

3.52 In the draft Stalking Bill which accompanied Discussion Paper 108 the Commission requested comment regarding which sentence(s), following conviction for stalking, would be appropriate, for example a reprimand; a fine; imprisonment; submission to instruction or treatment; or a suspended sentence.

3.53 In this regard the National Commissioner of the South African Police Service submits that sentencing should be left to the discretion of the judiciary, so as not to tamper with judicial independence on sentencing. The National Commissioner points out that it is therefore not necessary for a prescribed or so-called minimum sentence. He proposes that the penalty which should be provided for stalking as an offence could be the same as the penalty provided for contravening a protection order under the Domestic Violence Act, namely, "a fine or imprisonment of not more than five years."

3.54 Some participants of the workshop held in Pretoria endorsed the application of stiff sentences that are deterrent and rehabilitative in nature. At the same time others favoured the application of principles of restorative justice, in so far as a diversion contract could be aimed at interrupting compulsive behaviour.

3.55 Participants of the workshop held in Cape Town were not in favour of diversion as a sentencing option as in their opinion such sentencing would understate the seriousness of the offence. Some of the participants were in favour of suspending sentences for first offenders once the offender had been convicted of stalking.

3.56 Prof Schlebusch emphasises that punishment should result in behaviour change. In his opinion even if you can't cure the stalker, he or she can at the very least develop an understanding of the consequences of his or her behaviour.

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141 National Prosecuting Authority.

142 Magistrate's Court, Welkom.

3.57 Mr Rashid Patel<sup>143</sup> points out that criminal sanctions are not the only solution and to his mind the issue that needs to be addressed is whether there is a means of avoiding a recordal of certain conduct as a 'previous conviction' depending on the nature of the stalking. He suggests that where the parties are known to each other compulsory mediation, conciliation and arbitration in some instances may also have positive results. Alternatively he suggests that a reprimand coupled with an interdict, restraining the perpetrator from communicating or interfering or desisting from the conduct complained of for a specified term, would help. He notes that correctional supervision for a maximum period of 1 month, for example, may be useful. He states that a fine can also help but this may not have the desired effect as the purpose of imposing sentence for an offence of this nature is to curtail perpetual conduct and a fine generally does not achieve this goal.

3.58 Some respondents<sup>144</sup> feel that in criminal proceedings an order for treatment or counselling should form part of the conditions of release or part of the conditions for suspension<sup>145</sup> of a sentence or form part of a perpetrator<sup>146</sup> or diversion<sup>147</sup> programme.

### **Evaluation and recommendation**

3.59 When considering sentencing in relation to persons who stalk others it is important to bear in mind, that these persons do not form part of a homogenous group. The differences are illustrated by comparing a former intimate partner with a delusional erotomaniac or a person with a false victimisation syndrome. The Commission recommends that the presiding officer be allowed to exercise his or her discretion in imposing a fitting sentence. The Commission suggests that following a conviction in terms of the existing criminal law for harassing or stalking behaviour the accused should be liable to a fine or imprisonment for a period not exceeding five years or to both such fine and imprisonment. It is also suggested that depending on the circumstances a breach of a protection order against harassment as defined in the proposed draft Bill be met with the same penalties. In relation to sentencing the necessity for mental, psychiatric or behavioural intervention is dealt with below.<sup>148</sup>

## **Methods employed by stalkers**

### **Overview**

3.60 Methods employed by stalkers vary. In the Issue Paper<sup>149</sup> on Stalking the Commission noted that a typical stalker would engage in a series of acts (some legal, some illegal, depending on the circumstances) that, viewed collectively, present a pattern of behaviour that annoys or alarms the person at whom the conduct is directed. These actions are aimed at a specific person, his or her family, colleagues, friends or property.

### **Proposals in Discussion Paper 108**

3.61 Discussion Paper 108 reflects a wide variety of methods employed by stalkers. From the submissions referred to in the Discussion Paper it is clear that stalkers do not use only one or a few identifiable methods of stalking. The Commission noted that in addition to the more common forms of stalking i.e. following, silent calls and vandalising property, the use of computerized technology i.e. mobile phones, electronic mail and the

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143 Rashid Patel & Company.

144 J.H. Wiegand, National Prosecuting Authority' Sarika Uys, National Prosecuting Authority; L.M Jacobs, NICRO.

145 Sarika Uys, National Prosecuting Authority; Ancois Venter, Department of Justice.

146 L.M Jacobs, NICRO.

147 Sarika Uys, National Prosecuting Authority.

148 See paras 3.127 and further.

149 Issue Paper 22 at pp2.

internet is being more frequently harnessed to stalk victims. The circumstances, the relationship, or lack thereof, between the stalker and the victim and the reason for the stalking all influence the method which the stalker will use to stalk his or her victim.

3.62 The Commission concluded that there are many different methods of stalking, each capable of being adapted to suit the intentions of the stalker. It therefore initially recommended that stalking should be defined broadly and that the emphasis should not be placed on the methods used, as attempting to legislate for each situation would be a legal impossibility.<sup>150</sup>

3.63 The Commission stated that one way of broadly defining stalking would be to define the prohibited conduct in terms of "communication", "harassment", or "threats" without specifying the exact methods. However the Commission also noted that a number of respondents to the Issue Paper had requested that specific instances of stalking be prohibited.

3.64 In an attempt to combine the two abovementioned approaches the Commission referred to stalking behaviour as "conduct" in the definition of stalking<sup>151</sup> and defined "conduct" in a non-exhaustive manner in the definitions clause. The clause read as follows:

**"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.

150 Discussion Paper 108 at pp23.

151 See Clause 2 of the Draft Bill.

## Exposition of comment

3.65 An overwhelming majority of the respondents indicated that they were in favour of defining stalking conduct broadly by using the terms “communication”, “harassment”, or “threats”.<sup>152</sup> However, many of the same respondents indicated that they also agree with the proposed open-ended definition of “conduct” contained in the draft Bill.<sup>153</sup>

3.66 Sarika Uys<sup>154</sup> agrees with the broad defining of prohibited conduct by using the terms “communication”; “harassment”; “threats”; but recommends that the terms “invasion of privacy”; “relative, acquaintances, work colleagues or property”; “detriment”; and “distress” should also be used and that the victim should have a material interest or connection with them. She suggests that terms similar to the definitions used in the Witness Protection Act 1998 could be used. Alternately she<sup>155</sup> suggests that direct and indirect contact and any other harassing and intimidating conduct and/or invasion of privacy could be included in a definition of conduct.

3.67 B.D Madonsela<sup>156</sup> is of the opinion that the definition ‘conduct’ should be as embrative as possible in order not to leave the matter to the court for the interpretation of the definition. Nelia Schutte<sup>157</sup> agrees that the methods of stalking should be specified to prevent “loopholes”.

3.68 Mr D Ngobeni<sup>158</sup> states that specific prohibited conduct must be defined. Together with a number of other respondents<sup>159</sup> he is also of the opinion that the catch all phrase “controlling or abusive behaviour” contained in the definition of conduct in the draft Bill must be omitted due to the risk of possible abuse. Although Sohana Moodley<sup>160</sup> agrees that the “catch all” phrase should be deleted, she submits that it should be substituted with the following phrase “any other behaviour directed towards the complainant which is intended to . . .” Neil Thompson adds that although the words “controlling or abusive” should be deleted, they be replaced with

152 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Melville Cloete, SAPS Legal Services Western Cape; Gashiena van der Schaff, United Sanctuary Against Abuse (USAA) ; Sohana Moodley, National Prosecuting Authority; Neil Thompson, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate’s Office Sasolburg; Lizemarié Faber, Magistrate’s Office, Bloemfontein; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; L.M Jacobs, NICRO; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate’s Court, Welkom; Jacqueline Fourie, Magistrate’s Court, Welkom; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; ; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Mareile Kröning, Childline, Mpumalanga; G.A.J.F Gous, Magistrate, Middleburg; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; H.P Ferreira, Magistrate, Witbank; Connie Khantsi-Sefo, State Attorney; ATKV Randburg; Sgt Nkabi, SAPS Guguletu; Lesbian and Gay Equality Project.

153 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Sr/Supt Anneke Pienaar, Unit Commander, FCS Detective Service; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Melville Cloete, SAPS Legal Services Western Cape; Sophie Giorgi, National Prosecuting Authority; R van der Merwe, Magistrate’s Office Sasolburg; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate’s Office, Bloemfontein; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; Connie Khantsi-Sefo, State Attorney; L.M Jacobs, NICRO; Malefu Ragolile, Department of Social Development; Marina Voges, Regional Court, Bloemfontein; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate’s Court, Welkom; J.D Wessels, Magistrate, De Aar; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMSA, Limpopo; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; Mareile Kröning, Childline, Mpumalanga; G.A.J.F Gous, Magistrate, Middleburg; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Sgt Nkabi, SAPS Guguletu.

154 National Prosecuting Authority.

155 National Prosecuting Authority.

156 Magistrate Eerstehoek.

157 FAMSA, Limpopo.

158 Magistrate, Nelspruit.

159 Neil Thompson, National Prosecuting Authority; participants of the workshops held in Cape Town and Durban.

160 National Prosecuting Authority.

the words "harassing or irritating". Adv Dalene Barnard of the Director of Public Prosecutions in Kwazulu-Natal suggests that the phrase be amended as follows:

"... where such conduct harms or may or is likely to cause imminent harm to the safety, health or well being of a person."

3.69 In particular, the Commission on Gender Equality recommends that the definition of 'conduct' in clause 1 of the Bill be amended as follows: *(i) any other threatening or intimidating behaviour*. The Commission motivates that in this way, a broader range of conduct and behaviour would be covered under the legislation. The Commission on Gender Equality also recommends that the following change to the definition of "conduct" be incorporated: *(f) acting in a controlling or abusive manner towards a person, or causing such act to be committed, whether or not violence or the threat of violence is involved*. Finally the Commission on Gender Equality recommends that the last sentence of the definition of 'conduct', stating "where such conduct harms, or may cause imminent harm to, the safety, health or well-being of a person" should be removed. It explains that sub-clauses 2(1)(i) and (ii) address the need to show that the victim was in some way harmed; thus, it is confusing and redundant to include a similar provision within the definition itself.

3.70 Senior Superintendent Anneke Pienaar<sup>161</sup> comments that this phrase should be replaced with the following: "any other way of communication". Participants of the workshop held in Bloemfontein suggest that the phrase be substituted by "the invasion of private life/sphere of a person".

3.71 Germa Wright of the Society of Advocates and the Lesbian and Gay Equality Project submit that the Bill should steer away from providing lists as the courts can draw their own conclusions. In the same vein F.C. Muller of the Department of Justice states that prohibited conduct should simply be "any unwanted/unwelcome interference in a victim's private life which annoys the victim". Elsabe Krafft<sup>162</sup> and Enrico Brits<sup>163</sup> agree that prohibited conduct should merely refer to an invasion of a person's private or public space. Jacqueline Fourie<sup>164</sup> also agrees and suggests the following wording "any behaviour which is an invasion of the complainant's privacy" so as to set an objective standard.

3.72 Heather Douglas<sup>165</sup> suggests the inclusion of creating internet sites relating to the victim or purporting to relate to or to originate from the victim; for the inclusion of the tracing of a victim's use of the Internet or of e-mail or other electronic communications; and for interfering with property where the property is not criminally damaged but is 'interfered with' in an apparently benign way which may have a particular meaning for the person being stalked. Further comment entailed the inclusion of direct or indirect conduct,<sup>166</sup> the institution of repeated civil suits,<sup>167</sup> the exclusion of body language,<sup>168</sup> eliciting personal information,<sup>169</sup> religious stalking<sup>170</sup> and the qualification that watching and following must be accompanied by violence or threats.<sup>171</sup>

3.73 The Commission on Gender Equality states that it supports a broad definition of conduct for the reason that it can be difficult to anticipate in the abstract every single act that a stalker may commit. The Commission on Gender Equality notes that in other countries such as the U.S., lawmakers are already reforming anti-stalking

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161 Unit Commander, FCS Detective Service.

162 National Prosecuting Authority.

163 National Prosecuting Authority.

164 Magistrate's Court, Welkom.

165 Senior Lecturer, Law School, Griffith University & Part-time Commissioner, Queensland Law Reform Commission, Australia.

166 Mrs D Milton, Bezuidenhouts Inc.

167 Dr Bridget Armstrong, Sterkfontein Hospital.

168 Zwelakhe S Mthembu, SANGOCO.

169 Durban Workshop 6 October 2004.

170 Bloemfontein Workshop 11 October 2004.

171 Nation Mthemjame.

statutes that were previously enacted in order to prohibit acts of cyberstalking. In its view stalkers will always attempt to come up with new and creative ways to stalk their victims which border on the edge of legality. It recommends that any list of potentially illegal acts contained within the legislation should be clearly identified as non-exhaustive. However, the Commission on Gender Equality cautions that it is equally important that the list contain as many examples as possible in order to give stalking victims the maximum benefit when the act is being interpreted in a court of law.

3.74 The Commission on Gender Equality voices its concern that the definition of 'conduct' within the proposed Bill does not list any examples of indirect harassment, such as "spreading rumours about the victim ... or sending messages to others in the victim's name." It is of the opinion that judges in particular may not be as familiar with these newer, less explicit forms of stalking, so every effort should be made to incorporate them into the legislation.

3.75 With regard to prohibited conduct the Saartjie Baartman Legal Advice and Training Project and participants at the workshop on stalking held in Pretoria<sup>172</sup> have drawn the Commission's attention to the inclusion of the offence of 'grooming' in the then most recent version of the Criminal Law (Sexual Offences) Bill.<sup>173</sup> They comment that the proposed offence should capture the concern regarding online solicitation or exploitation of children. Based on considerations of clarity the Saartjie Baartman Training Project advocates that some distinction between the offences of online 'grooming' of children for purposes of sexual exploitation and 'cyberstalking' be made.

## Evaluation and recommendation

3.76 Foreign stalking laws define stalking behaviour by listing prohibited activities generally or by way of lists which serve as examples of the genus of prohibited behaviour. The United Kingdom (England & Wales) Protection from Harassment Act 1997 prohibits 'harassment'<sup>174</sup> and 'putting people in fear of violence'<sup>175</sup> without defining the terms. By way of explanation the Act simply states that references to harassing a person include alarming the person or causing the person distress and that "conduct" includes speech.<sup>176</sup> Similarly Scotland broadly prohibits 'harassment' and states that "harassment" includes causing the person alarm or distress.<sup>177</sup> Although the Model Antistalking Code for the United States defines "course of conduct" as "repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person" most of the American statutes list examples of specific acts. Some states include in their definition such activities as lying-in-wait, surveillance, non-consensual communication, telephone harassment, and vandalism.<sup>178</sup>

172 Held on 27 September 2004.

173 Clause 19 of the Working Document dated 24 February 2004 provides that:

**19.** A person ("A") who-

(d) having met or communicated with B by any means from, to or in any part of the world, on at least two earlier occasions, intentionally travels to meet or meets B with the intention of committing a sexual offence, during or after the meeting; or

(e) arranges or facilitates the meeting or communication with B by any means from, to or in any part of the world with the intention that A or another person will commit a sexual offence against B during or after such meeting,

is guilty of the offence of promoting a sexual offence with or grooming of a child and is liable upon conviction to a fine or imprisonment for a period not exceeding six years or to both such fine and such imprisonment.

174 Section 1.

175 Section 4.

176 Section 7.

177 Section 8 of the Protection from Harassment Act 1997.

178 National Criminal Justice Association, Project to Develop a Model Anti-Stalking Code for States, Washington D.C.: U.S. Department of Justice, National Institute of Justice, October 1993 as quoted by the Home Office Research Study 210 The extent and Nature of stalking; findings from the 1998 British Crime Survey Home Office Research, Development and Statistics Directorate October 2000, pp2.

3.77 In revising its prohibition against stalking, Queensland lists examples of stalking in the Criminal Code (Stalking) Amendment Act 1999 (Qld) as follows:

**'359B. "Unlawful stalking"** is conduct –

- ...(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 the 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 . . ."

Similar lists are found in Tasmania<sup>179</sup> and Victoria.<sup>180</sup>

3.78 Section 264 of the Canadian Criminal Code defines harassing conduct as follows:

- "264 . . . (2) The conduct mentioned in subsection (1) consists of
- (a) repeatedly following from place to place the other person or anyone known to them;
  - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
  - (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
  - (d) engaging in threatening conduct directed at the other person or any member of their family."

3.79 Locally the Criminal Law (Sexual Offences and Related Matters) Amendment Bill [B50B – 2003] *inter alia* includes an open-ended list to exposit circumstances which do not amount to free agreement in relation to the offence of rape. Before extensively listing the circumstances clause 1(3) of the Bill provides that ". . . circumstances in which B does not freely agree to . . . include, but are not limited to, the following . . .". The Domestic Violence Act also defines 'harassment' in an open-ended fashion by providing that 'harassment' "means engaging in a pattern of conduct that induces the fear of harm to a complainant including - . . ." but then proceeds to define 'stalking' restrictively. As mentioned above, the separation in the Domestic Violence Act of what is internationally recognized as stalking behaviour into the definitions of 'harassment' and 'stalking' is unfortunate.<sup>181</sup>

3.80 The Commission is mindful that defining conduct or behaviour in an embracive manner may not recognise or make provision for the fact that methods of stalking vary or for the ingenuity of stalkers to engage in new or different methods of harassment or stalking. It is also mindful of the pitfall of not adequately defining what conduct or behaviour is prohibited in terms of the Bill. The Commission is of the view that as the essence of harassment is unreasonable, non-physical, low-key intrusion it would be advisable to broadly yet specifically list the prohibited behaviour in order to avoid over breadth and confusion.

3.81 In order to align the proposed Bill with the Domestic Violence Act the Commission recommends that the lists found in the definitions of 'harassment' and 'stalking' in the Domestic Violence Act should be combined

179 Section 192 Criminal Code Amendment (Stalking) Act 1999 (Tasmania)

180 Section 21A Victoria Consolidated Legislation.

181 See para 3.15 above.

and reflected in the definition of harassment in the proposed Bill. As conduct is now listed under the definition of harassment the purpose of having a separate definition of 'conduct' becomes redundant and it is therefore recommended that this definition be omitted from the proposed Bill.

3.82 In order to avert loopholes identified in other jurisdictions the Commission has augmented the existing list to include reference to the use of verbal or other communication which is not restricted to telephony and bringing the victim indirectly into contact with unwanted items. The proposed list includes behaviour which if accompanied by implied or actual consent could be considered to be quite ordinary and even morally acceptable. The behaviour is censured where it is unreasonable and causes harm or founds the reasonable belief that harm may be caused.

3.83 The Commission agrees that the catch-all phrase "other controlling or abusive behaviour" should be omitted from the proposed definition of "conduct" as it restricts the ambit of stalking to such behaviour. However the same could be argued for substituting this phrase with the phrase "any other threatening or intimidating behaviour". The Commission is of the opinion that the proposed list adequately places the conduct in context.

3.84 The Commission agrees that direct or indirect conduct should be included in the definition. By including indirect conduct provision is made for instances such as using a third party to make contact, the spreading of malicious rumours or the placement of false advertisements.

3.85 In order to differentiate between grooming for the purpose of committing a sexual offence and cyberstalking it is necessary to unpack each concept. The proposed offence of grooming contained in clauses 18 and 24 of the Criminal Law (Sexual Offences and Related Matters) Bill *inter alia* aims to draw a distinction between persons who promote or facilitate the grooming of a child or a person who is mentally disabled and those who actively groom children and the mentally disabled. It also addresses grooming over the internet by placing emphasis on the process of inviting, persuading or enticing a child or person who is mentally disabled to respond to certain sexual overtures.<sup>182</sup> This person usually uses a fictitious persona to lure the victim into initially feeling comfortable with the cyber-friendship and then to lure the victim into meeting him or her. The unsuspecting child or person who is mentally disabled is systematically reeled in by this person. This offence is restricted to the commission or intended commission of a sexual offence.

3.86 Cyberstalking on the other hand is commonly comprised of online harassment, threats, intimidating messages and subscribing the victim to unwanted online services. From the outset this interaction may be considered an irritation or an annoyance or may give rise to a belief that harm may be caused. The cyber-stalker may however initiate contact in a non-confrontational manner and proceed to woo or groom the victim into a cyber-friendship in order to gain the victim's confidence and to determine personal details such as the person's address. Without the victim's knowledge the same "cyber-friend" could be stalking the victim in person, perhaps even giving the victim advice on how he or she should respond to the stalker. Although cyberstalking which has escalated into stalking the victim in person i.e. "real time stalking" may result in the commission of a sexual offence, it is not the only outcome.

3.87 Although the boundaries of what is defined as grooming and cyberstalking may overlap, the offence of grooming in the context of the Criminal Law (Sexual Offences) Bill is, as mentioned above, only committed where the person's intention is to commit a sexual offence or to diminish or reduce the person's resistance or unwillingness to perform a sexual act. The distinction between grooming and cyberstalking will lie in the particular circumstances of each case. If the actions of a person who is in the process of grooming a child or a person who is mentally disabled fall within the proposed definition of harassment and cause such person harm or the reasonable belief that harm may be caused to him or her, he or she would also be able to apply for a protection order as proposed in this Report.

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182 Memorandum on the objects of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2003.

3.88 Due to the rapid advancement of technology the Commission does not recommend specific reference to cyberstalking in the Bill. In a number of foreign jurisdictions cyberstalking has been overtaken by technostalking, for example the use of Global Positioning Systems, which in turn has necessitated numerous amendments to anti-stalking legislation. In reality, however surreal “cyberstalking” or the use of technical or computerised equipment to stalk a person is it fundamentally amounts to an extension of physical stalking. One is merely dealing with a different medium.

3.89 The definition of conduct read together with clause 2 of the draft Stalking Bill included conduct directed at “a complainant or the complainant’s relatives, acquaintances, work colleagues or property”. Although a wide range of relationships is covered by this description a stalker may target a person who strictly speaking may fall outside of the protected group, for example a domestic employee. The term ‘related person’ in the Witness Protection Act, Act 112 of 1998 “means any member of the family or household of a witness, or any other person in a close relationship to, or association with, such witness”. This definition addresses a wider range of persons who may be affected as a result of a person being stalked. For example, this may include domestic employees or lodgers. The Commission recommends that reference be made to a ‘related person’ in the Bill accompanied by an explanatory definition. The Commission recommends that the following definition of ‘related person’ be included in the Bill:

**“related person”** means any member of the family or household of a witness, or any other person in a close relationship to such complainant;

3.90 In summary the proposed definition of harassment reads as follows:

**“harassment”** means directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

- (a) following, watching, pursuing or accosting the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
- (b) engaging in verbal or any other communication aimed at the complainant or a related person by any means whether or not conversation ensues; or
- (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by, given to or brought to the attention of, the complainant or a related person;

## Categorising stalkers

### Overview

3.91 A review of the literature on stalking reveals that there are numerous categories of stalkers. In Discussion Paper 108 a plethora of categories and sub-categories of stalkers were identified and specific reference was made to delusional erotomanics, borderline erotomanics, “former intimate” stalkers, sociopathic stalkers, debt collectors, complaining clients and stalkers with false victimisation syndromes.

### Proposals in Discussion Paper 108

3.92 The Commission found that there is no single prototype of a stalker as people stalk for a multitude of reasons.<sup>183</sup> Furthermore, that the motives of identified stalkers are divergent and cannot be typified by their

relationship or lack of relationship with the victim. The Commission also found that irrespective of the intention of the stalker the victim may or may not experience fear or believe that they will be harmed. To this end the Commission made the recommendation that the focus should be placed on the behaviour and the effect of the behaviour on the victim and that reference to specific categories of stalkers should be avoided.

3.93 The Commission also found that certain behaviour, for example numerous phone calls requesting payment of a debt or persistence in having a client complaint addressed, constitutes behaviour which in itself is perfectly legal and hardly constitutes stalking. However the Commission stated that where a debt collector or a client exceeds the bounds for obtaining reasonable redress, his or her behaviour could amount to stalking.

### Exposition of comment

3.94 Many respondents<sup>184</sup> agree that the focus should be placed on the behaviour and the effect of the behaviour on the victim and that reference to specific categories of stalkers should be avoided.

3.95 Neil Thompson and Elsabe Krafft both of the National Prosecuting Authority agree that categorising of stalkers will be useful for enforcement agencies and in rehabilitation as guidelines. Dr Bridget Armstrong of Sterkfontein Hospital and Senior Superintendent Gérard Labuschagne PhD<sup>185</sup> are of the opinion that defining certain categories of stalking will help with relation to management of the stalker, for example whether incarceration, counselling or psychiatric treatment is needed.

3.96 Ms Mbali Mncadi of the South African Police Services and Mr B.D Madonsela<sup>186</sup> state that classifying stalkers will confine stalking behaviour to these categories. They contend that behaviour which is not addressed under the identified categories may consequently go unpunished.

3.97 A few respondents<sup>187</sup> suggest that the focus should be placed on the behaviour of the stalker but not on the effect of the stalking on the victim. Ms Sophie Giorgi of the National Prosecuting Authority comments that in convicting the stalker the effect stalking has on the victim is irrelevant but that it will be considered in determining the sentence given to the stalker. Ms Lizemarié Faber<sup>188</sup> explains that people respond differently to certain behaviour, but that their response or lack thereof does not negate illegal conduct. She further argues that if the victim is unaware of being kept under surveillance this does not make the actions legal.

3.98 Adv Natasha van Wyngaardt<sup>189</sup> and Mr Makauto Masilo<sup>190</sup> suggest that an objective test be applied to the reaction of the person who is allegedly being stalked, in order to avoid complaints being made by hypersensitive persons.

184 Peter Goldsmid, Southern Exposure; Getywayo Masoa; Ajanta Dheda, Legal Aid Board; Sohana Moodley, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMSA, Limpopo; Maloko Mamabolo, SALGA Mareile Kröning, Childline, Mpumalanga; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal; Ria Smit, RAU; Beaty Naude, Department of Criminology, UNISA; Melville Cloete, SAPS Legal Services Western Cape; F.C. Muller, Department of Justice; L.M Jacobs, NICRO; ATKV Randburg; Sr/Supt Anneke Pienaar, Unit Commander, FCS Detective Service; Commission on Gender Equality; Lesbian and Gay Equality Project.

185 Commander: Investigative Psychology Unit Serious & Violent Crime Component Detective Service Head Office South African Police Service.

186 Magistrate, Eerstehoek.

187 Ms Sophie Giorgi of the National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; J.D Wessels, Magistrate, De Aar; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates.

188 Magistrate's Office, Bloemfontein.

189 SAPS Legal Services Uitenhage.

190 SAPS Head Office, Legal Service.

3.99 The majority of respondents<sup>191</sup> to the Discussion Paper agree that certain behaviour, for example numerous phone calls requesting repayment of a debt or persistence in having a client complaint addressed constitutes behaviour which in itself is perfectly legal and hardly constitutes stalking. They state that the emphasis should remain on the conduct of the particular person. Some respondents<sup>192</sup> comment that where the conduct of a debt collector or a complaining client gives rise to apprehension or fear or where threats “get personal” and therefore unlawful that person should be dealt with as a stalker. Dr Bridget Armstrong of Sterkfontein Hospital states that the impact of the conduct on the victim is of importance.

3.100 Mr J.H. Wiegand of the National Prosecuting Authority and Mr Nation Mthemjame caution that debt collectors and complaining clients should not easily be construed as stalkers as the motive does not fit in with the general idea of stalking. R van der Merwe of the Magistrate’s Office in Sasolburg agrees that this behaviour would hardly ever be stalking and should be dealt with as a civil matter. J.D Wessels, a Magistrate in De Aar, states that as an ethical code of conduct exists for debt collectors any contravention of the code should be dealt with in accordance with the code and not in terms of stalking legislation. Ms R.J. Smith of the Department of Correctional Services is of the opinion that recognising abusive debt collectors or persistent complaining clients as stalkers could lead to “victims” abusing this remedy where they do not wish to or are unable to repay a debt or deliver a service.

## Evaluation and recommendation

3.101 The Commission agrees that it would serve little purpose legislatively to categorize stalkers according to the manner in which they stalk. The Commission does not recommend that debt collectors and complaining clients be dealt with in terms of stalking legislation where their behaviour does not amount to harassment as defined in the proposed Bill. As recommended above<sup>193</sup> the Commission is of the opinion that the focus should be placed on the intention to unreasonably engage in conduct which causes harm or founds a reasonable belief that harm may be caused. The objective unreasonableness of the conduct coupled to the subjective perception of the victim towards this conduct plays a role in determining liability.

3.102 This recommendation does not however preclude the classifying of or leading of evidence regarding the category under which the stalker resorts. As indicated by Dr Armstrong, this could prove beneficial in determining an appropriate sentence.

191 Peter Goldsmid, Southern Exposure; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Melville Cloete, SAPS Legal Services Western Cape; Sophie Giorgi, National Prosecuting Authority; F.C. Muller, Department of Justice; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate’s Office, Bloemfontein; L.M Jacobs, NICRO; Marina Voges, Regional Court, Bloemfontein; Elna Ferrera, Magistrate’s Court, Welkom; Jacqueline Fourie, Magistrate’s Court, Welkom; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Mareile Kröning, Childline, Mpumalanga; G.A.J.F Gous, Magistrate, Middleburg; Sgt Nkabi, SAPS Guguletu; Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Chanáz Mitchell, NISAA Institute; Mokautu Masilo, SAPS Head Office, Legal Service; Ria Smit, RAU; Beaty Naude, Department of Criminology, UNISA; Mballi Mncadi, SAPS; Elsabe Krafft, National Prosecuting Authority; B.D Madonsela, Magistrate Eerstehoeck; J.G Liebenberg, Magistrate, Barbeton; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; Lesbian and Gay Equality Project; ATKV Randburg.

192 Chanáz Mitchell, NISAA Institute; Adv Natashia van Wyngaardt, SAPS Legal Services Uitenhage; Neil Thompson, National Prosecuting Authority; Sohana Moodley, National Prosecuting Authority; Commission on Gender Equality.

193 See paragraph 3.45.

## Arrest by peace officer without warrant

### Proposals in Discussion Paper 108

3.103 In Discussion Paper 108<sup>194</sup> the Commission recommended that a police officer should be able to, without a warrant, arrest any person whom he reasonably suspects of having committed an act of stalking accompanied by an element of violence.

3.104 The following clause was proposed in the draft Bill in Discussion Paper 108:

#### 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.

3.105 In order to give effect to this clause, the following amendment of the Criminal Procedure Act 51 of 1977 was proposed in the draft Bill:

#### 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.”

### Exposition of comment

3.106 The Saartjie Baartman Legal Advice and Training Project comments that given the need for early intervention in stalking cases, the inclusion of ‘an element of violence or threat of imminent violence’ in clause 3 renders this provision too narrow. It refers to a statement made by the Commission in Discussion Paper 108 that the primary focus of the legislation should be on ‘interrupting the pattern of behaviour before physical harm ensues’.<sup>195</sup>

3.107 The Saartjie Baartman Legal Advice and Training Project requests that clause 17 of the Bill be reworded. In its submission it observes that the amended version of section 40(1)(q) of the Criminal Procedure Act, which at present includes any act of domestic violence with an element of violence, would be limited to stalking conduct as contemplated in section 1 of the Domestic Violence Act (with an element of violence). This would exclude a broad range of acts of domestic violence as contemplated in section 1 of the Domestic Violence Act that currently fall within the ambit of section 40(1)(q).

3.108 A few participants<sup>196</sup> of the workshop held in Pretoria comment that the police find the mirror provision contained in the Domestic Violence Act and its companion provision, section 40(1)(q) difficult to interpret and therefore to enforce as the Act does not contain a definition of “violence”. They recommend that “violence” be

<sup>194</sup> Para 3.158 at pp120.

<sup>195</sup> Para 1.88 at p 32.

<sup>196</sup> Senior Superintendent Anneke Pienaar, Unit Commander, FCS Detective Service; Wilma van der Bank, SAPS; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage.

defined; that such definition should include “threats of violence”; and that “harm” should be included in the provision, in other words, “violence or harm”.

3.109 A number of respondents<sup>197</sup> recommend that the riders in clause 3 “containing an element of violence” and clause 17 “in respect of which violence is an element” be deleted. In the opinion of Sophie Giorgi of the National Prosecuting Authority and L.M. Jacobs of NICRO these riders restrict the powers of the police and make the definition too narrow. Sarika Uys<sup>198</sup> contends that “an element of violence” is too difficult to prove and not always present.

3.110 The Commission on Gender Equality recommends that the legislation be revised so that police officers *must* arrest, even without a warrant, any person reasonably suspected of having committed an act of stalking accompanied by *any threat of violence*. It motivates that by requiring police officers to wait until the stalker has already committed an act of violence before arresting him or her, the purpose of the legislation – namely to prevent the situation from escalating further and to reduce the amount of violence in inter-personal relationships – would be undermined. In its opinion the use of the word “may” gives the police too much discretion when it comes to arresting perpetrators. The Commission on Gender Equality explains that the existence of a “threat” could be substantiated through eyewitness accounts, an examination of the stalker’s prior criminal history, or other physical evidence (such as a tape-recording or written message).

3.111 Gashiena van der Schaff<sup>199</sup> agrees with the Commission on Gender Equality. She cautions that the victim might experience a very real threat or fear which the police officer may or may not perceive or sympathise with. She suggests that police officers be provided with a list of conditions, grounds or criteria – so if the victim mentions the ground the police can make an arrest.

3.112 However, F.C. Muller<sup>200</sup> is of the opinion that the police must be in possession of an affidavit from the complainant before arresting someone and should not be able to arrest on their own discretion. Germa Wright<sup>201</sup> is also of the view that summary arrest should only be allowed in serious matters.

3.113 Participants of the workshop held in Bloemfontein point out that it is unnecessary to include a provision such as clause 3 in the Bill or an amendment to section 40 of the Criminal Procedure Act. In their collective opinion section 40 of the Criminal Procedure Act is sufficient to arrest for the offence of stalking if stalking is made a crime. They note that the need to amend section 40 of the Criminal Procedure Act to allow for arrest without a warrant in terms of the Domestic Violence Act was brought about solely by the fact that the Domestic Violence Act is civil in nature.

## Evaluation and recommendation

3.114 As stated above the primary focus of legislation prohibiting stalking or harassing behaviour is on ‘interrupting the pattern of behaviour before physical harm ensues’. The suggested prerequisite that an arrest without warrant can be effected where the behaviour constitutes an offence with an element of violence clearly defeats the purpose of such legislation. The answer however does not lie in allowing arrests without warrant for all incidences of stalking behaviour. Arrest and particularly arrest without a warrant is the most drastic method whereby an accused person’s attendance at trial can be ensured.<sup>202</sup> Where stalking or harassing behaviour

197 Sophie Giorgi of the National Prosecuting Authority; L.M. Jacobs of NICRO; Marina Voges, Regional Court, Bloemfontein; Sarika Uys, National Prosecuting Authority; Ancois Venter, Department of Justice; J.D Wessels, Magistrate, De Aar; Enrico Brits, National Prosecuting Authority.

198 National Prosecuting Authority.

199 United Sanctuary Against Abuse (USAA).

200 Department of Justice.

201 Society of Advocates.

202 Du Toit, et al, **Commentary on the Criminal Procedure Act** Juta & Co, 1978 at pp 4.

constitutes a crime, an arrest without a warrant for such crime would be allowed in terms of section 40(1)(a) of the Criminal Procedure Act where a person has committed the crime or is attempting to commit the crime in the presence of the person effecting the arrest. Where the stalking or harassing behaviour constitutes a crime but is not committed in the presence of a peace officer, the peace officer may effect an arrest if he or she reasonably suspects that the crime is an offence referred to in Schedule 1 of the Criminal Procedure Act or given the seriousness of the behaviour may take the complainant's statement and based on the circumstances of the case apply for a warrant to effect an arrest. The Domestic Violence Act specifically makes provision for arrest without a warrant where an offence containing an element of violence has been committed. This provision was included in the Act to address the dilemma which faces police when attending a domestic violence call out which amounts to common assault. Prior to the Act the police could, apart from taking a statement at the scene of domestic violence, do nothing to protect the victim if the offence was one of suspected common assault not committed in the presence of the police.<sup>203</sup>

3.115 Individual circumstances surrounding harassing behaviour may differ considerably and may call for different responses, of which arrest may not be the most effective for the given situation. Training and sensitization to the dynamics of stalking would be crucial to ensure appropriate intervention.

3.116 The Commission is of the opinion that it is unnecessary to provide for arrest without warrant in terms of the proposed Bill and therefore recommends that clause 3 and 17 of the draft Bill be omitted.

## **Application for a protection order on behalf of a victim of stalking by a third person**

### **Proposals in Discussion Paper 108**

3.117 In keeping with the recommendation to mirror the Domestic Violence Act in the proposed draft Bill, the Commission supported the inclusion of a provision which allows a person who has a material interest in the wellbeing of the victim to seek such remedy on that person's behalf. The Commission explained that this would inter alia enable a third person to seek relief on behalf of a child.

3.118 The following clause was included in Discussion Paper 108. The relevant portion of this clause reads as follows:

#### **Application for protection order**

4. . . (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 child, or any person on behalf of a child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person. . .

## Exposition of comment

3.119 The majority of the respondents and workshop participants indicate that a person who has a material interest in the wellbeing of the victim should be allowed to seek a civil remedy on that person's behalf.<sup>204</sup> Sarika Uys<sup>205</sup> emphasises that where a victim of stalking is able and older than 18 years of age an application may only be brought in the complainant's name with his or her written consent. Mareile Kröning of Childline in Mpumalanga adds the proviso that a person who has a 'material interest' in the wellbeing of the victim may only bring an application in the name of the victim if such application is to the benefit of the person on whose behalf the application is being sought.

3.120 The Commission on Gender Equality remarks that the ability to make an application on behalf of a victim of stalking should pertinently be brought to the attention of persons clothed with an inherent "material interest" in the wellbeing of others, for example, counselors, health care professionals and social workers.

3.121 Some respondents comment<sup>206</sup> that the general rule should be that the victim or complainant should be the one to seek the remedy and that a third person seeking a remedy on behalf of a minor should be seen as an exception to the general rule. The National Commissioner of the South African Police Service submits that a minor should be defined as a person below the age of 16 or be a mentally challenged person. The National Commissioner is of the opinion that lowering the age to 16 will prevent a situation where for example a parent who does not approve of a relationship between his 18 year old daughter and another person, will lay a charge of stalking against that other person.

3.122 With regards to instituting criminal proceedings on behalf of a third person Mrs D Milton<sup>207</sup> states that a third person may lay a charge on behalf of another person, for example where that person is not able to do so by themselves due to mental, physical or age impediments, despite the fact that this is not regulated in the Criminal Procedure Act. She is of the opinion that in certain circumstances third parties would be allowed to act on behalf of victims and that it is unnecessary to make specific mention of it in the Stalking Bill.

## Evaluation and recommendation

3.123 The Commission agrees that the general rule should be that a victim or complainant should seek a remedy in his or her own name. However circumstances may prevail that make it difficult or impossible to do so. Bringing an application on behalf of a third person is not foreign to our law. In section 38 of the Constitution of the Republic of South Africa, 1996 specific provision is made for the enforcement of rights. It provides that where a right in the Bill of Rights has allegedly been infringed anyone acting on behalf of another person who cannot

204 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Sr/Supt Anneke Pienaar, Unit Commander, FCS Detective Service; Dr Bridget Armstrong, Sterkfontein Hospital; Wilma van der Bank, SAPS; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Qetywayo Masoca; Ajanta Dheda, Legal Aid Board; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Melville Cloete, SAPS Legal Services Western Cape; Sohana Moodley, National Prosecuting Authority; Neil Thompson, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; Nonlanhla Mlangeni, O.V.V. Welfare; L.M Jacobs, NICRO; Malefu Ragolile, Department of Social Development; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMSA, Limpopo; Zwelakhe S Mthembu, SANGOCO; R.J. Smith, Department of Correctional Services; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal; ATKV Randburg; Sgt Nkabi, SAPS Guguletu; Dr Bridget Armstrong, Sterkfontein Hospital; Mbalu Mncadi, SAPS; F.C. Muller, Department of Justice; Sarika Uys, National Prosecuting Authority; Connie Khantsi-Sefo, State Attorney; Maloko Mamabolo, SALGA; Benita Nel, Lifeline, Nelspruit; Commission on Gender Equality; Lesbian and Gay Equality Project.

205 National Prosecuting Authority.

206 Mokautu Masilo SAPS Head Office, Legal Service; Peter Goldsmid, Southern Exposure; the National Commissioner of the South African Police .

207 Bezuidenhouts Inc.

act in their own name has the right to approach a competent court. It also includes anyone acting in the public interest; anyone acting as a member of, or in the interest of, a group or class of persons or association acting in the interests of its members. The Domestic Violence Act also acknowledges that an application on behalf of a complainant may be necessary. However, in order not to infringe the freedom of choice of a victim of domestic violence, the Act circumscribes the circumstances under which a person may bring an application on behalf of another person. In relation to stalking the Commission deems it necessary to provide an avenue by which application for redress can be made for those victims of stalking who are unable to do so in their own name. In order to avoid possible abuse or institution of proceedings where a victim is opposed to it, the Commission recommends that, unless the complainant is in the opinion of the court unable to provide the required consent, an application may only be brought on behalf of a complainant with his or her written consent. The Commission also recommends that an application may be brought by or on behalf of a child.

3.124 Numerous respondents to the Issue Paper on Stalking supported the notion of a third person being able to seek relief on behalf of a child. Clause 4 of the Stalking Bill reflected the mirror clause in the Domestic Violence Act regarding the circumstances under which an application for a protection order could be made on behalf of another with or without written consent. In order to avoid any confusion or abuse in this regard the Commission recommends that the court may allow an application on behalf of a complainant if the complainant, for any good physical or emotional reason, is unable to bring the application him or herself.

3.125 Express recognition was given to minors to apply for protection orders without the assistance of another person. In terms of the Age of Majority Act 57 of 1972, South Africans attain majority on reaching the age of 21 years (the age of majority). A minor is therefore anyone younger than 21. A minor can also attain majority status by concluding a valid marriage, or in terms of the Age of Majority Act through a High Court process allowing for express emancipation. However moves are afoot to lower the age of majority. In 2002 the definition of 'major' or 'person of age' as defined in the Births and Deaths Registration Act 51 of 1992 was amended. This amendment lowered the age from 21 years to 18 years of age. In line with international law and our Constitution, section 17 of the Children's Act 38 of 2005 provides that a child, whether male or female, becomes a major upon reaching the age of 18 years.

3.126 The Commission confirms its recommendation that a third person may bring an application for a protection order on behalf of a victim of harassment. In order to keep in step with international instruments to which South Africa is party, such as the Convention on the Rights of the Child, and section 28 of our Constitution, the Commission further recommends that the word 'minor' be substituted with the term 'child'. It also recommends that 'child' be defined in the definitions clause as "a person under the age of 18 years". The Commission could find no compelling reason to lower the age further to 16. In this regard the Commission recommends that the draft Bill be amended as follows:

#### Definitions

1. . . . "child" means a person under the age of 18 years;

#### Application for protection order

2. . . . (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 person who, in the opinion of the court, is unable to do so.

(4) Notwithstanding the provisions of any other law, any child, or any person on behalf of a child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person. .

## Mental evaluation and treatment of stalkers

### Proposals in Discussion Paper 108

3.127 In Discussion Paper 108 the Commission voiced its concern that obtaining legal redress, whether civilly or criminally, against a stalker might provoke the stalker even further. The Commission identified the need to determine the mental condition of the alleged stalker and where appropriate to have the person detained in terms of the Mental Health Act 18 of 1973. The Commission suggested that mental health intervention and appropriate treatment programmes could alleviate strong feelings of anger and assist the stalker to develop insight into the impact of his or her abusive behaviour on victims and communities and may help develop alternative behaviours and ways of managing anti-social impulses.

3.128 The Commission concluded that the existing powers of the courts in criminal matters are adequate in relation to referral, evaluation and treatment of accused persons.

3.129 The Commission deemed it appropriate to refer to the salient provisions in the Criminal Procedure Act and consequently inserted the following subclause in section 2 of the Bill:

#### Stalking

2. . . .(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) . . .

3.130 In so far as civil proceedings are concerned the Commission recommended that pursuant to an application for a protection order the presiding officer should be empowered to make a number of orders, one of them being that the respondent submits to psychological treatment, anger management or counselling.

3.131 The following subclauses were included in Discussion Paper 108:

#### Court's powers in respect of protection order

7. . . . (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. . .

3.132 The Commission partially mirrored section 7 of the Domestic Violence Act in clause 7 of the draft Bill. Subclauses (2) and (3) were inserted as new subclauses to make provision for the granting of specific orders related to treatment and retention of stalkers.

3.133 While advocating the use of treatment and rehabilitation to prevent the further commission of stalking conduct the Commission cautioned that counselling or treatment may not be a guaranteed panacea for stalking and that victims should still be informed that treatment may not be successful and that they should take the necessary steps to protect themselves.

## **Exposition of comment**

### ***Determination of mental illness or criminal responsibility***

3.134 A number of respondents<sup>208</sup> state that it is unnecessary for the Stalking Bill to provide that a determination in accordance with section 78 of the Criminal Procedure Act must be made as such determination will in any event be made in terms of the Criminal Procedure Act and consequently that subclause 2(2) should be deleted.

3.135 The Saartjie Baartman Legal Advice and Training Project notes that sections 77 and 78 will invariably apply where the capacity of an accused to understand the proceedings or his or her criminal responsibility at the time of the commission of the offence becomes relevant. In both instances, a report in terms of section 79 will be required, and this report in turn rests on referral for observation for a period of 30 days. It explains that it is accepted law that before the accused can be sent for observation the court must be satisfied that some factual or medical basis has been laid for the referral. The Saartjie Baartman Legal Advice and Training Project concludes that given that this is the legal position irrespective of the nature of the offence, the inclusion of a specific provision in the stalking legislation would not be required.

3.136 The Saartjie Baartman Legal Advice and Training Project questions whether the intention of the Commission was, however, that every person charged with stalking should be referred for 30 days' observation with the aim of obtaining a section 79 report, in the absence of any indicators of possible mental illness or incapacity other than the nature of the charge. It considers this option problematic from both a constitutional perspective and a practical one. It states that in its opinion a requirement of referral for observation in the absence of a sound basis (motivated solely by the fact that the accused is charged with stalking), will accordingly not pass constitutional muster.

3.137 Professor Schlebusch, a participant of the Durban workshop, noted that stalkers usually suffer from personality disorders and not mental illness and that such a determination, whether brought about by the application of the Criminal Procedure Act or the Bill may prove futile.

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208 Participants of the workshop held in Durban; Saartjie Baartman Legal Advice and Training Project; Adv Dalene Barnard, Director of Public Prosecutions, Kwazulu-Natal.

### ***Court's powers in civil proceedings***

3.138 Numerous respondents<sup>209</sup> to Discussion Paper 108 agree that a presiding officer should be empowered to make a number of orders, one of them being that the respondent submits to psychological treatment, anger management or counselling. Dr Bridget Armstrong of Sterkfontein Hospital comments that it is also important to assess stalkers in terms of risk for future violence.

3.139 A few respondents<sup>210</sup> voice their concern regarding the cost of providing such services and emphasize that the State will not be able to foot the bill. Benita Nel of Lifeline in Nelspruit suggests that partnerships be established between the courts and community based service providers who provide approved "anger management" courses and are able to monitor attendance etc. Mareile Kröning<sup>211</sup> agrees and states that NGO's should have working agreements with courts for this purpose so that their services can be provided without payment.

3.140 Workshop participants in Pretoria suggested that psychologists doing community service could provide the psychological treatment or that the cost could be covered by the Legal Aid Board. One respondent<sup>212</sup> recommended that compulsory psychiatric analysis and treatment could be at the expense of the stalker and could be considered part of his or her punishment. Representatives of NICRO and FAMSA in both the Durban and Bloemfontein workshops state that psychological intervention by way of perpetrator assistance programs and therapeutic programs, such as conflict management are available through their organisations.

3.141 Adv Dalene Barnard<sup>213</sup> proposes that where no criminal charge has been instituted and where a means is required to provide for the psychiatric and/or psychological assessment of a person in respect of whom a protection order is issued in terms of section 5 and 6, the following be added to section 7(2) as point (a), as no treatment, or intervention can be prescribed or recommended before an assessment is done.

"7(2)(a) psychiatric or psychological assessment, by a psychiatrist or psychologist who is in the full time employ of the state, (where such cost shall if the respondent is indigent be borne by the State) which includes any clinical investigations which the psychiatrist or psychologist may deem necessary."

3.142 Malefu Ragolile<sup>214</sup> is of the opinion that a respondent could also be ordered to attend a stress or trauma management course in addition to counselling. The Lesbian and Gay Equality Project indicate that psychological treatment could be ordered, together with confinement. However it adds that such an order must be accompanied by a post facto report which is to be considered by a judicial officer to ensure that such treatment has had the desired effect.

209 Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Qetywayo Masoa; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Sohana Moodley, National Prosecuting Authority; Neil Thompson, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; Connie Khantsi-Sefo, State Attorney; Mrs D Milton, Bezuidenhouts Inc; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates; Eina Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; B.D Madonsela, Magistrate Eerstehoek; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; G.A.J.F Gous, Magistrate, Middleburg; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal; ATKV Randburg; Ria Smit, RAU; Nelia Schutte, FAMSA, Limpopo; Mareile Kröning, Childline, Mpumalanga.

210 F.C Muller, Department of Justice; Nico van der Merwe, Du Toit Smuts & Matthews Phosa Inc.; D Ngobeni, Magistrate, Nelspruit.

211 Childline, Mpumalanga.

212 Mr Rashid Patel, Rashid Patel & Company.

213 Director of Public Prosecutions Kwazulu-Natal.

214 Department of Social Development.

3.143 A number of respondents<sup>215</sup> comment that any psychological treatment or counselling must be supervised and that non-compliance must result in arrest and punishment. A Dr S Kauski, a participant of the Cape Town workshop, states that rehabilitation is only successful where there is a very clear consequence for non-compliance, for example, a threat of incarceration over the person's head. He cautions that if the stalker is not mentally ill, but merely recalcitrant, then counselling will not help as the behaviour is consonant with the stalkers personality style. He cautions against "medicalising" a social problem. Professor Schlebusch agrees, he states that most stalkers have personality disorders, not psychological disorders. He points out that clinically there is no cure for a true stalker, consequently "the stalker either finds someone else to stalk or kills the victim".

3.144 The Commission on Gender Equality states that it supports the use of psychological treatment and counseling as tools to help eradicate this type of behavior among perpetrators. However, it cautions that there may be issues of legality where the presiding officer makes this type of order in a civil (as opposed to criminal) context, given the lack of any finding of guilt. The Commission is of the view that ordering the respondent to undergo an evaluation can be an appropriate civil remedy in certain circumstances; however, ordering a respondent to take part in treatment or counseling would likely extend beyond the scope of a civil remedy.

3.145 Participants of the workshop on stalking held in Nelspruit comment that a presiding officer may only order psychiatric intervention on a return date for a final protection order or after conviction as a further condition of release.

3.146 A few respondents<sup>216</sup> highlight that often victims of stalking are also in need of counselling and therapy.

3.147 With regard to clause 7(3), where provision is made for a court to issue a reception order for a respondent in terms of the Mental Health Act 18 of 1973, the Saartjie Baartman Legal Advice and Training Project draws the Commissions attention to the fact that the Mental Health Act of 1973 is to be repealed by the Mental Health Care Act 17 of 2002. According to Adv Dalene Barnard<sup>217</sup> the procedure of issuing a reception order by a Magistrate does not exist under the new Act. The Saartjie Baartman Legal Advice and Training Project comments that the provisions of the latter Act relating to the care, treatment and rehabilitation of mental health care users without their consent may be important in the context of stalking,<sup>218</sup> as well as section 40, which allows for intervention by the SAPS under certain circumstances.

3.148 The Saartjie Baartman Legal Advice and Training Project also points out that there are certain provisions in the draft Bill that are directly derived from the Domestic Violence Act, and that these provisions may not be applicable in the context of stalking as intended here. It explains that for example, Clause 7(1)(c) provides for the court to prohibit the respondent from entering a residence shared by the complainant and the respondent. However, where the complainant and respondent share a residence, they would be parties to a 'domestic relationship' as defined in section 1 of the Domestic Violence Act, and the complainant would therefore in practice not be bringing her application in terms of the stalking legislation. The Saartjie Baartman Legal Advice and Training Project states that a similar argument could be raised in respect of Clause 7(4)(b), which provides for the court to order that a peace officer must accompany the complainant to assist with arrangements regarding personal property.

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215 Sr/Supt Anneke Pienaar, Unit Commander, FCS Detective Service; Ajanta Dheda, Legal Aid Board; Melville Cloete, SAPS Legal Services Western Cape: Cape Town Workshop.

216 Nelia Schutte, FAMSA, Limpopo.

217 Director of Public Prosecutions Kwazulu-Natal.

218 Sec 32-38 of the Act.

## Evaluation and recommendation

3.149 The Commission agrees that there is no just reason to subject every alleged stalker to mental observation in terms of the Criminal Procedure Act. The Commission further agrees that the existing powers of courts in criminal matters are adequate in relation to referral, evaluation and ordering of an accused to submit to instruction or treatment and that if deemed necessary such referral will be made by a court in terms of the relevant sections of the Criminal Procedure Act. It concedes that it is unnecessary to include clause 2(2) in the Bill and recommends accordingly.

3.150 With regard to the proposed powers granted to a court in civil proceedings Adv Barnard validly points out that no treatment or instruction can be prescribed or recommended before an assessment is done. The Commission therefore recommends that where appropriate an assessment, including an assessment of the risk for future violence be ordered, where after the court may if practicable and if the stalker demonstrates the potential to benefit from the instruction or treatment, make participation or completion of the recommended instruction or treatment within a prescribed period part of the conditions of the protection order. Non-compliance with this order would activate the suspended warrant of arrest accompanying the protection order. This consequence ties in with the submission that rehabilitation is only successful where there is a very clear consequence for non-compliance i.e. a threat of incarceration following a conviction for breach of a protection order.

3.151 The Commission agrees with the participants of the Nelspruit workshop that an order for psychiatric or behavioural intervention would only be justified on a return date for a final protection order or after conviction pursuant to a breach of a protection order as a further condition of release. The Commission consequently recommends that the proposed clause be amended to reflect this.

3.152 The Commission recommends that if the court is satisfied that the respondent is in need of mental health care it may order the respondent to submit to a psychiatric or psychological assessment and if deemed necessary order the respondent to submit to whichever care, treatment, rehabilitation or instruction it deems appropriate. Where this care, treatment and or rehabilitation is provided for in terms of the Mental Health Care Act 17 of 2002 the cost will be borne by the State.

3.153 The Commission agrees with the argument put forward by the Saartjie Baartman Legal Advice and Training Project that sub-clause 7(1)(c) is a domestic violence specific provision and is therefore not applicable in this context. It is recommended that this sub-clause be deleted from the Bill.

3.154 However with regard to sub-clause 7(4)(b) the Commission is not convinced that the necessity to be accompanied by a peace officer under specific circumstances to collect personal property is restricted to the domestic sphere. Many victims of stalking are afraid to enter their own dwellings for fear of what may await them. The Commission is further of the opinion that a specific list of prohibitions is unnecessary. It recommends that the court be empowered to prohibit whichever behaviour it is of the opinion needs to be prohibited.

3.155 The Commission recommends that the Bill be amended to read as follows:

### Court's powers in respect of protection order

5. (1) The court may, by means of a protection order referred to in sections 3 and 4 prohibit the respondent from—

- (a) engaging in or attempting to engage in harassment;
- (b) enlisting the help of another person to engage in such harassment; or
- (c) committing any other act as specified in the protection order.

(2) If the court is satisfied that the respondent may be in need of mental health care, treatment or rehabilitation, it may, by means of a protection order referred to in section 4 order the respondent to submit to -

- (a) psychiatric or psychological assessment, by a psychiatrist, psychologist or health care provider, which includes any clinical investigations which may be deemed necessary and;
  - (b) whichever care, treatment, rehabilitation or instruction the court deems appropriate within a period specified by the court.
- (3) The court may impose such additional conditions it deems reasonably necessary to protect and provide for the safety or well-being of the complainant, including an order—
- (a) to seize any arm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 7; and
  - (b) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property.
- (4) (a) The physical, home and work 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 or well-being of the complainant.
- (5) (a) Provided that the complainant is not in possession of or not in the process of applying for a protection order against harassment or stalking as contemplated in the Domestic Violence Act, 1998 (Act No. 116 of 1998) 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.

## Protection order accompanied by a suspended warrant of arrest

### Proposals in Discussion Paper 108

3.156 The Commission specifically recommended that when a protection order is sought and granted, such protection order should be accompanied by a suspended warrant of arrest, as is done in the Domestic Violence Act.

3.157 The following clause was proposed in Discussion Paper 108:

#### 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.

## Exposition of comment

3.158 The majority of the respondents support the proposal that a protection order be accompanied by a suspended warrant of arrest<sup>219</sup> and that if the order is contravened the perpetrator should be charged criminally.<sup>220</sup> Professor Burchell notes that the most compelling proposal in the Discussion Paper is the use of a system of protection orders accompanied by a suspended warrant of arrest.

219 Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Ajanta Dheda, Legal Aid Board; Melville Cloete, SAPS Legal Services Western Cape; Neil Thompson, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Lizemarié Faber, Magistrate's Office, Bloemfontein; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; Connie Khantsi-Sefo, State Attorney; Malefu Ragolile, Department of Social Development; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; Nozizwe Ngubeni, WAWA; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMSA, Limpopo; Zwelakhe S Mthembu, SANGOCO; Nation Mthemjame; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; Mareile Kröning, Childline, Mpumalanga; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; ATKV Randburg; Sgt Nkabi, SAPS Guguletu; Commission on Gender Equality.

220 P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank.

3.159 However Nthabiseng Motsau<sup>221</sup> and the Lesbian and Gay Equality Project voice their reservations about the effectiveness of this clause based on the perceived ineffectiveness of the mirror clause contained in the Domestic Violence Act and the implementation problems it faces.

3.160 Whilst supporting the use of a suspended warrant of arrest in this regard, Acting Judge Molwantwa points out that in terms of the Domestic Violence Act when a warrant of arrest is executed, lost or damaged (destroyed) the complainant can approach a magistrates court and apply for another warrant of arrest to be issued. The Act states that the clerk of the court must re-issue another warrant. In practice a clerk of the court fills in the application for re-issuing of arrest with the reasons and circumstances under which the warrant of arrest was executed, lost or destroyed<sup>222</sup> and a magistrate<sup>223</sup> authorises the re-issuing thereof. She notes that the wording of the Domestic Violence Act is a bit lax in this regard and suggests that the proposed Stalking Bill should clearly state that a magistrate must re-issue the warrant of arrest.

## Evaluation and recommendation

3.161 The Commission takes note of concerns regarding the implementation and enforcement of a suspended warrant of arrest following a breach of a domestic violence protection order. The implementation of any provision in law is invariably affected by a lack of resources and infrastructure. On closer inspection though, it seems that this failure is not solely brought about by a lack of or inappropriate implementation by the authorities, but that the dynamics peculiar to domestic relationships have a role to play. In the First Research Report on monitoring the implementation of the Domestic Violence Act<sup>224</sup> (under an exposition of the unexpected consequences of domestic violence) the point is made that due to financial reasons, complainants generally want the abuse to stop without their partners being arrested.<sup>225</sup> As a result, complainants prefer the civil remedy in which the chances of arrest are stalled and may be loathe to activate a suspended warrant of arrest. Although stalking is beset with its own inter-personal intricacies these hurdles are by nature less insurmountable than those in the domestic sphere.

3.162 The constitutionality and importance of issuing a suspended warrant of arrest at the same time as a domestic violence protection order has recently been confirmed and underscored in the Constitutional Court judgment **Omar v The Government of the Republic of South Africa and Others**.<sup>226</sup> Writing for a unanimous court Van der Westhuizen J found that the purpose of issuing a suspended warrant of arrest is to provide a mechanism to ensure compliance with protection orders and to protect complainants against further domestic violence. The court further found that it is not uncommon for the law to provide for interim relief to protect a party who feels threatened by the immediate conduct of another.

3.163 The Commission confirms its recommendation that a protection order be accompanied by a suspended warrant of arrest. The Commission agrees that any ambiguity with regard to the re-issuing of executed, cancelled, lost or destroyed warrants of arrest should be avoided and consequently recommends that the Bill be amended to clearly state that a magistrate must re-issue such warrant.

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221 Prosecutor, Soweto Magistrate Court.

222 Form 9.

223 Form 8.

224 Parenzee,P., Artz,L. and Moulit,K. 2001 *Monitoring the Implementation of Domestic Violence Act: First Report*. Institute of Criminology, University of Cape Town: South Africa.

225 Ibid at pp 111.

226 Case No: CCT47/04 decided on 7 November 2005.

3.164 The relevant clause reads as follows:

**Warrant of arrest upon issuing of protection order**

6. (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 5.
- (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 court may 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 specified 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 is or 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 13(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 and work address and the occupation or status of the respondent;
  - (ii) calls upon the respondent to appear before a court on the date and at the time specified in the notice, on a charge of committing the offence referred to in section 13(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 its import 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 was handed to the respondent specified therein.
- (5) In considering whether or not the complainant is or may suffer 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 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 simultaneously to lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

## Firearms and dangerous weapons

### Proposals in Discussion Paper 108

3.165 Discussion Paper 108 acknowledged the validity of the concern that failure to seize firearms could leave a stalking victim even more vulnerable and susceptible to the wrath of a stalker. The Commission indicated that the Firearms Control Act 60 of 2000 clearly recognises that a causal link may exist between the possession of a firearm and domestic violence and provides for the finding of a person to be unfit to possess a firearm. The Act also provides a wider discretion to the court to declare a person unfit to possess a firearm than the discretion provided for in the Domestic Violence Act. Without making a recommendation in this regard the Commission questioned whether the provisions in the Firearms Control Act would adequately provide recourse to

a victim of stalking seeking the seizure of a stalkers firearm without specifying stalking specifically. Alternatively the Commission enquired as to whether adequate recourse would be provided if the sections in the Firearms Control Act addressing domestic violence were to be expanded to include stalking in those circumstances. However as the Firearms Control Act does not regulate dangerous weapons other than firearms the Commission further enquired whether, in order to regulate the possession of dangerous weapons in relation to stalking, the relevant sections of the Firearms Control Act could be mirrored in the draft Stalking Bill with the inclusion of the power to seize dangerous weapons.

3.166 The following definitions and clauses were included in Discussion Paper 108:

**"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);

**"dangerous weapon"** means any weapon as defined in section 1 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968);

#### **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.

#### **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;"

## Exposition of comment

3.167 A substantial number of respondents<sup>227</sup> recommend that provision should be made in stalking legislation authorizing the seizure of firearms and dangerous weapons and that in so doing appropriate reference should be made in and to the Firearms Control Act.<sup>228</sup> Some respondents<sup>229</sup> to the Discussion Paper and participants of the Cape Town workshop on stalking note that the circumstances surrounding domestic violence are different to those envisaged by the Stalking Bill and suggest that stalking be listed separately in the Firearms Control Act. Participants of the Nelspruit workshop on stalking recommend that in relation to dangerous weapons appropriate reference should be made to the Dangerous Weapons Act 71 of 1968.

3.168 A number of respondents<sup>230</sup> deem the provisions in the Firearms Control Act to be sufficient and therefore find it unnecessary to provide for the seizure of firearms in terms of stalking legislation. They suggest that with reference to section 103(2) of the Firearms Control Act, schedule 2 of the Act should be amended to include stalking as a crime.<sup>231</sup>

3.169 Qetywayo Masoa and D Ngobeni<sup>232</sup> disagree with the manner in which clause 9 has been drafted and suggest that the legislature must clearly state under which circumstances firearms may be seized. Sgt Nkabi<sup>233</sup> agrees and further states that a firearm should only be seized and the person be declared unfit, if there is an indication of a threat by way of a firearm or aggressive and violent behaviour. Senior Superintendent Anneke Pienaar, the Unit Commander of the Family Violence, Child Abuse and Sexual Offences Units suggests that only where a firearm has been used to commit stalking should such firearm be seized and dealt with in terms of the Firearms Control Act.

3.170 The Saartjie Baartman Legal Advice and Training Project notes that clause 9 of the proposed Bill currently provides for an order for the seizure of arms or dangerous weapons without a need for the applicant to show any additional criteria as required under the Domestic Violence Act. As this clause stands, a court must therefore order seizure of arms or dangerous weapons in the possession of the respondent in all cases. It notes that this casts the ambit of this provision very wide: although the provision is not entirely clear on this point, it may be read as requiring an order for seizure in case of both interim and final protection orders. It further notes that the clause directs a court to declare such person unfit to possess such arm in terms of section 103 of the Firearms Control Act without allowing the court any discretion and without the respondent having been convicted of any offences. The Saartjie Baartman Legal Advice and Training Project submits that this is not only at variance with the existing legal mechanisms, but may be objectionable in that such declaration could happen in the case of an interim order based only on the applicant's *ex parte* application, in other words without the respondent having been

227 Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Ajanta Dheda, Legal Aid Board; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Melville Cloete, SAPS Legal Services Western Cape; Neil Thompson, National Prosecuting Authority; F.C. Muller, Department of Justice; R van der Merwe, Magistrate's Office Sasolburg; Ria Smit, RAU; Angela Malope, Department of Justice; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; Nonlanhla Mlangeni, O.V.V. Welfare; Malefu Ragolile, Department of Social Development; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMSA, Limpopo; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; G.A.J.F Gous, Magistrate, Middleburg; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; ATKV Randburg; J.H. Wiegand, National Prosecuting Authority; Participants of the Nelspruit workshop on stalking; Commission on Gender Equality; Lesbian and Gay Equality Project.

228 D Ngobeni, Magistrate, Nelspruit.

229 Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Connie Khantsi-Sefo, State Attorney.

230 The majority of the participants of the stalking workshop held in Durban; a number of participants of the Bloemfontein workshop; Sohana Moodley, National Prosecuting Authority.

231 Sophie Giorgi, National Prosecuting Authority; L.M Jacobs, NICRO; Elsabe Krafft, National Prosecuting Authority; Sarika Uys, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; Connie Khantsi-Sefo, State Attorney; Mrs D Milton, Bezuidenhouts Inc.

232 D Ngobeni, Magistrate, Nelspruit.

233 SAPS Guguletu.

afforded an opportunity to be heard. It recommends that clause 9 of the Bill be amended accordingly and that it should be brought in line with analogous provisions in the Domestic Violence Act and section 102 of the Firearms Control Act.

3.171 The Saartjie Baartman Legal Advice and Training Project comments that with regard to the criteria for declaration of unfitness in terms of section 102 of the Firearms Control Act, a victim of stalking who is not eligible to apply for a protection order in terms of the Domestic Violence Act, would firstly rely on the provisions of the Firearms Control Act in order to effect seizure, and would secondly rely on the two criteria set out in sec 102(b) and (c) in order to motivate the stalker being declared unfit to possess a firearm. It is of the opinion that while the majority of stalking situations would in practice fit into these two sections, it is also conceivable that there may be additional situations that would not be covered. It therefore supports the inclusion of a further ground under sec 102(1)(a), i.e. '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' as proposed in Clause 18 of the Bill.

3.172 In the same vein the Saartjie Baartman Legal Advice and Training Project also supports the inclusion of the offence of stalking in the offences listed in section 103, either in terms of sec 103(1) or (2). Consequently it supports clause 19 of the Bill in principle, but expresses concern about the proposed inclusion of a requirement of 'violent conduct'.

3.173 J.H. Wiegand observes that the definition of firearm in the proposed Bill includes ammunition. He is of the opinion that reference to ammunition is unnecessary and should be deleted. Adv Dalene Barnard<sup>234</sup> suggests that ammunition be removed from the definition of a firearm but that ammunition be defined separately, as 'Ammunition' as defined in section 1 of the Firearms Control Act. She further recommends that the following be added to section 7(4)(a)

(a) "to seize any firearm or ammunition or dangerous weapon. . ."

3.174 And that the following be added to section 9:

". . . to seize any firearm or ammunition or dangerous weapon . . . "

## Evaluation and recommendation

3.175 As pointed out by the Saartjie Baartman Legal Advice and Training Project a victim of stalking would be able to rely on the provisions of the Firearms Control Act, 2000 to effect seizure of a firearm and or the criteria set out in sections 102(1)(b) and (c)<sup>235</sup> could be used to motivate the stalker being declared unfit to possess a firearm.

3.176 Section 110 of the Firearms Control Act read together with section 20 of the Criminal Procedure Act, authorises the State to seize a firearm or ammunition if the reasonable belief exists that such is under the control of a person, who by reason of any physical or mental condition, is incapable of having proper control of any firearm or ammunition or who by such reason presents a danger of harm to himself or herself or to any other person. If the facts surrounding stalking behaviour indicate that the criteria of section 110 are met then irrespective of whether

234 Director of Public Prosecutions Kwazulu-Natal.

235 102 Declaration by Registrar of person as unfit to possess firearm

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

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

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

a victim of stalking wishes to pursue a civil, criminal or any remedy at all, he or she may cause the seizure of any firearm or ammunition the alleged harasser or stalker has.

3.177 Where seizure of a firearm has, for whatever reason, not already been effected in terms of section 110 of the Firearms Control Act, and to provide for the seizure of dangerous weapons, the Commission recommends that a court be given the discretion to order the seizure of a firearm or a dangerous weapon on granting an interim or final protection order and that such seizure be further dealt with in terms of the Firearms Control Act.

3.178 The Commission agrees that it would not be justifiable to order the seizure of a firearm in all instances of stalking and that such seizure should be ordered with the aim of averting the commission of an offence or harm to any person by way of a firearm.

3.179 The Commission recommends that the Bill be amended accordingly. The revised clause reads as follows:

#### **Seizure of arms and dangerous weapons**

7. The court may 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 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 the Firearms Control Act, 2000 (Act No. 60 of 2000).

3.180 While the majority of stalking situations would in practice fit into the criteria set out in section 102(b) or (c) for declaration of unfitness to possess a firearm, the Commission agrees with the Saartjie Baartman Legal Advice and Training Project that there may be additional situations that would not be covered. To this end the Commission confirms its recommendation to include reference to the Protection from Harassment Bill in section 102 of the Firearms Control Act. However in order to acknowledge the view of a number of respondents that the proposed Act should stand independent from the Domestic Violence Act, the Commission recommends that reference to a protection order in terms of the Protection from Harassment Bill be inserted in the Firearms Control Act independent of the similar provision regarding the Domestic Violence Act.

3.181 The Commission recommends as follows:

#### **Amendment of section 102 of the Firearms control Act, Act 60 of 2000**

Section 102 of the Firearms Control Act, 2000, is hereby amended by the insertion after paragraph (a) of subsection (1) of the following paragraph:

"(aA) a final protection order has been issued against such person in terms of the Protection from Harassment Act, 200X (Act XX of 200X);"

3.182 The proposed definition of "firearm" in the Bill is at variance with the definition of "firearm" contained in the Firearms Control Act. The aforementioned Act separately defines 'airgun', 'ammunition', 'firearm' and 'handgun'. To this end the Commission recommends that the term "firearm" be replaced with the word "arm" and that such be defined as any firearm, handgun, airgun or ammunition as contemplated in the Firearms Control Act. This will negate the need to create separate definitions for the terms firearm, handgun, airgun and ammunition and to repeat the relevant definitions in the Firearms Control Act verbatim in the Protection from Harassment Bill.

3.183 The Commission recommends that 'arm' be defined as follows:

**"[firearm] arm"** means any firearm or any handgun or airgun or ammunition as contemplated in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000);

3.184 The Commission agrees that Schedule 2 of the Firearms Control Act should be amended to include any crime or offence in terms of the Protection from Harassment Bill to ensure that a court is obliged in terms of section 103(2) of the Act to enquire and determine whether a person found guilty of breaching a protection order as proposed in the Protection from Harassment Bill is unfit to possess a firearm. The additional amendment of section 103(1) is not deemed necessary. The Commission recommends that Schedule 2 of the Firearms Control Act be amended accordingly.

**Amendment of Schedule 2 of the Firearms Control Act, Act 60 of 2000 by the insertion of subparagraph (e) after item 7**

**Any crime or offence-**

... (e) in terms of the Protection from Harassment Act, 200X;

## No specific exclusion from prosecution

### Proposals in Discussion Paper 108

3.185 In view of the fact that many respondents to the Issue Paper were concerned that people who may legitimately keep persons under surveillance may abuse their position of power the Commission recommended that a specific exemption from prosecution should not be contained in the draft Bill. The Commission commented that when one does something in the pursuance of a legal purpose such person will have a defence irrespective of whether it is legislated for and that the court needs to weigh the merits of each case.

### Exposition of comment

3.186 The majority of the respondents<sup>236</sup> agree that specific exemption for stalking behaviour in pursuit of a legal purpose should not be included in stalking legislation. Only one respondent<sup>237</sup> argues in favour of an exemption for performance of duties in pursuance of legal purpose accompanied by the criminalising of a false claim or information.

3.187 The Commission on Gender Equality comments that there is no need to include any specific exemption; individuals who were legitimately pursuing legal activities would clearly be exempt on that basis. The Lesbian and Gay Equality Project agrees and points out that our legal system provides ample methods for an accused to argue innocence. It states that the use of exemptions in our legal system, which in a sense amounts to immunities, should be kept to an absolute minimum. It suggests that abuse of a position of power to perpetrate stalking behaviour should be considered an aggravating factor during sentencing.

236 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbali Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Melville Cloete, SAPS Legal Services Western Cape; Sohana Moodley, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; R van der Merwe, Magistrate's Office Sasolburg; Enrico Brits, National Prosecuting Authority; Lizemarié Faber, Magistrate's Office, Bloemfontein; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; Sarika Uys, National Prosecuting Authority; Connie Khantsi-Sefo, State Attorney; Malefu Ragolile, Department of Social Development; Marina Voges, Regional Court, Bloemfontein; Germa Wright, Society of Advocates; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; Nozizwe Ngubeni, WAWA; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMSA, Limpopo; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; G.A.J.F Gous, Magistrate, Middleburg; D Ngobeni, Magistrate, Nelspruit; J.G Liebenberg, Magistrate, Barbeton; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; ATKV Randburg; Sgt Nkabi, SAPS Guguletu; Neil Thompson, National Prosecuting Authority; F.C. Muller, Department of Justice.

237 Senior Superintendent Anneke Pienaar, Unit Commander, FCS Detective Service.

3.188 One respondent<sup>238</sup> emphatically states that there should be no exception whatsoever. She is of the opinion that each case of stalking will have to be evaluated objectively on its own facts since power positions could very well be abused to obtain the very means that the stalker is envisaging. However she notes her concern that this Bill may seriously inhibit the work of private investigators that in her opinion have an important role to play in our legal society.

## Evaluation and recommendation

3.189 The Commission is of the view that it would be unnecessary to acknowledge lawful stalking by creating specific exemptions or defences, as anything done in pursuance of a legal purpose would provide a person with a defence. The general common-law defences that apply to all criminal prosecutions would be available to an accused charged with an offence arising out of stalking behaviour. Although there is no general defence of 'acting lawfully' this type of defence would seem implicit in the requirement that unlawfulness must be established by the prosecution. In regard to private detectives and debt collectors the central issue will be whether their conduct is reasonable or unreasonable in the circumstances.<sup>239</sup>

## Bail

### Proposals in Discussion Paper 108

3.190 Although the Commission found in the Discussion Paper that the existing legislation regulating bail is theoretically sound it voiced support for the argument that there should be renewed efforts to train and guide officials regarding bail. The Commission further contended that if legislation acknowledging stalking in relation to persons outside of domestic violence relationships is promulgated that sensitization towards the effect and impact of stalking should, due to the potential for overlap, form part of the training curriculum addressing domestic violence and sexual offences. The Commission concluded that this in turn would positively impact on the manner in which bail applications are dealt with.

### Exposition of comment

3.191 Many respondents agree that existing legislation regulating bail is theoretically sound.<sup>240</sup> Gashiena van der Schaff comments that the United Sanctuary Against Abuse (USAA) has successfully opposed bail on grounds contained in the existing bail provisions.

3.192 However, other respondents<sup>241</sup> point out that in practice bail legislation is not always used effectively. They recommend that bail provisions should be properly applied.<sup>242</sup>

238 Mrs D Milton, Bezuidenhouts Inc.

239 Professor Burchell.

240 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Sr/Supt Anneke Pienaar, Unit Commander, FCS Detective Service; Dr Bridget Armstrong, Sterkfontein Hospital; Mokautu Masilo, SAPS Head Office, Legal Service; Wilma van der Bank, SAPS; Peter Goldsmid, Southern Exposure; Chanáz Mitchell, NISAA Institute; Ria Smit, RAU; Angela Malope, Department of Justice; Beaty Naude, Department of Criminology, UNISA; David Makhubela; Mbalu Mncadi, SAPS; Qetywayo Masoa; Ajanta Dheda, Legal Aid Board; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Sohana Moodley, National Prosecuting Authority; Sophie Giorgi, National Prosecuting Authority; F.C. Muller, Department of Justice; R van der Merwe, Magistrate's Office Sasolburg; Pearce Mokoena, Botshabelo Hospital; Nonlanhla Mlangeni, O.V.V. Welfare; Connie Khantsi-Sefo, State Attorney; L.M Jacobs, NICRO; Malefu Ragolile, Department of Social Development; Germa Wright, Society of Advocates; Ancois Venter, Department of Justice; Elna Ferrera, Magistrate's Court, Welkom; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; B.D Madonsela, Magistrate Eerstehoek; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; Nelia Schutte, FAMS, Limpopo; Zwelakhe S Mthembu, SANGOCO; Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; Benita Nel, Lifeline, Nelspruit; D Ngobeni, Magistrate, Nelspruit; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu-Natal; Sgt Nkabi, SAPS Guguletu.

241 Melville Cloete, SAPS Legal Services Western Cape.

242 Neil Thompson, National Prosecuting Authority.

3.193 Some respondents note that training<sup>243</sup> and retraining<sup>244</sup> on the use of and implementation of bail provisions is needed. Marina Voges of the Regional Court in Bloemfontein adds that training and sensitization needs to be given to all roleplayers in the criminal justice system, namely magistrates, prosecutors, police and correctional service officials. The Lesbian and Gay Equality Group cautions that attention needs to be given to existing training methods as in its opinion ad hoc training, although it can help, only acts as a “band-aid” on what appears to be a criminal justice system that is suffering badly from systemic failures in training at many levels. J.G Liebenberg<sup>245</sup> suggests that training on stalking be given separately from domestic violence and sexual offence training.

3.194 The Commission on Gender Equality strongly supports the use of training for magistrates and judges that focuses on bail in the context of sexual offenses, domestic violence, and stalking. The Commission on Gender Equality mention that these offenses are typically committed by intimate partners, and women are frequently the victims of these crimes, it is extremely important that officials receive proper training and sensitization in these areas.

3.195 Participants at the Cape Town workshop on stalking contend that while existing bail legislation is appropriate, intimidation is often brought about by third parties and not enough information is brought to bail hearings. They suggest that guidelines should be established so as to bring about a common understanding of different forms of intimidation and hence the possibility of creative options for bail. However, they voice the concern that once the case is finalised, a complainant or witness is no longer protected by bail conditions and can not apply for witness protection.

3.196 A number of respondents<sup>246</sup> comment that stalking should be considered a schedule 1 offence, but where stalking is accompanied by violence it should be dealt with in terms of schedule 5 or 6. J.H. Wiegand<sup>247</sup> recommends that it be made a condition of bail that no contact by whatever means, and or by other parties may be made with the complainant.

3.197 The Saartjie Baartman Legal Advice and Training Project refers to the research findings set out in their second report on bail in sexual offence cases,<sup>248</sup> in which it has proposed that the safety of the victim should be made more prominent in the court’s consideration of whether or not the release of the accused will be in the interests of justice. In this report the Project proposed the amendment of the relevant provisions of section 60(4) of the Criminal Procedure Act. Similarly the Project recommended that the determination of appropriate bail conditions should also be made with a clear awareness of the victim’s need for protection against further violence, intimidation or harassment by the accused.

3.198 The Saartjie Baartman Legal Advice and Training Project contends that although these recommendations were originally formulated in the context of sexual offences, they may be apposite to the question of stalking. In this regard the Saartjie Baartman Legal Advice and Training Project recommends the insertion of the following provisions in section 60 of the Criminal Procedure Act (as indicated by underlined text):

“60(7) In considering whether the ground in subsection 4(c) has been established, the court may, where applicable, take into account the following factors, namely –

(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

243 G.A.J.F Gous, Magistrate, Middleburg; ATKV Randburg; Mrs D Milton, Bezuidenhouts Inc; Lesbian and Gay Equality Project.

244 ATKV Randburg.

245 Magistrate, Barbeton.

246 Sarika Uys, National Prosecuting Authority; Lizemarié Faber, Magistrate’s Office, Bloemfontein; Enrico Brits, National Prosecuting Authority; J.H. Wiegand, National Prosecuting Authority; Elsabe Krafft, National Prosecuting Authority.

247 National Prosecuting Authority.

248 H Combrinck & Z Skepu *Bail in Sexual Assault Cases: Victims’ Experiences* (2003).

- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed;
- (h) the view of any person against whom an offence was allegedly committed regarding their safety; or
- (i) any other factor which in the opinion of the court should be taken into account.

**Add to sec 60(10):**

Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any persons against whom the offence has allegedly been committed.

**Add to sec 60(12):**

The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any persons against whom the offence has allegedly been committed."

**Evaluation and recommendation**

3.199 As noted above, once an accused has been convicted and sentenced the complainant would no longer be protected by bail conditions. Despite this a victim of stalking would not be left totally vulnerable as the court may make the suspension of the whole or part of the sentence subject to similar conditions. The victim would also be able to apply for a protection order against the stalker.

3.200 Due to the nature of harassing conduct, legal intervention may trigger the stalker to intensify the harassment and thereby place the victim at greater risk. The Commission therefore agrees that the immediate and future safety of the victim should be made more prominent in the court's consideration of whether or not the release of the accused will be in the interests of justice.

3.201 The Commission further agrees that the determination of appropriate bail conditions should also be made with a clear awareness of the victim's need for protection against potential or further harm, violence, intimidation or harassment by the accused. It is important to clarify that the primary aim of addressing stalking or harassing behaviour is to interrupt the pattern of behaviour before harm ensues.

3.202 The Commission accordingly recommends the following amendments to section 60 of the Criminal Procedure Act:

Amendment of section 60 by-

- (a) the insertion after paragraph (g) of subsection (7) of the following paragraph:

"(gA) the view of any person against whom an offence was allegedly committed regarding his or her safety."

- (b) the substitution for subsection (10) of the following subsection:

“(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence has allegedly been committed.”; and

- (c) the substitution for subsection (12) of the following subsection:

“(12) The court may make the release of an accused on bail subject to conditions which, in the court’s opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence has allegedly been committed.”



# Chapter 4:

## Non-Legislative Intervention

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# Non-Legislative Intervention

## Proposals in Discussion Paper 108

4.1 In Discussion Paper 108 the Commission noted that if a legislative strategy against stalking is to achieve more than symbolic importance and be useful against a stalker, implementation is a key component of success. The Commission noted that comparative jurisdictions have found that stalking is exceptionally difficult to police – difficult to investigate, prosecute, and prevent. The Commission posed the question as to whether non-legislative intervention in the form of early intervention and preventive action on the part of the police was deemed necessary and given the specialised nature of such intervention whether there was a need to establish a dedicated unit within the police to deal with stalking.

### Proactive intervention

#### *Exposition of comment*

4.2 The Saartjie Baartman Legal Advice and Training Project endorses the Commission's statement that traditional 'reactive' policing is ill-suited to the challenges of stalking, and that stalking behaviour requires early intervention, preventive action and proactive problem-solving.<sup>249</sup> It is of the opinion that the enactment of stalking legislation as contemplated by the Commission will represent a significant departure from the current legal position, where victims of stalking (unless this is committed in the context of a domestic relationship) do not have much accessible recourse in terms of criminal or civil law. It comments that especially in the case of the police, this will imply a major shift in the current approach to stalking complaints.

4.3 The Saartjie Baartman Legal Advice and Training Project proposes that the development of national policy directives (similar to the National Instructions issued regarding domestic violence and sexual assault cases) will be essential to ensure effective implementation of the legislation by the police. It also strongly urges the inclusion of provisions, similar to sec 18(3) and 18(5)(b) of the Domestic Violence Act in the stalking legislation. The Saartjie Baartman Legal Advice and Training Project further points out that it may also be useful to include similar provisions relating to the prosecution of stalking offences (analogous to sec 18(2) and 5(a) of the Domestic Violence Act).

4.4 Senior Superintendent Anneke Pienaar<sup>250</sup> and Wilma van der Bank of SAPS state that all role players, not only the police, must be obligated to perform their relevant functions in terms of the Bill.

### *Evaluation and recommendation*

4.5 The Commission recommends that policy directives be issued by the South African Police Service and the National Prosecuting Authority to address harassment. It also recommends that these directives should emphasize the seriousness of certain incidences of stalking and the safety of the victim specifically in relation to bail proceedings. The following empowering clauses in the proposed Bill relate to such directives.

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249 Par 5.4 at p 141.

250 Unit Commander, FCS Detective Service.

**Policy Directives**

- (1) (a) The National Director of Public Prosecutions referred to in section 10 of the National Prosecuting Authority Act, 1998, in consultation with the Minister for Justice and Constitutional Development and after consultation with the Directors of Public Prosecutions, must determine prosecution policy and issue policy directives regarding any offence arising out of this Act;
- (b) The National Director of Public Prosecutions must submit any prosecution policy and policy directives determined or issued in terms of subsection (1)(a) to Parliament, and the first policy and directives so determined or issued, must be submitted to Parliament within six months of the commencement of this Act;
- (2) (a) The National Commissioner of the South African Police Service must issue national instructions as contemplated in section 25 of the South African Police Service Act, 1995 (Act No.68 of 1995), with which its members must comply in the execution of their functions in terms of this Act, and any instructions so issued must be published in the Gazette;
- (b) The National Commissioner of the South African Police Service must submit any national instructions issued in terms of subsection (2)(a) to Parliament, and the first instructions so issued, must be submitted to Parliament within six months of the commencement of this Act.

4.6 In order to nip this behaviour in the bud it is essential that intervention by victims and officials of the criminal justice system is early and aggressive.<sup>251</sup> Risk assessment guidelines should be compiled which include identifying immediate safety concerns, which include threats of violence, threats of suicide or a history of mental illness or head trauma of the alleged stalker. Victims of stalking need assistance to obtain legal redress against such behaviour and where appropriate to be empowered to take responsibility for self-protection. This includes addressing personal behaviours and situations such as changing telephone numbers, considering relocation, preserving anonymity and changing daily routines on a regular basis.

**Specialized units****Exposition of comment**

4.7 Some respondents<sup>252</sup> are of the opinion that establishing specialized units within the police to deal with stalking is vital to ensure implementation, monitoring and evaluation.<sup>253</sup> The prerequisite for the establishment of such units however, is that the units are trained properly and have the necessary manpower, time and knowledge.<sup>254</sup>

4.8 Enrico Brits<sup>255</sup> agrees that special units should be established to deal with this complex crime. He states that due to the ingenuity of the offender and the manner in which this crime is committed a thorough and specialised investigation is necessary for successful prosecutions. Sarika Uys adds that specialized prosecutors and magistrates should be assigned to these cases. Prof L Schlebusch<sup>256</sup> suggests that mental health experts with expertise in stalking behaviour should be listed as consultants when their services might be required as the

251 Ogilvie E Stalking: Legislative, Policing and Prosecution Patterns in Australia Australian Institute of Criminology Research and Public Policy Series No.34 (2000) at pp 120.

252 Angela Malope, Department of Justice; Qetywayo Masoa; Jacqueline Fourie, Magistrate's Court, Welkom; J.D Wessels, Magistrate, De Aar; J.H. Wiegand, National Prosecuting Authority; Chanáz Mitchell, NISAA Institute; Lizemarié Faber, Magistrate's Office, Bloemfontein; Enrico Brits, National Prosecuting Authority; Sarika Uys, National Prosecuting Authority; Ancois Venter, Department of Justice; Sgt Nkabi, SAPS Guguletu; Mrs D Milton, Bezuidenhouts Inc; Elna Ferrera, Magistrate's Court, Welkom.

253 Chanáz Mitchell, NISAA Institute.

254 Lizemarié Faber, Magistrate's Office, Bloemfontein; Ancois Venter, Department of Justice.

255 Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court.

256 Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal.

public is usually unaware of where to turn for psychological help. The Commission on Gender Equality proposes that a database of referral agencies be created so that courts can easily refer both victims and perpetrators for counseling, treatment or evaluation. It also recommends that mechanisms should be established to ensure better cooperation among the police, the judiciary, public prosecutors, and NGOs.

4.9 One respondent<sup>257</sup> is in favour of allocating the investigation of stalking offences to existing specialized units, such as the sexual offences unit. However the Commission on Gender Equality proposes that instead of incorporating the investigation of harassment or stalking to existing units, a dedicated unit for all victims of gender-based violence should be established. The Commission remarks that it is vital that local law enforcement agencies receive training on how to deal with both victims and perpetrators of gender-based violence. It states that in addition, such a unit would need to be staffed by experts in the field of gender-based violence as well as sufficient numbers of female personnel (in order to be representative of the community at large).

4.10 Some respondents<sup>258</sup> are expressly opposed to establishing specialised units to deal with stalking. Mbali Mncadi of SAPS comments that every police officer should be equipped to provide appropriate first-line intervention and services before referrals for further specialised intervention. She explains that this is important for access to immediate protection which would be lacking if dedicated units were not available in all centres.

4.11 In the same vein other respondents comment that the primary factor militating against the establishment of units dealing solely with stalking is the financial non-viability thereof, both in terms of personnel and resources.<sup>259</sup>

4.12 With a lack of statistics to indicate the extent of stalking in South Africa, some respondents<sup>260</sup> state that specialised units are not justified. They suggest that stalking be dealt with in the same way as all other crime.<sup>261</sup>

### **Evaluation and recommendation**

4.13 Being mindful that the South African Police Service is faced with numerous financial and personnel constraints in its fight against all manners of crime the Commission does not wish to prescribe to the police how stalking should be policed and whether or not specialised units should be established to do so. The Commission is of the opinion that the South African Police Service is best placed to determine the most effective way of pro-actively policing stalking. However, based on its investigations into sexual offences and domestic violence the Commission is of the opinion that stalking behaviour does not always fall within the framework of sexual offences or domestic violence. Consequently the Commission does not recommend that the policing of stalking should be relegated to a unit specifically dealing with sexual offences or domestic violence unless the framework of such unit is expanded to specifically cater for stalking.

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257 Elsabe Krafft, National Prosecuting Authority.

258 National Prosecuting Authority; Peter Goldsmid, Southern Exposure; Beaty Naude, Department of Criminology, UNISA; Nelia Schutte, FAMSA, Limpopo; D Ngobeni, Magistrate, Nelspruit; Melville Cloete, SAPS Legal Services Western Cape; Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc; ATKV Randburg.

259 Mrs D Milton, Bezuidenhouts Inc; Marina Voges, Regional Court, Bloemfontein; Nthabiseng Motsau, Prosecutor, Soweto Magistrate Court; Ajanta Dheda, Legal Aid Board; Sophie Giorgi, National Prosecuting Authority; Germa Wright, Society of Advocates; Benita Nel, Lifeline, Nelspruit.

260 Peter Goldsmid, Southern Exposure; Ajanta Dheda, Legal Aid Board; Adv Natasha van Wyngaardt, SAPS Legal Services Uitenhage; Neil Thompson, National Prosecuting Authority; J.G Liebenberg, Magistrate, Barbeton.

261 Maloko Mamabolo, SALGA; R.J. Smith, Department of Correctional Services; P.J. Venter, Senior Magistrate, Evander; H.P Ferreira, Magistrate, Witbank.

## Training

### ***Exposition of comment***

4.14 A number of respondents<sup>262</sup> emphasise the importance of adequate training and sensitisation of all officials to the dynamics of stalking. Malefu Ragolile of the Department of Social Development states that training should include magistrates, psychologists, psychiatrists, teachers, social workers, nurses, prosecutors, clerks and doctors and should not concentrate solely on the police. Prof L Schlebusch agrees and remarks that in his view training of the relevant parties, especially mental health experts is essential not only in terms of procedure but also in recognising when to attribute the stalking or its consequences to psychological causes or sequelae that require urgent help. Some respondents<sup>263</sup> agree that training of government officials should be incorporated into existing curricula dealing with sexual offences and domestic violence.

4.15 A few respondents<sup>264</sup> suggest that public awareness programs and training should also be held for communities and not only formally but informally too, as well as marketing the “new bill” via the media for example on television, radio and in newspapers. Ms R.J. Smith<sup>265</sup> recommends that pamphlets and posters should be placed at community centres such as Town Councils, Police Stations, Post Offices and courts. Benita Nel of Lifeline in Nelspruit agrees. She is of the opinion that it is very important to have all stakeholders “buy in” and take ownership of the Bill otherwise she feels the Bill will be lost if grassroots individuals do not know what it is about or how to use it.

### ***Evaluation and recommendation***

4.16 The Commission endorses an inter-sectoral training approach and recommends that the Departments of Justice and Constitutional Development, Safety and Security, Health, Education and Social Development liaise on the design and presentation of training in this regard.

4.17 Based on international best practice the Commission recommends that stalking specific training should at least include early intervention, preventive action and proactive problem solving skills. Optimally training on the management of stalking should include training on the typologies of stalker characteristics in order to allow for the effective identification of danger signs and the most appropriate response to such signals. Specific attention should also be given to training on the detection and investigation of stalking by means of electronic technology and the possible progression from online or electronic stalking to real-time or offline stalking.

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262 Connie Khantsi-Sefo, State Attorney; Malefu Ragolile, Department of Social Development; Prof L Schlebusch, Head of Department of Behavioural Medicine, Nelson R Mandela School of Medicine, University of Kwazulu- Natal; Sgf Nkabi, SAPS Guguletu; ATKV Randburg; The Saartjie Baartman Legal Advice and Training Project; Commission on Gender Equality.

263 B.D. Madonsela, Magistrate, Eerstehoek; Ancois Venter, Department of Justice.

264 Ria Smit, RAU; Sarika Uys, National Prosecuting Authority; Elna Ferrera, Magistrate’s Court, Welkom.

265 Department of Correctional Services.



# Annexures:

## ANNEXURES:

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# Annexure A:

## Protection from Harassment Bill

To provide for the granting of protection orders against harassment; 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;

**IT IS THE PURPOSE** of this Act to afford victims of harassing behaviour an effective remedy in terms of civil law and to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act.

**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—

“**arm**” means any firearm or any handgun or airgun or ammunition contemplated in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000);

“**child**” means a person under the age of 18 years;

“**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**” means any person who alleges he or she is being subjected to harassment;

“**court**” means any court contemplated in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“**dangerous weapon**” means any weapon contemplated in section 1 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968);

“**harm**” means mental, psychological, physical harm or damage to property;

“**harassment**” means directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

- (a) following, watching, pursuing or accosting the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
- (b) engaging in verbal or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
- (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by, given to or brought to the attention of, the complainant or a related person;

“**member of the South African Police Service**” means any member contemplated in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995);

“**peace officer**” means a peace officer contemplated 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 of this Act;

“**related person**” means any member of the family or household of a complainant, or any other person in a close relationship to such complainant;

“**respondent**” means any person against whom proceedings are instituted in terms of this Act;

“**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.

### **Application for protection order**

**2.** (1) A complainant may in the prescribed manner apply to the court for a protection order against harassment as contemplated in section 1.

(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 also lodge a criminal complaint against the respondent of *crimen injuria*, assault, trespass, extortion or such other offence as may be apposite.

(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 person who, in the opinion of the court, is unable to do so.

(4) Notwithstanding the provisions of any other law, any child, or any person on behalf of a child, 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 is or may suffer harm 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**

**3.** (1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 2(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 engaging, or has engaged in harassment;

(b) harm is or may be suffered by the complainant as a result of such conduct if a protection order is not issued immediately; and

(c) the protection to be accorded by such interim order is likely not to be achieved if prior notice of the application is given to the respondent,

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 final protection order should not be issued against the respondent.

(b) A copy of the application referred to in section 2(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 6(1)(a), to be served on the complainant.

### Issuing of a final protection order

4. (1) If the respondent does not appear on a return date contemplated in section 3(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 engaged or is engaging in harassment, the court must issue a final protection order in the prescribed form.

(2) If the respondent appears on the return date in order to oppose the issuing of a final protection order, the court must proceed to hear the matter and—

(a) consider any evidence previously received in terms of section 3(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, of its own accord or on the request of the complainant, if it is of the opinion that it is required, 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 harassed; 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 final protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has engaged or is engaging in harassment.

(5) Upon the issuing of a final 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 6(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 final protection order and of the warrant of arrest contemplated in section 6(1)(a) to the police station of the complainant's choice.

(7) Subject to the provisions of section 5(5), a final 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**

5. (1) The court may, by means of a protection order referred to in sections 3 and 4 prohibit the respondent from—

- (a) engaging in or attempting to engage in harassment;
- (b) enlisting the help of another person to engage in such harassment; or
- (c) committing any other act as specified in the protection order.

(2) If the court is satisfied that the respondent may be in need of mental health care, treatment or rehabilitation, it may, by means of a protection order referred to in section 4 order the respondent to submit to—

- (a) psychiatric or psychological assessment, by a psychiatrist, psychologist or health care provider, which includes any clinical investigations which may be deemed necessary and;
- (b) whichever care, treatment, rehabilitation or instruction the court deems appropriate within a period specified by the court.

(3) The court may impose such additional conditions it deems reasonably necessary to protect and provide for the safety or well-being of the complainant, including an order—

- (a) to seize any arm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 7; and
- (b) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property.

(4) (a) The physical, home and work 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 or well-being of the complainant.

(5) (a) Provided that the complainant is not in possession of or not in the process of applying for a protection order against harassment or stalking as contemplated in the Domestic Violence Act, 1998 (Act No. 116 of 1998) 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**

6. (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 5.

(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 court may 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 specified 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 is or 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 13(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 and work address and the occupation or status of the respondent;
- (ii) calls upon the respondent to appear before a court on the date and at the time specified in the notice, on a charge of committing the offence referred to in section 13(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 its import 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 was handed to the respondent specified therein.

(5) In considering whether or not the complainant is or may suffer 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 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 simultaneously to 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**

7. The court may 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 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 the Firearms Control Act, 2000 (Act No. 60 of 2000).

### **Variation or setting aside of protection order**

8. (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 4 in the prescribed manner.

(2) If the court is satisfied that circumstances have materially changed since the granting of the original protection order and 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

- 9.** (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

**10.** 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

**11.** 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

**12.** 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

**13.** Notwithstanding the provisions of any other law, any person who—

- (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 5; or
- (b) in an affidavit referred to in section 6(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

- 14.** (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 or 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.

## Policy Directives

**15.** (1) (a) The National Director of Public Prosecutions referred to in section 10 of the National Prosecuting Authority Act, 1998, in consultation with the Minister of Justice and after consultation with the Directors of Public Prosecutions, must determine prosecution policy and issue policy directives regarding any offence arising out of this Act;

(b) The National Director of Public Prosecutions must submit any prosecution policy and policy directives determined or issued in terms of subsection (1)(a) to Parliament, and the first policy and directives so determined or issued, must be submitted to Parliament within six months of the commencement of this Act;

(2) (a) The National Commissioner of the South African Police Service must issue national instructions as contemplated in section 25 of the South African Police Service Act, 1995 (Act No.68 of 1995), with which its members must comply in the execution of their functions in terms of this Act, and any instructions so issued must be published in the *Gazette*;

(b) The National Commissioner of the South African Police Service must submit any national instructions issued in terms of subsection (2)(a) to Parliament, and the first instructions so issued, must be submitted to Parliament within six months of the commencement of this Act.

## Amendment of laws

**16.** The laws specified in the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.

## Short title and commencement

**17.** This Act shall be called the Protection from Harassment Act, 200X, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## Schedule

(Section 18)

No. and year of law	Short title	Extent of amendment
Act No. 51 of 1977	Criminal Procedure Act, 1977	<p><b>1.</b> Amendment of section 60 by—</p> <p>(a) the insertion after paragraph (g) of subsection (7) of the following paragraph:</p> <p><u>“(gA) the view of any person against whom an offence was allegedly committed regarding his or her safety.”;</u></p> <p>(b) the substitution for subsection (10) of the following subsection:</p> <p>“(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: <u>Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence has allegedly been committed.</u>”; and</p> <p>(c) the substitution for subsection (12) of the following subsection:</p> <p>“(12) The court may make the release of an accused on bail subject to conditions which, in the court’s opinion, are in the interests of justice: <u>Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence has allegedly been committed.</u>”</p>
Act No. 60 of 2000	Firearms Control Act, 2000	<p><b>2.</b> Amendment of section 102 by the insertion after paragraph (a) of subsection (1) of the following paragraph:</p> <p><u>“(aA) a final protection order has been issued against such person in terms of the Protection from Harassment Act, 200X (Act XX of 200X);”</u></p> <p><b>3.</b> Amendment of Schedule 2 by the insertion after paragraph (d) of item 7 of the following paragraph:</p> <p><u>“(e) in terms of the Protection from Harassment Act, 200X (Act XX of 200X).”</u></p>

# Annexure B:

## LIST OF RESPONDENTS: ISSUE PAPER

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

Anonymous (1);

Anonymous (2);

Anonymous (3);

KZN Network on Violence Against Women Workshop;

Ms Bowers;

Ms Clark, Senior Public Prosecutor, National Prosecuting Authority;

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

Mrs Fourie;

Ms Kleynhans;

Mrs Lugtenburg;

Ms Palmer;

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

Mrs Van Heerden;

Ms Van Niekerk, the National Coordinator of Childline;

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

Mrs Van Wyk;

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

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

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

# Annexure C:

## LIST OF RESPONDENTS: DISCUSSION PAPER

ATKV Randburg;

Adv Brandon Lawrence, SOCA Unit, National Prosecuting Authority;

Angela Malope, Department of Justice;

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B.D Madonsela, Magistrate Eerstehoek;

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Benita Nel, Lifeline, Nelspruit;

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Commission on Gender Equality;

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D Ngobeni, Magistrate, Nelspruit;

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F.C. Muller, Department of Justice;

G.A.J.F Gous, Magistrate, Middleburg;

Germa Wright, Society of Advocates;

H.P Ferreira, Magistrate, Witbank;

Heather Douglas, part-time Commissioner, Queensland Law Reform Commission, Australia.

J.D Wessels, Magistrate, De Aar;

J.G Liebenberg, Magistrate, Barbeton;

J.H. Wiegand, National Prosecuting Authority;

Jacqueline Fourie, Magistrate's Court, Welkom;

L.M Jacobs, NICRO;

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Lizemarié Faber, Magistrate's Office, Bloemfontein;

Malefu Ragolile, Department of Social Development;

Mbali Mncadi, SAPS;

Melville Cloete, SAPS Legal Services Western Cape;

Mokautu Masilo, SAPS Head Office, Legal Service;

Mrs D Milton, Bezuidenhouts Inc;

Nation Mthemjame;

National Commissioner, South African Police Service;

Neil Thompson, National Prosecuting Authority;

Nelia Schutte, FAMSA, Limpopo;

Nico van der Merwe, Du Toit Smuts & Mathews Phosa Inc;

Nonlanhla Mlangeni, O.V.V. Welfare;

Nozizwe Ngubeni, WAWA;

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P.J. Venter, Senior Magistrate, Evander;

Pearce Mokoena, Botshabelo Hospital;

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