STALKING: DEFINING AND PROSECUTING A NEW CATEGORY
OF OFFENDING

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\textbf{Introduction}
Stalking is a course of conduct in which one individual inflicts on another repeated unwanted intrusions and communications to such an extent that the victim fears for his or her safety (Pathé & Mullen, 1997). When considered individually, the constellation of behaviours associated with stalking may seem inoffensive and not particularly threatening to the uninvolved observer, for example, sending letters or gifts, making telephone calls or waiting outside a person’s home or workplace. When repeated over time, however, such actions become altogether more ominous for the target of these unwanted attentions. In the last decade, stalking has emerged as a form of human behaviour which commands not only considerable public attention, but is increasingly attracting clinical and research interest among mental health professionals. Stalking’s emergence as a significant social issue has resulted in its categorisation, in many western jurisdictions, as a specific form of criminal offence.

The term ‘star-stalking’ was initially coined by journalists in the United States in the late 1980’s to describe the unwanted communications and intrusions of mentally disordered or over-enthusiastic fans on film and television celebrities (Lowney & Best, 1995). It was later extended to include those who pursued and harassed ex-partners, casual acquaintances, co-workers and a whole range of their fellow citizens. Although the term ‘stalking’ was in this context novel, the behaviour itself was not new, having been dealt with in various ways by the criminal justice system since at least the 18th century (see Dennis v. Lane, 1704; Regina v. Dunn, 1840). By the early 1990’s, however, there was growing public agreement, orchestrated primarily by media reports of the stalking of celebrities which culminated in violence, that existing legal measures to address stalking were inadequate. Criminal, civil and common laws, while available to prosecute stalking-related conduct, proved largely ineffective either at deterring the stalker or protecting the victim. The laws that existed in most jurisdictions prior to 1990 applied only to single illegal acts (for example, trespass or malicious communication), rather than taking into consideration that the repetition of an act may change not only its gravity but its nature. Existing legal approaches, though stretched to encompass stalking, were ill-equipped to deal with offending that is constructed of repeated
acts, each instance of which may be legal but the totality of which is a damaging and distressing infliction.

The intense media attention which stalking has attracted generated a public consciousness and concern, which found political expression in a series of legislative initiatives to prohibit this form of intrusive conduct. Since 1990, there has been a rapid proliferation of anti-stalking legislation, beginning in the United States and extending to Canada, Australia, and more recently the United Kingdom and New Zealand. Similar laws are now being considered for enactment in continental Europe (e.g. The Netherlands – see ref). In the popular arena, the introduction of anti-stalking laws has been welcomed, but for many jurists, civil libertarians and liberals the new legislation is contentious. In a departure from most criminal laws, anti-stalking legislation is often drafted to make it an offence defined by the victim's response, as opposed to the intentions of the perpetrator. The reaction of the victim therefore becomes the principal element that defines a stalking event, rather than traditional criminal intent requirements. The framing of anti-stalking laws has further been troubled by the issue of defining a criminal activity which comprises a series of actions that, when taken individually, often constitute legitimate behaviour. In creating a legal definition of stalking, legislators have broadly prohibited contacts and communications that occur on two or more occasions that render the recipient fearful. The rationale behind such regulations appears to be that requiring a greater number of prohibited acts may leave victims vulnerable to an escalation to violence before the necessary elements of the offence have been fulfilled. It is because these laws require so few - and potentially such inoffensive - acts to establish the offence of stalking that they all too easily may cross the line between prohibiting and punishing illegal behaviours and intruding upon legitimate activities.

Defining the offence of stalking is undoubtedly a complex and problematic endeavour. The blurred boundaries between what constitutes legitimate and illegal behaviours have bedevilled the development and application of anti-stalking laws. These laws raise compelling legal issues, especially in North America where constitutionally protected rights and behaviours have been considered by some to be infringed by anti-stalking laws. Anti-stalking legislation equally raises important questions about the nature of social
interactions in Western industrialised societies, particularly when a person can at least in theory be convicted of a criminal offence on the basis of several, from their point of view, well intentioned contacts with someone who perceives this behaviour as threatening.

To date, little discussion of the boundary problems associated with stalking has occurred in the scholarly literature. The legal literature on stalking has focused on the issue of legitimate versus criminal following and intrusion, although this has usually been in the context of the framing of more effective legislation. The purpose of this paper is to examine the development of anti-stalking laws and the various legal definitions that have been applied to stalking in the United States (US), Canada, Australia and the United Kingdom (UK). Specifically, we examine the attempts that have been made to limit the offence in order to prevent inadvertently making legitimate activities illegal and the relative importance that different jurisdictions have placed on the intentions of the stalker versus the reactions of the victim. Furthermore, the advantages and disadvantages of anti-stalking legislation are analysed, placing emphasis on the proper application and the potential for misuse of these contentious laws.

The Impetus for Change: Limitations with Existing Legal Approaches

Prior to 1990, stalking was not recognised socially or legally as a distinct form of offending, and therefore any attempts to prosecute this form of behaviour had to be mounted on the basis of existing criminal or civil offences that sought to punish crimes against the individual (e.g. assault), the community (e.g. public nuisance provisions) or more recently, within the context of the family (e.g. domestic violence provisions).

The criminal laws and torts principally employed to prosecute stalking-related conduct were assault, harassment, menacing, intimidation, terroristic threatening, malicious communications or trespass (Guy, 1993; McAnaney, Curliss & Abeyla-Price, 1993; Home Office, 1996). Pursuing stalkers under these broad anti-harassment laws provided some recourse for victims, but as a systematic means to address the
activities associated with stalking, they proved inadequate for several reasons. As mentioned earlier, these criminal laws typically address *discrete* incidents that are illegal in and of themselves. The use of these laws to punish stalking would require multiple prosecutions of the offender. An effective prosecution under such circumstances would be so drawn out as to deter victims who are reluctant to repeatedly provide essential testimony. Furthermore, crimes such as trespass or malicious communications are typically classed as summary or misdemeanour offences and as a consequence the penalties associated with them are limited (usually fines) and certainly unlikely to dissuade most stalkers or afford the victim any protection. Finally, anti-harassment laws such as menacing require an immediate threat of violence against the victim, which is not applicable to many stalking situations where threats, if they exist at all, are rarely explicit but rather implicit in the course of continued following or surveillance.

The use of civil law remedies, such as restraining or non-molestation orders, were another means by which stalking victims could attempt to protect themselves against repeated intrusions and unwanted communications. To obtain a restraining order, however, the onus is on the victim to make an application to the court that contains sufficient evidence of an imminent threat against his or her physical safety. This petitioning process is often associated with lengthy delays between application and hearing and may involve the expense of hiring counsel. Many jurisdictions restrict issuing restraining orders to intimate or former-intimate relationships, thereby excluding those circumstances where a victim is pursued by an acquaintance or stranger (Sohn, 1994; Home Office, 1996). The greatest limitation of restraining orders, however, is the notorious difficulty of enforcing them (Sanford, 1993). Often referred to as “paper shields” (Walker, 1993; Smith, 1995), in practice these orders do little to abate stalking and frequently serve to intensify the anger and determination of the perpetrator, and precipitate an escalation to violence (Mullen & Pathé, 1994).

Although criminal and civil laws could in theory be stretched to extend their scope to stalking, these laws
failed to reflect the unique nature of this conduct, which involves a series of related and seemingly lawful actions, as opposed to single or unrelated offences. Prior to the enactment of anti-stalking laws, any effective legal action against stalking usually required a physical assault against the victim or damage to his or her property. Criminal justice intervention was all too often stalled until the stalker ‘did something’. Mrs Sandra Polard, the mother of a stalking victim, testified in 1992 before the US Senate Judiciary Committee Hearings on Antistalking Legislation that “despite the threats he has made against our lives, despite his repeated violations of restraining orders, despite the professional assessment of him as dangerous, both the District Attorney and our own attorney have said that nothing can be done until he has “done something”. What is the “something” they must wait for him to do? Kidnap [my daughter]? Rape her? Kill her?” (cited in Walker, 1993). This gap in the law, which in practice if not in theory permitted effective intervention only after escalation to violence, prompted consideration of a more effective and specific legislative response to the problem of stalking. Although critics argued for a strengthening and proper enforcement of existing anti-harassment laws (e.g. making restraining order violations punishable by significant terms of imprisonment; Way, 1994), for both political and practical legislative reasons, the response of legislators has been to create with specific anti-stalking statutes a new category of offending.

The Introduction of Anti-Stalking Legislation

In 1989 a popular young television actress, Rebecca Schaeffer, was murdered by a disordered fan who had stalked her for two years. Schaeffer was not the first celebrity to attract the unwanted attentions of a disturbed admirer, but she was the first high profile victim to be fatally attacked by a stalker and her death has become synonymous with the public outcry and media pressure that culminated in the instigation and passage of the world’s first anti-stalking statute in California (see Gilligan, 1992; Resnick, 1992; Anderson, 1993; Perez, 1993; Kurt, 1995). Although the community outrage over Schaeffer’s death was sufficient to galvanise a political response to stalking (National Institute of Justice, 1996), the murders of four women from Orange County, California, in 1989 also highlighted the inadequacy of existing laws. In each case,
the victim had been pursued by a former intimate partner prior to her murder, despite legal intervention to obtain restraining orders in response to the ongoing harassment (Guy, 1993; Montesino, 1993). The highly publicised deaths of these five women stimulated public demand for specific laws prohibiting stalking. State Senator Edward Royce, the representative for Orange County, sponsored a bill in 1990 making stalking a criminal offence. The California legislature passed the bill in September 1990, defining the offence of stalking as “any person who wilfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily harm…” (California Penal Code § 646.9 {West 1990}). “Harasses” was defined as:

“a knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of course of conduct.”

In less than nine months the California legislature had conceived and enacted the first law to prohibit stalking. The primary legal elements of this offence were a course of conduct over a period of time that evidenced a continuity of purpose to harass, alarm or annoy a person. In response to California’s landmark law, each US State subsequently introduced anti-stalking legislation, or amended existing criminal statutes to address stalking behaviours. In what was aptly described as a ‘torrent of legislation’ (McAnaney et al, 1993), 30 States enacted anti-stalking legislation in 1992 and an additional 19 jurisdictions passed anti-stalking laws in 1993, most States framing their legislation in response to local and highly emotive cases of stalking. Canada in 1993 passed a comparable law prohibiting stalking in its
Criminal Harassment Law.

The rush to enact specific anti-stalking legislation in North America was followed by the passage of similar laws in each Australian State and territory between 1993 and 1995. While Australian law is based both on the common law of England and Wales, as well as State and Federal legislation, Australian courts not infrequently refer to North American (particularly Canadian) judgements and North American decisions are increasingly influencing legislative initiatives in Australian States (e.g. the use of victim impact statements, or defences such as the battered woman syndrome). It was not unexpected, therefore, that once anti-stalking laws were established in North America, a campaign to introduce comparable legislation in Australia would be forthcoming. Like the experience in North America, the highly publicised murders of women in the context of ongoing harassment by former intimate partners and the public outrage accompanying these cases were catalysts for anti-stalking laws in Australia (McMahon & Davids; 1993 Goode, 1995). Although the majority of Australian State laws prohibited harassment, intimidation or malicious communications, the option to strengthen such laws was, as in North America, passed over in favour of the creation of a new criminal offence.

The introduction of anti-stalking laws in North America and Australia led to public calls in the UK for similar laws to be enacted. The UK tabloid press ably placed stalking on the national political agenda, providing a plethora of cases involving the pursuit of celebrities (particularly members of the Royal family), strangers or former intimate partners. Wells (1997) succinctly expressed the beliefs underscoring the push for anti-stalking laws, both in the UK and elsewhere: that violence/stalking is increasing, that something must be done to address this and that legislation, as a vehicle for social change, is the appropriate means to achieve this. Although stalking was touted as a “growing menace” (Turl, 1994), legislators in the UK were relatively circumspect in their response to the problem. Academics questioned whether existing criminal and civil laws were sufficient to deal with this behaviour and the impact any extension of the law would
have on legitimate activities (Allen, 1996; Wells, 1997). Nonetheless, in 1997 the British Government passed two bills establishing offences to deal with stalking and other forms of harassment (e.g. racial intolerance), which were introduced in the Protection from Harassment Act.

The anti-stalking legislation introduced in North America, Australia and the UK shares the broad common purpose of prohibiting repeated unwanted forms of contact and communication that render the recipient fearful. Despite this shared objective, the specific definitions applied to stalking and the essential elements required to establish the offence vary considerably from one jurisdiction to another, both between and within countries. Most jurisdictions framed their legislation in response to local and often violent cases of stalking (typically involving ex-intimate partners), with each jurisdiction giving greater or lesser emphasis to the rights of the victim and the accused. As a consequence, no single legal definition of stalking exists and there is considerable variation in the application of these laws across jurisdictions. This contrasts with the more uniform definitions applied to many criminal laws such as theft, battery or murder. That being said, most anti-stalking laws require at least one of three critical elements to establish the offence: conduct requirements, intention and the response of the victim.

*The Critical Elements of Anti-Stalking Laws*

*Conduct Requirements*

The first necessary element for the offence of stalking is the performance of the requisite ‘act’ or prohibited conduct. In California and several other US States, the law requires a course of conduct against a victim involving harassment or following. The National Institute of Justice in its Model Anti-Stalking Code for the States (1996), a document intended to bring uniformity to US anti-stalking laws, defines stalking as “repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct...”. Canada’s Criminal Harassment provision similarly requires
concerning repeated following or communicating, besetting or watching a place occupied by the victim, or engaging in threatening conduct. In the UK, the Protection from Harassment Act requires either a course of conduct that amounts to harassment, or conduct that causes the victim to fear that violence will be used against him or her.

In contrast to this approach of prohibiting conduct broadly defined as "harassment" or following, in several US States (e.g. Michigan) and in each Australian jurisdiction, legislators have explicitly specified within the laws activities that constitute stalking. Prohibited acts in these jurisdictions consist of, but are not limited to:

- following the victim,
- loitering outside the place of residence of the victim or some other place frequented by the victim,
- keeping the victim under surveillance,
- entering or interfering with the victim’s property,
- giving offensive material or leaving such material for the victim to find,
- approaching or confronting the victim, or
- telephoning, sending letters or electronic messages to, or otherwise communicating with the victim.

It has been argued that those US States that specify prohibited activities within their stalking statutes are unlikely to fall to constitutional challenges on the basis of vagueness as potential stalkers are put on notice as to what behaviour is illegal (Walker, 1993). The doctrine of vagueness, which operates under the due process clause of the Fourteenth Amendment of the US Constitution, requires that legislation be written with sufficient clarity to enable a person of common intelligence to ascertain the boundaries of lawful conduct and behaviour (Thomas, 1993; Faulkner & Hsiao, 1994). The US Supreme Court held in Connally v General Constr. Co. (1926), that "a statute which either forbids or requires the doing of an act in terms
so vague that men of common intelligence must necessarily differ as to its application, violates the first essential of due process of law”. Thus, the creation of a new criminal offence must be sufficiently explicit to inform members of the community what conduct will render them liable to its sanctions. Conversely, many jurisdictions in the US and elsewhere have chosen not to specify those activities that constitute stalking for fear that courts will consequently limit prosecutions only to those behaviours so proscribed (National Institute of Justice, 1996), although this is yet to occur in any US appellate court.

In most jurisdictions, anti-stalking legislation requires the prohibited conduct to occur on two or more occasions. Several US States do not specify within their statutes the number of acts required to constitute stalking, referring instead to a “series of acts”, although US courts have interpreted this to mean acts performed on at least two occasions (e.g. People v. Heilman, 1994). Requiring as few as two prohibited actions to constitute the offence of stalking will undoubtedly assist the proscription of behaviour prior to an escalation to violence. This low threshold also increases the likelihood, however, that essentially inoffensive behaviours will be prosecuted as stalking (for example, maintaining on two occasions a ‘visual proximity’ to a person). Where these regulations become increasingly problematic is in those jurisdictions that do not specify the number of acts required to constitute stalking, nor provide any reference to a ‘course of conduct’ (e.g. Canada and several Australian States, including Tasmania and Western Australia). For example, although a defendant must ‘repeatedly’ follow or communicate with the victim according to the Canadian provisions, acts such as ‘watching and besetting’ are not explicitly qualified by the need for repetition. Consequently, a person may in theory be convicted of stalking if he or she performs a prohibited act on only one occasion. This signals a significant departure from all other anti-stalking laws, which distinguish the offence on the basis that it relates to a series of actions, as opposed to one act. The risk that inadvertent behaviour will be prosecuted as ‘stalking’ is greatly increased in these jurisdictions, although the requirement that specific intent must accompany the crime in these States may hopefully lessen misuse of the laws.
Intention

The role of the perpetrator’s intentions in the offence of stalking is one of the most controversial and vexed aspect of these laws. It is generally considered a prerequisite of the criminal law that, in order to obtain a conviction, the offender must have intended to commit the crime or have been reckless as to the consequences of their actions (Burke, 1976). Anti-stalking laws in Canada, Australia, the UK and in most US States require that the offender possess either the intent to harass or cause mental or physical harm to the victim, or rely upon a recklessness standard whereby the defendant should have known that their conduct would result in untoward effects such as harassment, apprehension or intimidation.

The requirement that an offender possess the intent to harass or harm a victim can raise profound difficulties with the offence of stalking. Many stalkers do not intend to harm or alarm; instead they may possess the, albeit misguided, intention to establish a relationship with the object of their attention. Despite their pursuit of the victim and the fear this elicits, if the requirement for a guilty intent is retained in the absence of any specific aim to harass or harm, such stalkers could not be convicted of an offence. A man in Western Australia was charged under the State’s anti-stalking law for repeatedly approaching and intruding on a woman he had met while repairing the photocopier at her workplace. Following this brief business contact, the man made repeated visits to the woman’s workplace and later to her home. These unwanted approaches persisted for over seven years and did not abate when the woman obtained a restraining order. When finally brought to court under the new anti-stalking laws, the Magistrate found the defendant not guilty on the basis that he did not believe the man had intended to intimidate or frighten the woman. The Magistrate in his judgement opined “I don’t think he was intimidating her, he was just being persistent. He was being like a little puppy dog wagging its tail” (The West Australian, 1996). That a significant proportion of stalkers suffer psychiatric conditions (e.g. erotomania or other delusional conditions; see Zona, Sharma & Lane, 1993; Mullen & Pathé, 1994; Harmon, Rosner & Owens, 1995;
In response to the difficulties that intention poses for the prosecution of certain stalkers, several jurisdictions in the US have adopted a minimum standard of intent. Anti-stalking legislation in at least 16 US States does not require proof that the defendant intended to cause fear, alarm or any untoward effect in the victim (see Office of Justice Programs, 1997). Instead, if the victim is subjected to behaviour considered likely to frighten or harm a reasonable person, then the crime of stalking has been committed. In these jurisdictions (e.g. Michigan), it is necessary only to demonstrate that the defendant intended to commit the act that caused the victim to fear. In effect, the victim's perceptions, reactions, vulnerabilities and sensitivities become the critical elements that define a stalking event, rather than the intentions of the defendant. We thus have a victim-defined crime which is virtually unique. The non-lawyer usually does not find such a proposition troubling, but lawyers, for very good reason, are often less sanguine about overturning one of the most venerable and central tenets of the criminal law.

The absence of traditional criminal intent requirements in several anti-stalking laws has been praised by victim advocates and prosecutors (see Saunders, 1998) for enabling the apprehension of most, if not all stalkers. However, in recognising that psychiatric illness may be relevant to the emergence and the prosecution of stalking behaviour, it is from a mental health perspective both poor practice and policy that few of these anti-stalking laws contain provisions requiring the psychiatric assessment and management of such offenders (see Fritz, 1995, for a review of mental health provisions within anti-stalking laws). If it is prevention, not mere punishment, that is to guide the progress of anti-stalking laws, then it is essential that such laws contain provisions for mandatory assessment and mandated treatment of offenders when indicated.
The Response of the Victim

The final requisite element in most anti-stalking laws is the reaction of the victim. In the US, the UK and Canada, anti-stalking provisions require that the victim suffer emotional distress or fear for their safety due to the actions of the stalker. This distress is usually assessed both subjectively (i.e. the victim must actually suffer emotional distress or fear) and objectively (employing the standard of what a “reasonable person” would be expected to experience). The inclusion of an objective standard of distress and suffering ensures that the offence is not wholly contingent on the vulnerabilities of each victim. In *State v. Bryan*, 1996, the Kansas appellate court found the State’s anti-stalking law unconstitutionally vague on the basis that it did not include objective guidelines to determine whether a stalker’s actions were alarming, annoying or harassing to the victim. The defendant successfully argued that the crime of stalking “depends on the sensitivity of the complainant”, a concept rejected by the appellate court, which subsequently interpreted the statute to include a “reasonable person” standard.

In contrast to the uniform requirement of a subjective and/or objective measure of the victim’s response in most jurisdictions, the majority of Australian laws are surprisingly vague in relation to this issue. For example, in New South Wales and the Australian Capital Territory the prosecution need not prove that the victim feared personal injury as a result of the defendant’s actions, thereby abandoning the need for a subjective or objective standard of harm. In the State of Victoria, the offence of stalking requires the subjective experience of physical or mental harm, but does not include an objective assessment of the response. In the remaining Australian States, although the laws specify that the offender must intend to cause harm or apprehension, they fail to elaborate regarding whether the victim must subjectively experience such an effect. In Australia therefore, most jurisdictions do not require stalking victims to experience any untoward effects as a consequence of their harassment. In contrast to anti-stalking legislation in other Western jurisdictions, Australian legislators have resolved that fear or harm should not be prerequisites to establish the offence of stalking, in order to ensure that resilient or otherwise
unaffected victims are not denied appropriate legal recourse.

**Associated Elements of Anti-Stalking Laws**

**Penalties**

The majority of anti-stalking laws provide a scale of offending, thereby enabling the prosecution of a range of offensive behaviours. In the US, most statutes proscribe misdemeanour and felony stalking offences, the latter invoked in those cases involving the breach of protective orders or the accompaniment of violence to the offence. The range of penalties for stalking in the US varies considerably, from a maximum of 12 months imprisonment for felony stalking in West Virginia to seven years for the equivalent offence in Illinois. In the UK, the summary offence of ‘harassment’ attracts a maximum of six month’s imprisonment, while the indictable charge of ‘putting people in fear of violence’ is punishable by up to five years imprisonment. These penalties are commensurate with those imposed for criminal harassment offences in Canada. In Australia, stalking is punishable by a maximum two to three years imprisonment for summary offences and up to five year’s imprisonment for indictable offences involving aggravation. In Victoria however, the maximum penalty for stalking is 10 years’ imprisonment, one of the most severe penalties imposed in the world. This is a peculiarly harsh sanction, given that Victoria does not provide a scale of offending or an objective measure of suffering, and ascribes the criminal responsibility of recklessness to the offence (Wiener, 1995).

**Exemptions or Defences against a Charge**

Given the potential for anti-stalking laws to intrude upon essentially legitimate behaviours, the majority of jurisdictions have framed their laws to include specific exemptions for those who can demonstrate their conduct was in the circumstances appropriate or lawful. In the UK, the Protection from Harassment Act does not apply to those persons who can demonstrate that their conduct was pursued for the purpose of preventing or detecting a crime, or whose behaviour under the particular circumstances can be proved...
‘reasonable’. Several Australian States similarly provide defences against the charge of stalking if it can be shown that the conduct was for the purposes of a genuine industrial, political or other public dispute, or was carried out as part of official duties related to the enforcement of the criminal law or the protection of public revenue.

The Californian anti-stalking law states that “constitutionally protected activity” is not included within the meaning of the statute and specifically exempts acts of stalking that occur during labour picketing. Other US States have similarly exempted lawful demonstrations, journalists, process servers and private detectives to ensure that selected members of the community who possess a legitimate purpose can lawfully conduct their business without fear of, or nuisance from, anti-stalking laws (although in our experience, one stalker purposefully obtained a private investigator’s licence in order to continue his harassment and surveillance of the hapless victim with impunity). What constitutes a legitimate or constitutionally protected activity, however, has been the subject of debate in US appellate courts, several States suffering the striking down of their laws on the basis of such terms as “legitimate purpose” being unconstitutionally vague (see Oregon vs. Norris-Romine/Finley, 1995; Starr vs. Eccles, 1995).

**Special Provisions**

To date, relatively few jurisdictions have extended their anti-stalking provisions to include novel elements that enhance their practical application or conversely limit their potential for abuse, most legislators relying on the critical elements of the original Californian law when drafting anti-stalking legislation. Several jurisdictions, however, have included exceptional provisions within their laws which are worth noting. For example, the South Australian State Government framed its anti-stalking law to include a ‘double jeopardy’ protection clause in order to address the legislation’s potential for misuse and abuse. This provision states that:

(a) a person who has been acquitted or convicted on a charge of stalking may not be
convicted of another offence arising out of the same set of circumstances and involving a physical element that is common to that charge, and

(b) a person who has been acquitted or convicted on a charge of an offence other than stalking may not be convicted of stalking if the charge of stalking arises out of the same set of circumstances and involves a physical element that is common to the charge of that other offence.

Thus, an offender cannot be convicted of stalking if the series of acts were related to, and part of, another offence (e.g. a paedophile convicted of sexual assault cannot also be prosecuted for stalking, if following and surveillance were related to the preparation for the assault). Similarly, an offender convicted of stalking cannot also be prosecuted for trespass, for example, if this occurred during the commission of the offence. The South Australian Government included these provisions to ensure that the offence of stalking is not used to “load up” an indictment in cases where a series of crimes have been committed (Goode, 1995). Unfortunately, this feared ‘loading up’ is occurring in many Australian States, with initial sentencing statistics indicating that stalking is infrequently the principal charge brought against an accused. For example, in Victoria, the charge of stalking was most often included in a series of offences against defendants. Only in less than a third of cases was stalking the principal (i.e. most serious) charge for which a defendant was sentenced (Department of Justice, 1997, 1998). This loading up is occurring with suspected paedophiles in particular being charged with stalking, probably at least in part because in the State of Victoria the maximum sentence for stalking may be far higher than that for substantial sexual offences of, for example, indecent exposure or indecent assault. The inclusion of such protection clauses as that developed by the South Australian Government appears warranted in all anti-stalking laws, as such provisions help ensure that stalking is recognised and, more importantly, treated as a serious offence, rather than a useful adjunct to augment a case against a disliked offender.
In the UK, legislators included special provisions within the Protection from Harassment Act to link claims for civil damages and court-initiated restraining orders to the criminal offences contained within the law. For example, any breach of the Protection from Harassment Act may become the subject of a claim in a civil proceeding by the victim, whereby damages may be awarded for any anxiety and financial loss caused by the harassment. Furthermore, a person convicted under the Act may be subject to a court imposed restraining order that prohibits the defendant from further engaging in their harassing activities. If the defendant continues a prohibited course of conduct with this order in effect, he or she is liable to a maximum of five years imprisonment, a not insignificant incentive for some stalkers to desist. The provision of court-initiated restraining orders eliminates several difficulties encountered with the traditional victim-initiated system, such as the lengthy and potentially dangerous delays between application for a protective order and hearing, the expense of petitioning the court, and the victim incurring the wrath and resentment of the perpetrator for initiating legal intervention. The linking of civil provisions to the criminal offences in the Protection from Harassment Act should offer a reasonable deterrent for those who continue to flout the law, while affording the victim earlier intervention if harassment persists, and enabling compensation for any loss and suffering. The recognition by legislators in the UK that a range of remedies is required to adequately address this form of offending is also welcomed.

**Discussion**

In less than a decade, a new category of offending has been established in many Western countries. The categorisation of stalking as a criminal offence has been a swift and contentious exercise. By no means a new behaviour, stalking rapidly came to be perceived as a new and increasingly prevalent antisocial behaviour. Such beliefs gain considerable currency in those societies with ‘law and order’ agendas that value governments which are seen to be tough on crime and sensitive to the needs of victims. The criminalisation of stalking is a natural extension of such cultural beliefs and legislative agendas. Although the option of modifying and strengthening existing anti-harassment laws was available, legislators in each
country instead chose the popular response to prohibit this form of behaviour through specific anti-stalking legislation. Between 1990 and 1993, each US State and Canada enacted laws or amended existing statutes to criminalise stalking. Australia followed soon thereafter with the introduction of anti-stalking legislation in each State and territory between 1993 and 1995. The speed with which these laws were enacted is noteworthy given that the problem of stalking was well entrenched in these Western societies. The cumulative effect of lobbying by the women’s movement and domestic violence groups was undoubtedly instrumental in demonstrating the need for laws to address violence against women. However, feminist critics argued that the “speedy criminalisation” of one aspect of this problem was a knee-jerk reaction that served public relations imperatives for governments, as opposed to any desire to address systemic violence in society (Way, 1994). The observation that politicians, as public and often reviled figures, frequently draw the attention of disgruntled and deluded stalkers also has not escaped critics trying to explain the rapid response to stalking. However, the haste with which these laws were conceived and enacted has increased the likelihood that they may infringe constitutionally protected activities (several US States, including Massachusetts, Texas, Oregon and Kansas, having already suffered the striking down or amendment of their legislation; see for example Commonwealth v. Kwiatkowski, 1994; Oregon v. Norris-Romine/Finley, 1995; Long v. The State of Texas, 1996), as well as increased the probability that inadvertent or inoffensive behaviours may be prosecuted as ‘stalking’.

The other notable aspect of anti-stalking laws is their lack of uniformity. Stalking as a criminal offence varies considerably both within and between countries. Whereas California requires a stalker to intend to cause distress to the victim and pose a credible threat to their safety, in Michigan it is the perceptions and the reactions of the victim to a course of conduct that define whether stalking has occurred. Emphasising the responses of the victim of stalking ensures greater enforcement of anti-stalking laws, yet this is largely at the expense of traditional elements of culpability, any compromise of which may increase the likelihood that inadvertent behaviours are seen as stalking. Furthermore, while most laws require the stalker’s
unwanted conduct to occur on two or more occasions to demonstrate a 'continuity of purpose' to harass (a surprisingly limited proscription in order to establish such a malevolent objective), in Canada and several Australian States, the qualification of repetition of prohibited acts is largely absent, thus enabling the prosecution of an accused on the basis of only one unwanted contact.

Despite these limitations, anti-stalking laws undoubtedly filled a gap in the criminal and civil law that previously permitted effective intervention only after a harasser had caused physical harm to the victim and that largely ignored the enormous potential harm inflicted by inducing persistent fear and apprehension in the victim. Whether these laws prove sufficient to effectively prevent and punish stalking is questionable. Stalkers vary considerably according to their motivations, their psychiatric status and their response to management (Mullen et al, 1999). Laws that fail to include a range of remedies to address this variation are unlikely to offer an effective solution. With the exception of a handful of US statutes, most laws have failed to consider the value of including mental health evaluations and intervention as part of the sentences imposed on convicted stalkers. Whether anti-stalking laws prove effective may ultimately depend not only on the motivations and psychiatric status of the offender, but the willingness of the criminal justice system to view the offence seriously (Abrams & Robinson, 1998).

The public often looks to the criminal justice and legal systems to prohibit and punish antisocial behaviour, yet there are limits to what the law can do to help protect victims and prevent unwanted forms of conduct. It remains to be seen whether anti-stalking laws in their current form will prove an effective remedy to the problem of stalking, and, in many jurisdictions, in what form these controversial laws will eventually survive.

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