

STALKING: INTERVENTION ORDERS

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Introduction: Aims

In this paper we explore a particular feature of selected anti-stalking legislation: the creation of intervention orders as a means (independently of, conjointly with, or subsequent to, criminal proceedings for stalking) of regulating stalking behaviour. We intend to:

- a) briefly review salient features of selected anti-stalking legislation
- b) consider the rationale for, and characteristics of, intervention orders for this purpose
- c) consider in some detail the particular provisions that apply in Victoria
- d) analyse the utilisation of anti-stalking intervention orders in one problematic category of disputes: disputes between neighbours
- e) evaluate the utility of intervention orders for this type of dispute.

In Every Australian State and Territory

The first Australian state to introduce (but not to pass) anti-stalking legislation was South Australia. In the midst of a State election campaign, the Attorney General of South Australia introduced the *Criminal Law Consolidation (Stalking) Amendment Bill* which made it an offence for a person to, on at least two occasions, harass a person with the intention of causing him or her to fear for his or her life or cause mental harm, apprehension or fear; the bill was finally passed in 1994. Before it had passed, however, Queensland had already introduced its own form of anti-stalking legislation. Subsequently, similar legislation has been introduced in every other Australian State and Territory.¹ Thus, within a period of 3 years, each jurisdiction in Australia passed anti-stalking legislation. Related legislation has been enacted in New Zealand and the United Kingdom² and in every state in the USA, all within a decade. The popularity of this type of legislation and the speed with which it has been enacted in the various jurisdictions suggest that a crisis in the legal regulation of violence and harassment was identified,³ that political opportunism was high⁴ and that high profile cases of disastrous outcomes of stalking⁵ created a moral panic in which anti-stalking legislation could be introduced with high levels of popular support and (almost) universal political endorsement.

1 . Criminal Code Act 1899 (Qld) ss.359A; Crimes (Domestic Violence) Act 1993 (NSW) s.562A(1); Criminal Code Act 1997 (NT) s.189; Criminal Code Amendment Act 1994 (WA) ss. 338D & E; Crimes Act 1900 (ACT) s.34A; Criminal Code Act 1924 (Tas) s.192; Crimes Act 1958 (Vic) s.21A; Criminal Law Consolidation Act 1935 (SA) s.19, s.19AA.

2 . Protection from Harassment Act 1997.

³ . A national Australian survey of women conducted after anti-stalking legislation was introduced in every State and Territory that 15% of the women surveyed had been stalked at some time in their life and 2% had been stalked within the previous 12 months. In over half (57%) of the cases the women did not inform police, although one-third (32%) feared for their safety (Women's Safety Australia, 1996). A similar national survey of 8,000 men and 8,000 women in the USA reported that lifetime stalking victimisation was significantly higher for women (8%) than men (2%). These differences also persisted for victimisation in the 12 months preceding the survey: women (1%); men (0.4%). The notably different rates of incidence and prevalence of stalking victimisation in the two countries have not yet been explored.

⁴ . As previously noted, in South Australia anti-stalking legislation was developed in the midst of an election campaign which strongly featured 'law and order' issues and in Victoria the Attorney General emphasised that the legislation was part of the government's campaign to 'get tough' on crime. The same process has been noted in Canada (Way, 1994).

⁵ . For example, the case of Andrea Patrick - a young woman who was killed by a partner against whom she had taken out an apprehended violence order only days before - was extensively reported in the media in NSW and nationally.

Anti-stalking legislation was justified on the basis of perceived need and inadequacy of existing legal mechanisms.⁶ General legal remedies that existed prior to the legislation were deemed inadequate: sometimes because they were not adequately utilised⁷, sometimes because they did not cover the scope or nature of stalking behaviour.⁸ Thus, when the anti-stalking amendments were introduced in to the Victorian parliament, at the second reading speech the Minister justified the creation of the legislation on the basis that it was remedying a gap in the existing criminal law which did 'not adequately provide protection' for victims of stalking (Coleman, 1994: 1384).

Anti-Stalking Orders⁹

In reference to stalking, disproportionate attention has been directed to criminal offences (which are relatively infrequent) and considerably less attention has been directed to civil remedies (which are very frequent).

In a number of jurisdictions there are, in addition to the criminal offence of stalking, civil mechanisms in the form of injunctions designed to prevent stalking behaviour. Reference to selected anti-stalking legislation in Australia, the UK and the USA reveals:

- **Australia:** In all States and Territories, stalking has been criminalised; the form of the legislation varies, but typically lists behaviours that may constitute stalking. In addition to the criminal offences of stalking, intervention orders (or similar) are specifically available in some jurisdictions in relation to stalking (e.g. Victoria¹⁰), or may be available (dependent on relevant legislative provisions and the form of the stalking behaviour) under more general provisions, in other jurisdictions (e.g., NSW, Tas,¹¹ WA¹² and SA¹³). Consideration of the Victorian legislative provisions will be addressed later in this presentation.
- **UK:** The *Protection from Harassment Act 1997* (UK) introduced five means of regulating harassment:
 - The Act introduced two *criminal offences*: the offence of making another person fear that violence will be used against them,¹⁴ and the lesser offence of harassment.¹⁵

⁶ . In the UK, prior to the introduction of the *Protection from Harassment Act 1997*, civil injunctions had been granted to prevent the repetition of harassment ,and the criminal courts had, in some cases, equated severe psychological harm to bodily harm, thereby extending the range of remedies available to victims of stalking. However, the government persisted with the introduction of anti-harassment legislation on the basis that the scope of recent common law reforms was unclear and that the introduction of the legislation would provide victims with greater certainty (see the second reading speech of the Lord Chancellor (Lord Mackay of Clashfern), House of Lords, 24 January 1997, p.1).

⁷ . For example, existing legislation in NSW had some of the features of 'anti-stalking' statutes. s.545B of the *Crimes Act 1900 NSW* prohibits intimidation or annoyance by violence or otherwise and specifically prohibits watching, besetting or following another. However, this section has traditionally been used in relation to alleged intimidation by unions and pickets and has not hitherto been greatly utilised in other matters. Additionally, the penalties were not significant (imprisonment for 6 months, fine of \$500, or both).

⁸ . For example, it has been argued that although many acts that are now prosecuted as harassment offences in the UK might previously have been separately prosecuted as public order or criminal damage offences, the advantage of prosecuting for the single offence of harassment is that 'it allows the court to hear the entire catalogue of incidents, the evidence for which may be weak individually but strong collectively' (Women's Aid Federation of England, 2000b, pp1-2).

⁹ . It should also be noted that, although not the focus of this paper, injunctions against stalkers may also be granted at common law on the basis of the principles set out in *Burris v Azadani* (1995).

¹⁰ . *Crimes Act 1958* (Vic) s.21A.

¹¹ . *Justices Act 1959* (Tas) s.106B(1)(d) & (4B)(c).

¹² . Dependent on the behaviour of the offender, two types of restraining order may be available to a victim of stalking in WA under the *Restraint Orders Act 1997*: violence restraint orders (part 2);and misconduct restraint orders (part 3).

¹³ . In South Australia, essentially three types of restraining order may be used in relation to stalking behaviour: 'General' restraining orders issued under the *Summary Procedures Act 1921*; Domestic Violence Restraining Orders issued under the *Domestic Violence Act 1994*; and Paedophile Restraining Orders issued under the *Summary Offences Act 1921* s.99AA.

¹⁴ . This serious offence is triable either as a summary or indictable offence and the penalty is a fine and up to 5 years imprisonment (*Protection from Harassment Act 1997*, s.4).

- Additionally, if an offender has been convicted of one or both of these criminal offences a court can make a *restraining order* against the offender to stop the threats or harassment continuing.¹⁶
- Created a *civil tort* of harassment.
- Created a *simplified process for obtaining a civil injunction against an offender*.¹⁷

It should be noted that, apart from these statutory provisions, a person could seek an injunction from a civil court to put a stop to harassment. Breach of an injunction is an arrestable criminal offence that carries a maximum penalty of 5 years imprisonment and/or an unlimited fine.

USA: injunctions against stalking behaviour are available in 23 states.¹⁸ In the remaining 27 states, the District of Columbia, Puerto Rico and the Virgin Islands, stalking may be enjoined as an element of a protection order issued against domestic violence of abuse (Dept. of Justice, 1998).¹⁹

The Incidence and Significance of Stalking Intervention Orders

A notable feature thus far in jurisdictions where anti-stalking intervention orders are available has been the reliance on such intervention orders as the primary method of the legal regulation of stalking behaviour. The use of criminal sanctions occurs, in these circumstances, far less frequently. This point will be further discussed when the Victorian data is considered.

Some Key Features of Anti-Stalking Legislation

The following features characterise much of the anti-stalking legislation:

- This legislation is designed, in part, to regulate the behaviour of persons who may have a mental disorder or impaired reasoning. In some jurisdictions, in order to give efficacy to the legislation, the normal criminal law requirement of *mens rea* has been significantly diluted. Thus, the Victorian legislation specifically states that a person will have the relevant criminal intention if, in all the particular circumstances, that person should have realised the effects of his/her behaviour, although of course (by definition) he or she did not. The aim of legislation that includes this type of provision is to shift the emphasis from the subjective harmful intent of the alleged offender, which may be difficult to prove, to what actually happens and its effect on the victim. Thus, the provision of an objective, or a non-subjective, element of intent is designed to capture stalkers who may *not* have an intent to cause fear, apprehension etc, (e.g., those who are besotted with their victims) and claim that they have no intention of harassing them or causing them harm.

¹⁵ . This lesser offence is tried in the Magistrates Court and the penalty is fine and/or a maximum of 6 months imprisonment (*Protection from Harassment Act 1997*, s.2).

¹⁶ . s.5 permitted a complainant in Wales and England to obtain a restraining order against a person who had been convicted of a stalking offence. Similar provisions operated in relation to non-harassment orders in Scotland (*Criminal Procedure (Scotland) Act 1995* s.234A). There was no time limit on the maximum duration of the order and breach of the order may have resulted in fine and/or imprisonment. These orders were replaced by antisocial behaviour orders under the *Restraining and Protecting Orders Act 1999*, ss.1(5)(a) & (b)(ix) & s.3.

¹⁷ . Von Heussen (2000) claimed that the simplified process for obtaining an injunction in the UK created 'an unprecedented bridge between civil and criminal actions'. The insertion of this provision in the UK act was meant to aid victims of harassment by not requiring them to go through a separate action in a civil court to gain an injunction to prevent further harassment.

¹⁸ . For example, in Arizona a person may apply for an injunction against harassment to prevent another person seriously alarming, annoying or harassing them and causing them substantial emotional stress. The actions must be such that a reasonable person would suffer substantial emotional stress and must be performed without legitimate purpose. If granted, the injunction is in effect for one year. An order of protection is available in circumstances where there has been a prior specified relationship between the parties (e.g., current or former spouse, a relative or a spouse's relative etc).

¹⁹ . For example, in Nebraska two types of protection orders are available: a domestic violence protection order and a harassment protection order. Eligibility for the orders differs and each order seeks to regulate different forms of abuse (see *Nebraska Revised Statutes* §42-903, §42-924-42-931, §29-404.01-29-404.03, and §28-311.02-28-311.10).

- These statutes typically specify that stalking is constituted by a *series of acts* that may not be illegal as separate incidents but which may constitute a *course of conduct* that harasses and intimidates a victim. This can be contrasted with the general provisions of the criminal law which typically specify an isolated criminal act as the *actus reus* (Martinez, 2000).
- Stalking behaviour is criminalised; a criminal offence of stalking has been created.
- Intervention orders (sometimes called restraining orders, apprehended violence orders, anti-harassment orders etc) have been introduced as another strategy to regulate the behaviour of alleged stalkers. As previously noted, intervention orders (or similar) to restrict stalking behaviour are available to varying degrees in most States and Territories in Australia, in the UK and the USA. In some jurisdictions these orders can be obtained in the absence of any criminal conviction against the alleged stalker. Thus, the relevant legislation provides that these remedies can be invoked independently of, or conjointly with, criminal proceedings. In the UK, under the *Protection from Harassment Act 1997*, the equivalent of a stalking intervention order can only be made as part of a sentencing disposition after a defendant has been found guilty of the criminal offence of harassment.
- The anti-stalking legislation in many ways complements and broadens previously introduced legislation, such as the *Crimes (Family Violence) Act* which prohibited causing personal injury, or engaging in threatening, harassing or offensive behaviour to persons in an eligible intimate relationship (usually including spouses, former spouses, children etc). Much anti-stalking legislation does not require any particular prior relationship between victim and defendant.

Why Intervention Orders?

The major aim of stalking intervention orders is the regulation of future behaviour, including possibly more serious stalking behaviour.²⁰ Stalking intervention orders can involve significant restrictions on the liberty of a person with drastic criminal consequences for a breach of the order.²¹ Hence the orders are made against a backdrop of the criminal law of stalking (or harassment). The prediction of future behaviour is based, in significant measure, on the proof of past and present stalking behaviour.

Several other justifications have been offered to justify the strategy of introducing intervention orders to regulate criminal behaviour:

1. ***The regulation of anticipated harm.*** There has been considerable discussion about how to protect the public from the predicted future criminal behaviour of certain persons. Those from Victoria, for example, will remember the furore about Gary David and the concerns about the use of the criminal law to restrain a person on the basis of anticipated criminal wrongdoing rather than past criminal behaviour. The introduction of intervention orders in stalking legislation is another facet of this debate. The strategy here has been to avoid some of the controversies by effectively creating a hybrid of the criminal and civil laws in the restraining/harassment orders in circumstances where the anticipated future harm has an identifiable victim (the victim of stalking/harassment).²² Thus we have the emergence of a civil/criminal law hybrid as another strategy for dealing with anticipated future criminal wrongdoing.

²⁰ . For example, when the *Protection from Harassment Act 1997* was introduced in the UK the Lord Chancellor stated that 'The Government believes that victims should be able to seek the protection of the criminal law at an earlier stage, before the harm inflicted on them reaches such a serious level'

²¹ . In Victoria, an initial breach of an intervention order can incur a maximum penalty of 240 penalty units (\$24,000) or two years imprisonment or both, with subsequent breaches stated as incurring a maximum penalty of 5 years imprisonment: *Crimes (Family Violence) Act 1987* s.22.

²² . This issue was addressed most explicitly by the Lord Chancellor in England who commented that the availability of anti-harassment orders under the UK legislation 'gives the criminal courts in these specific circumstances a new sentencing power that is similar in its extent to a civil injunction.'

2. ***Mentally impaired individuals:*** Intervention orders are seen to be appropriate where the offender had some form of mental impairment and may not thereby have satisfied the elements of the criminal offence. Thus, when the stalking legislation was introduced into the Victorian parliament, it was suggested that the ability to make intervention orders under the new legislation enabled courts to provide protection for stalking victims where the alleged offender had an intellectual disability and may not therefor be criminally culpable (Victorian Parliamentary Debates, Assembly, Wednesday 16 November 1993, p.1895. This position is of doubtful legality since a pre-condition to the making of a stalking intervention order in Victoria is the proof, albeit on the civil standard, of the offence of stalking.
3. ***Reluctance to involve the police:*** It has been suggested that these orders present an option for victims of stalking who are reluctant to contact the police, for example in situations where they know the stalker (Addison, 2000).
4. ***Motivation of the stalker:*** It has also been suggested that where 'love or compassion' motivate the stalker, the solution may require a civil injunction rather than a criminal prosecution (Jepson, 1998), although the suggestion seems to be underpinned by the unwarranted assumption that this type of stalker is less harmful to the victim.

The Significance of Anti-Stalking Intervention Orders

As previously noted, available data indicates that, where dual strategies for legally processing stalking exists, intervention orders have become the primary legal strategy for the management of stalking disputes, both in Australia and the USA. For example, a national survey in the USA reported that just under a quarter (24%) of the victims of stalking surveyed sought some form of protective or restraining order against their stalker, compared to only 12% who reported that their stalker had been criminally prosecuted (Dept. of Justice, 1998).²³ Data from a survey of police officers in the ACT also supports the significance of intervention orders in stalking disputes: the majority of police officers surveyed indicated that they preferred to act under civil domestic violence legislation in cases of 'domestic stalking', either alone or in conjunction with anti-stalking legislation (Pearce & Easteal, 1999). The evidence in Victoria presents the same picture, with far more stalking intervention orders than criminal prosecutions for stalking.

Stalking: The Law in Victoria

Stalking intervention orders were introduced into Victoria some years after the establishment of family violence intervention orders under the *Crimes (Family Violence) Act*. Stalking intervention orders were tacked onto the existing family violence intervention orders and adopted most of their procedure. A brief account of the crime family violence intervention order is needed to put the stalking intervention order into some context.

Family Violence Intervention Orders

The *Crimes (Family Violence) Act* 1987 states that one of its main purposes is to 'provide for intervention orders in cases of family violence.' (Section 1). Under the legislation there are two main conditions for the making of an intervention order. These are:

- (a) the relationship between the applicant (aggrieved family member) and the defendant ; and
- (b) the behaviour alleged.

²³ . see fn 1.

(a) The relationship between the applicant and the defendant.

The applicant must have one of the following relationships with the defendant:

- be a spouse or former spouse (married or de facto) of the defendant
- have or have had an intimate relationship with the defendant
- be a relative of the defendant
- be or have been ordinarily a member of the household of the defendant.

(b) The behaviour alleged

Under section 4 of the Act the court can make an intervention order only if satisfied on the balance of probabilities that the defendant:

- (i) has assaulted the applicant or damaged the property of the applicant and is likely to again assault the applicant or damage the applicant's property; or
- (ii) has threatened to assault or cause damage to the property of the applicant and is likely to assault or cause damage to the property of the applicant; or
- (iii) has harassed or molested the applicant or has behaved in an offensive manner towards the applicant and is likely to do so again.

The Nature of the intervention order

The Court has a wide discretion as to the nature of the intervention order it may make. Section 4 (2) of the Act states that 'the order may impose any restrictions or prohibitions on the person that appear necessary or desirable in the circumstances to the court'.

Section 5 of the Act emphasises the breadth of this discretion. Section 5 states in part:

5. (1) Without limiting the generality of section 4, an order may do all or any of the following:-

- (a) prohibit or restrict approaches by the defendant to the aggrieved family member including prohibiting the defendant from approaching within a specified distance from the aggrieved family member; or
- (b) prohibit or restrict access by the defendant to premises in which the aggrieved family lives, works or frequents and such an order may be made whether or not the defendant has a legal or equitable interest in those premises;
- (c) prohibit or restrict the defendant from being in a locality specified in the order;
- (d) prohibit the defendant from contacting, harassing, threatening or intimidating the aggrieved family member;
- (e) prohibit the defendant from damaging property of the aggrieved family member;
- (f) prohibit the defendant from causing another person to engage in conduct restrained by the order;
- (g) direct the defendant to engage in prescribed counselling;
- (h) revoke any licence, permit or other authority to possess, carry or use firearms.

The powers granted to the court include the removal of a person from his or her house and great restrictions on where that person can go. It is a very large discretionary power.

Moreover, the duration of an intervention can be for a specified period or for an indefinite period (section 6). It should also be noted that an intervention can be granted even when the conduct complained of does not amount to a criminal offence. The most obvious limitation of the legislation is its restriction to persons who are in specified relationships.

Intervention orders under the *Crimes Family Violence Act* have proved popular in Victoria. For the financial year 1998/99 15,019 original intervention orders were made. Further, during the same period, 1,148 applications for intervention orders were dismissed, 5,553 struck out, and 3,853 withdrawn and 14 revoked. In addition to the original orders made, a further 1,457 intervention orders already in existence were extended or varied. (Magistrates' Court of Victoria, *Annual Report 1 July 1998 - 30 June 1999*, p.30).

Stalking Intervention Orders

The criminal offence of stalking and stalking intervention orders are established by section 21A of the *Crimes Act 1958*. Section 21A creates and defines the offences of stalking and further provides that a court, if satisfied that a person has stalked and is likely to continue to do so or to do so again, may make an intervention in respect of that person as if that person fell within the provisions of the *Crimes (Family Violence) Act*.

Section 21A provides:

(1) A person must not stalk another person.

Penalty: Level 5 imprisonment (10 years maximum).

(2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct that includes any of the following:

- (a) following the victim or any other person;
- (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or any other person;
- (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;
- (d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);
- (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
- (f) keeping the victim or any other person under surveillance;
- (g) acting in any other way that could be reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person - with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person and the course of conduct engaged in actually did have that result.

(3) For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if that offender knows, or in all the particular circumstances that offender ought to have understood, that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.

(4) This section does not apply to conduct engaged in by a person performing official duties for the purpose of –

- (a) the enforcement of the criminal law; or
- (b) the administration of any Act; or
- (c) the enforcement of a law imposing a pecuniary penalty; or
- (d) the execution of a warrant; or
- (e) the protection of the public revenue -

that, but for this sub-section, would constitute an offence against sub-section (1).

(5) Despite anything to the contrary in the *Crimes (Family Violence) Act 1987*, the Court within the meaning of that Act may make an intervention order under that Act in respect of a person (the defendant) if satisfied on the balance of probabilities that the defendant has stalked another person and is likely to continue to do so or to do so again and for this purpose the Act has effect as if the other person were a family member in relation to the defendant within the meaning of that Act if he or she would not otherwise be so.

The following comments can be made about this legislation:

1. Stalking is a serious offence. It is an indictable offence carrying a maximum of 10 years imprisonment.

2. The offence of stalking contains three essential elements:

- (i) the conduct of the offender;
- (ii) the effect of the offender's conduct on the victim; and
- (iii) the intention (or imputed intention) of the offender.

(i) the conduct of the offender

The conduct that can constitute stalking is very broadly drawn. The major limitation is the requirement of 'a course of conduct' and this has been interpreted to include a single, prolonged activity (*Gunes v Pearson* (1996) 89 A Crim R 297).

(ii) the effect on the victim

Apart from causing physical or mental harm, it is sufficient if the course of conduct causes 'apprehension or fear in the victim for his or her safety or that of any other person'. The word 'apprehension' is not defined, but presumably means a state of mind less serious than that of fear - real anxiety, perhaps.

(iii) the intention (or imputed intention) of the offender

The prosecution must prove that the offender intended to cause the victim mental or physical harm or an apprehension or fear for his or her safety or that of any other person. However, this element can be established in two other ways. Firstly, by proving that the offender was 'reckless' in that he or she knew that his or her behaviour was likely to cause such harm or arouse such apprehension or

fear. Finally, and most controversially, the element of intention can be established if the prosecution proves that the offender in all the particular circumstances of the case should have understood (but did not) that his or her behaviour would be likely to cause such harm or arouse such apprehension or fear. In other words, a person can be guilty of this offence even though he or she did not intend to cause the victim harm or apprehension or fear and did not realise that his or her conduct was likely to have that result. Simple negligence will suffice. For an offence where many of the alleged offenders may be psychiatrically impaired, this is a highly dubious approach.

The potential scope of the offence

This offence can extend to conduct well beyond stereotypic stalkers who are jealous, obsessively attached or delusional about some other person. Furthermore, there is a comparatively low threshold of harm required and the mental element can be imputed to an alleged offender when it can't be actually proved. Moreover, the offence as defined does not contain, as do many other offences, the phrase 'without lawful excuse'. Sub-section 4 of the section excludes from the offence a very limited number of person and actions. Otherwise, the legislation does not provide any general defence of 'lawful excuse' (hence the provisions may apply to union picketers, intrusive journalists and photographers, and particular situations where there is some ongoing, disharmonious contact, e.g. disputes between neighbours).

Stalking Intervention Orders

- (a) A precondition for a stalking intervention order is the proof on the balance of probabilities of the criminal offence of stalking and the further proof of the likelihood of the stalking continuing or starting again.
- (b) There is no restriction in terms of the relationship between victim and offender
- (c) Stalking can occur between persons who are family members as defined in the *Crimes (Family Violence) Act*.
- (d) The Court has the same very wide discretion with regard to the conditions of a stalking intervention order as it has for an order under the *Crimes (Family Violence) Act*.

The Process of Obtaining a Stalking Intervention Order in Victoria

In the majority of cases the complainant (typically the person who alleges that she/he is a victim of stalking or, less frequently, a police officer²⁴) makes application to the court to have an intervention order issued. The registrar then prepares a complaint. In some cases of urgency, an *ex parte* order can be issued; on the return date of the summons the matter proceeds as a civil hearing.

²⁴ . A Registrar, Crimes Family Violence, at the Magistrates Court where the empirical study is being conducted, estimated that 95% of applicants for stalking intervention orders to that court apply in person and have been directed to the court by the police. Typically, these complainants report that they have been advised that the police were unable to take any action on the matter complained of.

Stalking Intervention Orders: Victorian data²⁵

Stalking intervention orders first became available in Victoria in 1995. Since their introduction, applications have increased dramatically from 1,397 in 1995/96 (the first full year for which data are available) to 4,203 in 1997/98: an increase of just over 200% in just two years [figure 1]. Information available for the financial years 1995/96 and 1996/97 provides data on the gender and age of the complainants and defendants and is remarkably consistent across the two years.

Financial year 1995/96

As noted, in Victoria, stalking intervention orders are made very frequently. For the financial year 1995-96, in Victoria there were 1,397 applications for final intervention orders dealt with under stalking provisions in the Magistrates and Children's Courts. Nearly two-thirds (65%) of these applications involved female complainants and 41% of cases involved female defendants.

The most common patterns were (victim-defendant):[figure 2]

- female -male (34%)
- female - female (31%)
- male - male (25%)
- male - female (10%)

Of the 1,397 applications, 880 (63%) orders were granted, with the remainder being struck out, withdrawn or dismissed (Dept. of Justice, 1997).

By way of comparison, in the same time period, Victoria Police recorded a total of 380 stalking offences, of which 70% were cleared.

In 1995 there were 72 stalking charges finalised in the Magistrates Court, of which 32% were proven, with the remainder dismissed or struck out (Dept. of Justice, 1997).²⁶ Additionally, a further 8 stalking charges were finalised in the Higher Courts in that year (Dept. of Justice, 1998).

Financial year 1996/97

In 1996-97, there were in Victoria 2,711 applications for stalking final intervention orders, an increase of 94% over the previous year. Females were complainants in nearly two-thirds (65%) of cases and defendants in 39% of cases (figures that are almost identical to the previous year). Additionally, the overall gender distribution of complainants-defendants is also similar to the previous year:

Female victim - male stalker: 34% (927)

Female victim- female stalker: 31% (853)

Male victim- male stalker: 26% (707)

Male victim - female stalker: 8% (224)

²⁵ Inspection of similar data for South Australia for the two-year period 1995-1996 demonstrates similar trends. Nearly four thousand (3,828) restraining orders were sought in that State in that period, of which more than half (64%) were issued. This contrasts with the relatively small number of criminal stalking cases that were finalised in the same period (29) (Marshall & Castle, 1998), further substantiating the claim that the legal processing of stalking in Australia is overwhelmingly by means of intervention orders rather than criminal prosecutions.

²⁶ For the same period in the Magistrates' Court overall outcome rates for criminal cases finalised were 78% proven outcomes (found guilty), with remaining charges being dismissed, struck out or discharged: Statistics of the Magistrates' Court of Victoria, 1998/99.

Arising from these applications, 1,597 (59%) final intervention orders were granted, with the remainder being struck out (20%), withdrawn (12%) or dismissed (9%) (Dept of Justice, nd). (see figure 3). As with data for the previous year, this demonstrates a quite high failure rate for these applications, but one which is similar to the failure rate for general applications for intervention orders under the *Crimes (Family Violence) Act*.

Again, by way of comparison, for the same time period Victoria Police recorded 693 offences of stalking. In 1996, 199 charges of stalking were finalised in the Magistrates Court, with 51% of charges being proven and the remainder being dismissed or struck out (Dept. of Justice, 1998).²⁷ Additionally, a further 5 stalking charges were finalised in the higher courts in that year (Dept. of Justice, 1998).

Who are Taking Out the Stalking Intervention Orders? Who are the Defendants?

Analysis of data for both the years considered reveals that females were complainants in nearly two-thirds of cases and defendants in about 40% of cases (figures that are almost identical to the previous year). The most common gender patterns revealed in these applications are (in decreasing frequency) males stalking females, females stalking females, males stalking males and females stalking males. Overall, about 61% of these applications for final orders were granted (i.e., a failure rate of 39%). In this time period there were 1.7 times more applications for stalking final intervention orders in Victoria than criminal offences of stalking recorded by the Victorian police.

There is some evidence that a considerable proportion of these applications and orders relate to neighbourhood disputes rather than to other, more paradigmatic stalking behaviour.

Stalking Intervention Orders and Disputes between Neighbours: Some Empirical Data

Anecdotal evidence suggests that many applications being brought under the stalking intervention orders provisions refer to disputes between neighbours in Victoria. To investigate this possibility, data pertaining to all applications for stalking intervention orders that came before a selected Melbourne metropolitan Magistrates Court for the year 2000 are being examined.

In the ten month period January - October (inclusive), 397 applications were made for stalking intervention orders, generating an average of 40 applications per month (varying from a low of 26 to a maximum of 59 per month). [see figure 3]

February 2000

More detailed analysis was conducted on applications for stalking intervention orders for a single month (February). During that month, 47 applications were made for a stalking intervention order, of which 11 (24%) related to disputes between neighbours (figure 4). Obviously, with such a small sub-sample of cases, we offer only some observations that will subsequently be explored with a larger subset of cases.

In the sub-category of stalking orders involving neighbours, the complainant was more frequently female and the defendant was most commonly male; no applications in this category involved a complaint by a male applicant against a female defendant. Consistent with the fact that these matters typically involved home owners, the age distribution of complainants was skewed towards those aged 41-50 years, while defendants were younger (more frequently in the 21-30 years age group).

²⁷ . Again, for the same time period in the Magistrates' Court overall outcome rates for criminal cases finalised were 80% proven outcomes (found guilty), with remaining charges being dismissed, struck out or discharged (Statistics of the Magistrates' Court of Victoria, 1998/99).

In 6 of the 11 cases a final intervention order was *not* granted (i.e., a failure rate of 55%). In the 5 cases where a stalking intervention order was granted, it is interesting to note that in 3 of these cases both parties consented to the order.

What was the subject matter of these applications?

Analysis of these applications for intervention orders reveals that they cover a diverse range of activities, typically involving claims of verbal abuse, throwing rubbish onto the complainant’s property and causing damage to his/her property (see Table 1). While some of the alleged stalking was trivial (one complainant alleged that the stalking was constituted, *inter alia*, by the defendant ‘singing stupid songs’), several complainants reported that they were greatly fearful for themselves or their children. One female complainant, who had earlier given evidence in court proceedings when the defendant to the current stalking intervention order application had been charged with theft of her property, reported that she was ‘terrified’ of him.

The ‘mutual combat’ aspect of some of these disputes was evident in the application of one complainant who adverted to previous physical violence in the relationship with his neighbour and then acknowledged that *he* had been the subject of criminal charges arising from the incident.

The intractability of these disputes is also well-illustrated by one case in which conflict with a neighbour was reported to have existed for more than 21 years and had resulted in 55 interventions by the police. In all these disputes police had been involved.

Table 1: SIO (Neighbours): Nature of the Stalking Behaviour

Stalking Intervention Order Applications (Neighbours): Nature of the Stalking	
<i>Type of harassment / stalking</i>	<i>n</i>
Verbal abuse	10
Throwing rubbish on property	6
Damage to property	5
Threat to inflict physical harm	4
Offensive / obscene gestures	4
Throwing stones / rocks / mud at person or property	4
Threat to kill	2
Imprecise threat of physical harm	2
Watching	2
Physical violence	2
Excessive noise	2
Theft of property	2
Threat to harm pet(s)	2
Poison / dangerous objects placed near pet	2
Trespass	1
Killed pet	1
False call to fire brigade	1
Hosed visitors	1

n = 11

One other option for processing these types of dispute in Victoria is through mediation conducted by the Dispute Settlement Centre Victoria. Four of the 11 complainants indicated that they had considered this option. One complainant reported that mediation had been tried but had failed to resolve the matter, another two reported that the defendant had been approached but had refused to participate, and another complainant reported that he did not discuss the matter with the defendant because he believed that the defendant would refuse to participate.

CASE STUDY: The Saga of the Rubbish Bins

Three particular applications (not in the month of February, but included in the sample) lodged by one person against three of his neighbours, warrant particular attention. The applicant claimed that he and his family were the subject of verbal abuse, threats, trespass and intimidatory behaviour (punching his car windows and spitting on his car) by his neighbours. He believed that his neighbours were all aggrieved by a decision of the local council regarding the location of a collection spot for rubbish bins in the Court where they all lived. The collection point was outside the applicant's house and the appropriateness of this location was a matter of dispute. The applicant reported that conflict with his neighbours on this issue had persisted for more than three years and that police had advised him to seek a stalking intervention order against his neighbours.

The three applications were heard for two days in the Magistrates Court and resulted in two applications being refused and a third struck out. Frustration was expressed by court personnel at what they saw as a wasteful and inappropriate tying up of the court on this matter.

Efficacy of Stalking Intervention Orders

The widespread use of intervention orders as part of the strategy to combat stalking raises important policy issues. The efficacy of this approach can also be questioned: information from the USA indicates that 70% of victims of stalking who obtained a protective or restraining order against their stalker reported that it had been violated (time since taking out the order unspecified)(US Dept. of Justice, 1998).

In relation to applications involving neighbours, the utility of seeking to manage conflict by the use of stalking intervention orders is also dubious for a number of reasons:

1. These disputes involve individuals who obviously live in close proximity and therefore have - to some degree - an ongoing relationship. These factors have long been identified by the alternative dispute resolution movement as prototypical factors that suggest the use of strategies such as mediation, rather than litigation (e.g., see Clarke & Davies, 1991). However, it should be noted that three of the eleven cases examined in this study involved cases where complainants specified that they had either tried mediation and failed, or had been unable to utilise mediation because the defendant refused to attend. This does not necessarily mean that mediation of such disputes will be inefficacious, but it suggests that the mediation must have a higher status than currently.
2. Some of these disputes between neighbours may be more accurately described as mutual combat (reflected in cross-applications for anti-stalking intervention orders) rather than the more clear demarcation between victim and offender roles that is normally seen as characterising stalking.
3. The categorisation of these matters as stalking does not accord with the picture of stalking derived from the clinical literature. To be sure, stalking may emerge from relationships between neighbours²⁸ - but the clinical literature does not portray the type of neighbour dispute revealed in our empirical study as stalking and certainly does not convey that perhaps 1/4 of stalking involves relationships between neighbours. The clinical literature, like much of the criminological literature, tends to deal with stalkers who have been diverted to forensic services and/or been the subject of successful criminal charges and hence may deal with a different population to those who are subject to stalking intervention orders.

²⁸ . The criminal case of *R v Kerr* [1998] VSCA 125 (24 November 1998) illustrates a severe level of harassment by a neighbour.

4. It seems unlikely that this type of dispute was intended to be regulated by anti-stalking provisions. The breadth and generality of the stalking legislation means that it has easily covered a huge range of human conduct, including comparatively petty matters. The vagueness of the language of the statute (mental or physical harm, apprehension or fear) further assists such a broad approach. This suggests either:
 - a) an over-broad ambit of the legislation, or
 - b) Inadequacies in the legislation that need to be addressed, including a re-conceptualisation of stalking as a form of criminal harassment, broad enough to capture forms of harassment varying in degree from the irritating to the deadly. Such a reconceptualisation would be consistent with the provisions of the UK *Protection from Harassment Act 1997* which has a broad ambit and was specifically intended to cover a diverse range of harassing behaviours. Thus, in the Lord Chancellor's second reading speech before the House of Lords he specifically stated that the aim of the bill was to protect victims of harassment, including 'victims ...[of] anti-social behaviour by neighbours'.
5. Discontent has been expressed by some Magistrates at what they see as a non-productive tying up of the resources of the court on these types of disputes. Perhaps the nadir of the use of stalking intervention orders came in the case study previously discussed.
6. It is clear that police are directing these matters to the courts. If the police are unable to resolve a matter themselves, they are frequently suggesting that aggrieved individuals should themselves seek a stalking intervention order as a means of resolving their problem. At least 2 of the cases of neighbour stalking that we investigated recorded that police had advised the seeking of an intervention order. It is clear that many of these disputes have been traditionally regarded as trivial, domestic or private in nature and hence not worthy of police attention (von Heussen, 2000). Now, with the introduction of specific legislation, in effect, what is occurring is a shifting of jurisdiction for these low-status disputes: police are assisting the transformation of these disputes into civil matters to be addressed through stalking intervention orders.

Conclusion

Continuing research on these issues by the authors will attempt to address some of the broad policy issues raised in this paper:

1. Are the courts too accessible?
2. Issue of court resources.
3. Is some kind of filter needed between the application for an intervention order and the hearing of the matter in court?
4. Should the Court be specifically instructed by the legislation "To attempt to bring the parties to a mutually acceptable settlement"?
5. Breaches of intervention orders: These are orders in broad terms. The penalty for contravention is severe; may well lead to an unintended escalation of the original problem.
6. Quite high failure rates of these applications in the Court.
7. Is this method of dispute resolution likely to be counterproductive? (escalate problem rather than lessen it).