

ASSESSMENT OF THE IMPACT OF STALKING LEGISLATION

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Assessment of the Impact of Stalking Legislation

This paper presents the findings of a study assessing the impact of stalking in Victoria. The study specifically aimed: to assess the extent to which the legislation was being used for the purposes intended, to assess the impact of the legislation and its implementation on the justice system, and to identify specific issues which might affect the effective use of the legislation.

The study examined the implementation of the criminal and civil components of stalking legislation in the four years since its introduction in 1995 through an analysis of stalking legislation in Victoria and other parts of Australia, an overview of trends in police and magistrates' court statistics, a survey of 245 police and 16 magistrates on their knowledge of and experience with stalking and an analysis of representations of stalking in the media.

Stalking – A Criminal Offence and a Civil Remedy

In January 1995, the Victorian Parliament created the new offence of stalking by inserting section 21A into the *Crimes Act 1958*. Other Australian jurisdictions introduced the offence of stalking between 1993 and 1996 (see table 1).

The offence of stalking, punishable by 10 years imprisonment, is constituted by 'a course of conduct' intended to cause, and causing, physical or mental harm to the victim, or fear in the victim for their own safety, or that of another. A non-exhaustive list of stalking conduct in subsection 21A(2) includes: following the victim or another, telephoning or otherwise contacting the victim or another, entering or loitering outside or near a place frequented by the victim or another, interfering with the property in the possession of the victim¹, giving offensive material to the victim or another, keeping the victim or another under surveillance or acting in a way that could reasonably be expected to arouse apprehension or fear in the victim for their own safety or that of another.

The section does not provide a time frame for determining what constitutes a 'course of conduct' however, in the Supreme Court decision of *Gunes and Tunc v Pearson* (1997) 21 A Crim R 297, McDonald J found that 'course of conduct' encompassed conduct that was engaged in on more than one separate occasion, or one protracted incident

The Act specifically excludes from its operation persons performing official duties in relation to the enforcement of the criminal law, the administration of an Act, the enforcement of a law imposing a penalty, the execution of a warrant, or the protection of public revenue. It does not go so far as to protect private investigators engaged by members of the public.

An offender is considered to have intended to stalk where the offender knows, or ought to have understood (in all the particular circumstances) that engaging in a course of conduct of the kind undertaken would be likely to cause harm or arouse apprehension and the conduct had that result (subsection 21A(3)). It is the course of conduct that must be engaged in with relevant intent, not conduct of a particular type (*Gunes and Tunc v Pearson*). The reference to all the particular circumstances of the case was intended to enable a court to consider factors such as the offender's intellectual capacity, cultural background and age in determining culpability, preventing persons 'incapable of understanding' the effect of their behaviour from being charged with stalking (Second Reading Speech, Legislative Assembly, *Crimes (Amendment) Bill 1994 (Vic.)*).

Whether or not a criminal charge of stalking has or will be made, a victim of stalking behaviour can also apply for an intervention order.

Subsection 21A(5) provides a civil remedy for responding to stalking behaviour, allowing the court to make an intervention order under the *Crimes (Family Violence) Act* when satisfied on the balance of probabilities that a person has stalked a person and is likely to continue to do so. Provision is made for the *Crimes (Family Violence) Act*, which originally provided for intervention orders only in cases of family violence, to be read as if a stalking victim were a family member.

An intervention order can prohibit or restrict access to the victim, their home or their workplace, prohibit contact with the victim, prohibit damage to the victim's property or direct the alleged stalker to receive counselling (section 5 *Crimes (Family Violence) Act 1987*).

Any breach of an intervention order is a summary offence. It is punishable by imprisonment for up to two years and/or a fine of up to \$2,400 for a first breach and a term of imprisonment not exceeding five years for subsequent breaches.

Similar intervention orders are available in other Australian jurisdictions (see table 2).

Previous Studies on Stalking

The majority of literature about stalking falls into one of two categories: the psychology of the victims and/or stalkers and attempts to develop typologies of stalking behaviour.

Issues identified in the literature reviewed related to the association between domestic violence and stalking, the inadequacy of traditional remedies in addressing stalking behaviour, the mental health problems of many offenders and evidentiary and definitional issues in respect of stalking legislation.

An analysis of 100 victims of stalking throughout Australia by Mullen and Pathe (1997) found that approximately 80 per cent of stalking victims were female, and that 30 per cent of victims had been stalked by an ex-partner. Direct approaches were experienced by 80 per cent of women, 70 per cent had been followed, approximately 60 per cent were overtly threatened and 30 per cent had suffered physical or sexual assaults by their stalkers.

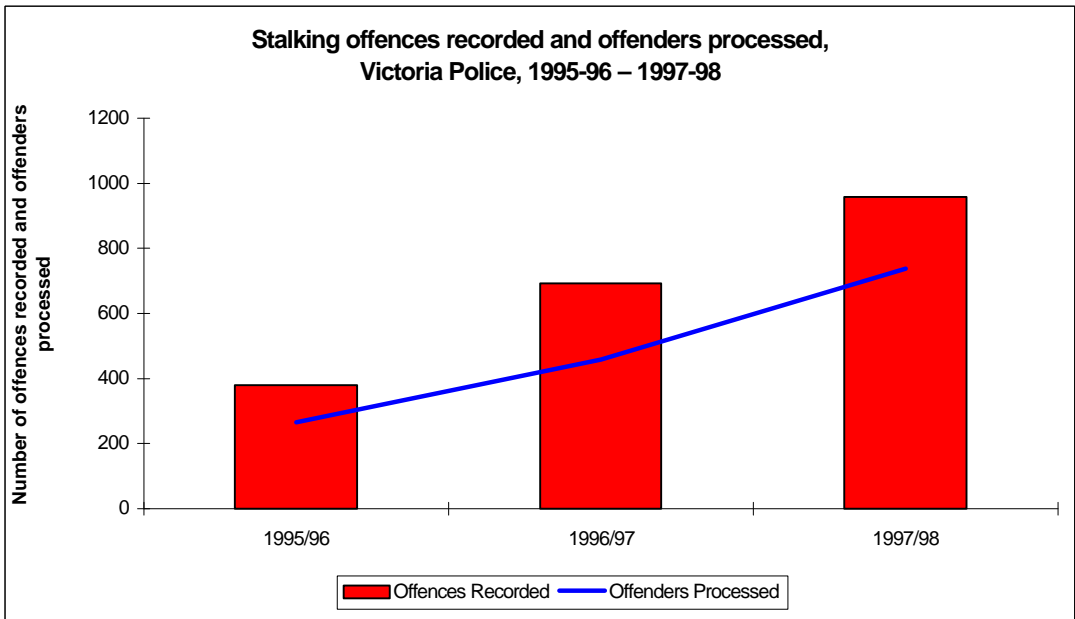
An Australian Bureau of Statistics (ABS) survey on *Women's Safety* (1996) found that 15 per cent of women had been stalked at some stage in life and 2.4 per cent had been stalked in the 12 months prior to the report. In that 12 month period women were more likely to be stalked by strangers than by someone they knew. The survey found the most common forms of stalking to be the making of telephone calls, sending mail and watching the victim.

At this time, no report exists specifically reviewing the impact of the introduction of stalking legislation and how this was perceived and used by justice agencies, namely police and magistrates.

Trends in Police Statistics

The number of offenders processed by police in Victoria for stalking rose from 265 in 1995-96 to 738 in 1997-98, representing a 59.5 per cent increase annually, over three years. The rate of stalking charges cleared by police increased from 69.7 per cent in 1995-96 to 74.3 per cent in 1998-99, generally very close to the overall clearance rates for all crimes against the person.²

² Note: stalking offences represent only a small proportion of all offences against the person (between 1 per cent and 3 per cent)



Three quarters of stalking offences recorded by police involved a male stalking a female. Police statistics indicate the vast majority (87.7 per cent) of stalking offenders over the entire period are male while the majority (82.4 per cent) of stalking victims are female.

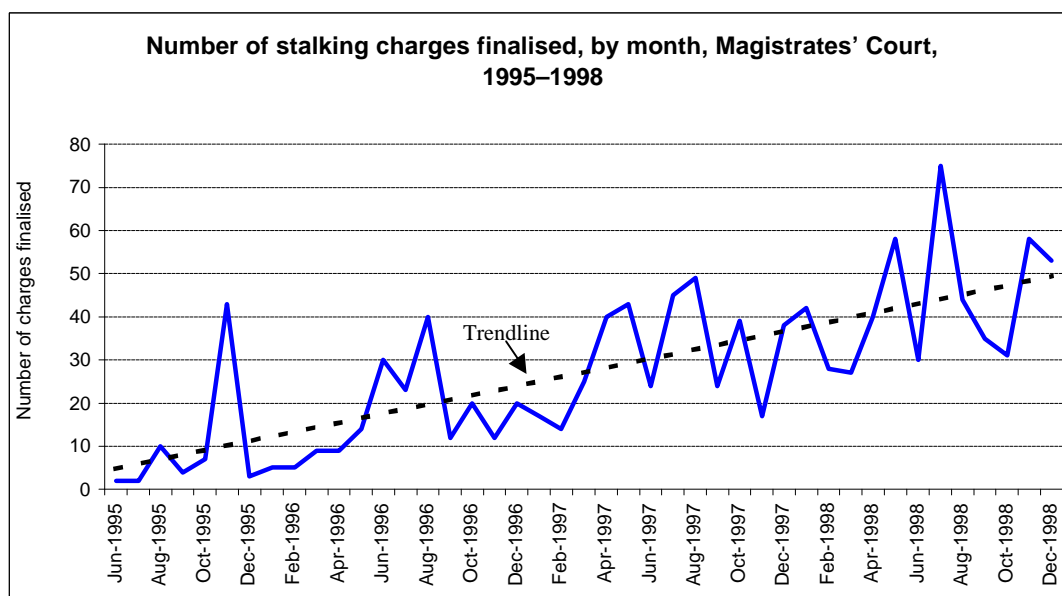
According to police statistics, most stalking offenders were between 20 and 39 years old (67.6 per cent). The majority of female stalking offenders were aged under 40 years and most fell into the 30-34 year age category. Most female victims were less than 40 years old (81.7 per cent) and the average age of female stalking victims was 28 years. Most male stalking victims were between 20 and 49 years old (75.8 per cent).



Trends In Court Statistics

Criminal Offence

Following police arrest, most stalking offences are dealt with in the Magistrates' Court. As with police statistics, there has been a substantial rise in stalking offences between 1995 (when stalking was introduced) and 1997. The number of stalking charges finalised in the Magistrates Court increased from 72 in 1995 to 521 in 1998. In terms of defendants with proven charges, there was an increase from 11 in 1995 to 127 in 1998. Seven offenders were convicted of stalking in the higher courts over the same period.



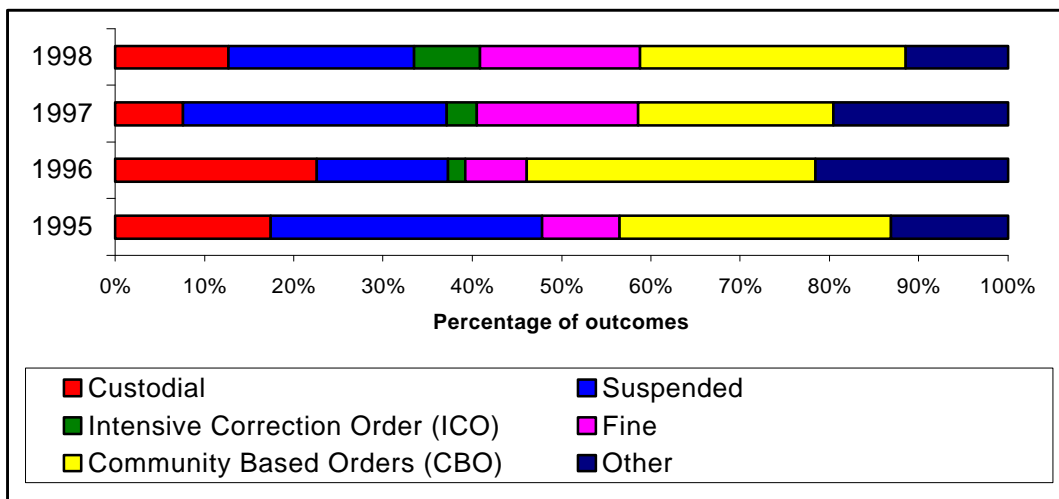
Of the stalking offences brought in the Magistrates' Court between 1995 and 1998, 50.3 per cent were not proven (compared to 25.0 per cent of all offences). However the proportion of defendants with proven stalking charges increased from 30.6 per cent in 1995 to 56.0 per cent in 1997, followed by a decrease to 47.0 per cent in 1998.

Discussions with police and magistrates indicated that difficulties with interpreting and proving the intent and harm components of the legislative provision may impact on the proportion of proven charges. The nature of stalking is that it is likely to occur in isolation, with few if any witnesses and is therefore an offence where the court must frequently choose whether to believe the evidence of the victim or the accused.

Other possible reasons for the number of charges not proven might be that alternative charges have been proven, or that the act of arrest itself was sufficient intervention in the circumstances to cause the behaviour to stop.

The most common penalties imposed for stalking in the Magistrates' Court were community based orders (23.6 per cent) or a suspended sentence (20.7 per cent). A smaller number of offenders received custodial sentences (11.8 per cent). The use of custodial sentences declined over the period (from 18.2 per cent in 1995 to 13.4 per cent in 1998) as did the use of suspended sentences³ (from 27.3 per cent in 1995 to 20.5 per cent in 1998) while the proportion of defendants receiving fines increased (from 9.1 per cent in 1995 to 20.5 per cent in 1998).

³ Note: Legislative changes were made to suspended sentences over the period and may have had an impact on this trend.

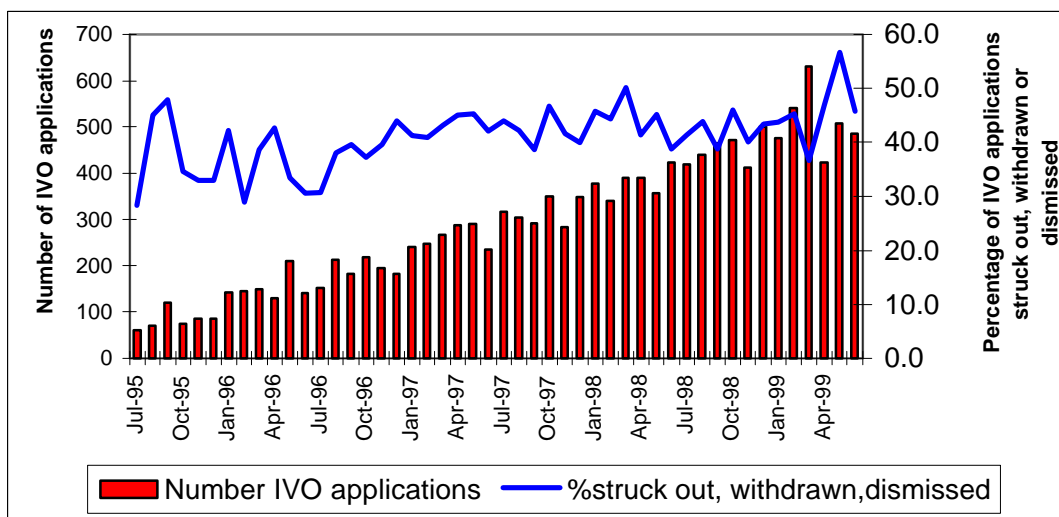


The profile of stalking offenders dealt with in the Magistrates' Court corresponds with the profile as found in police statistics.

Intervention Orders

Intervention orders have predominated over criminal actions in the courts. Over the last three years, for every criminal offence of stalking heard in the Magistrates' Court there were more than 50 applications for an intervention order relating to stalking.

This may point to intervention orders being more accessible (an application can be made with the registrar of any Magistrates' Court) and easier to obtain (the standard of proof is on the balance of probabilities, rather than beyond reasonable doubt). It may be seen as a more effective means of preventing stalking behaviour than bringing criminal charges.



The number of intervention order hearings has steadily increased from 480 hearings in the second half of 1995, to 2,274 hearings in the first half of 1998. Similarly the number of orders granted for stalking as a proportion of all orders granted by the Magistrates' Court has increased from 8.2 per cent in 1995-96 to 19.8 per cent in 1997-98.

Intervention orders were granted in more than half of cases (58.6 per cent). The proportion of intervention order applications that are withdrawn, struck out or dismissed increased from 36.6 per cent in 1995-96 to 44.0 per cent in 1997-98.

Some suggested reasons for applications being withdrawn included threats by the defendant and at the other extreme, reconciliation with the defendant.

Intervention orders most frequently included restrictions prohibiting the respondent from contacting (21.1 per cent) or approaching (20.5 per cent) the victim. An average of 4.7 restrictions were attached to each order.

Most intervention order applications are made by women (63.5 per cent), and are made in respect of male respondents (60.2 per cent). Both male and female applicants were most likely to obtain intervention orders in respect of male respondents (74.3 per cent and 52.2 per cent respectively).

Men comprise 36.5 per cent of intervention order applicants, despite comprising only 17.6 per cent of victims in criminal prosecutions for stalking. Women, who make up only 12.3 per cent of stalking offenders prosecuted, and more likely to be respondents to intervention order applications (39.8 per cent).

Most applicants for intervention orders are between 20 and 49 years old (74.4 per cent) as were most respondents (79.2 per cent).

Police and Magistrates Perceptions

Familiarity with the Stalking Legislation

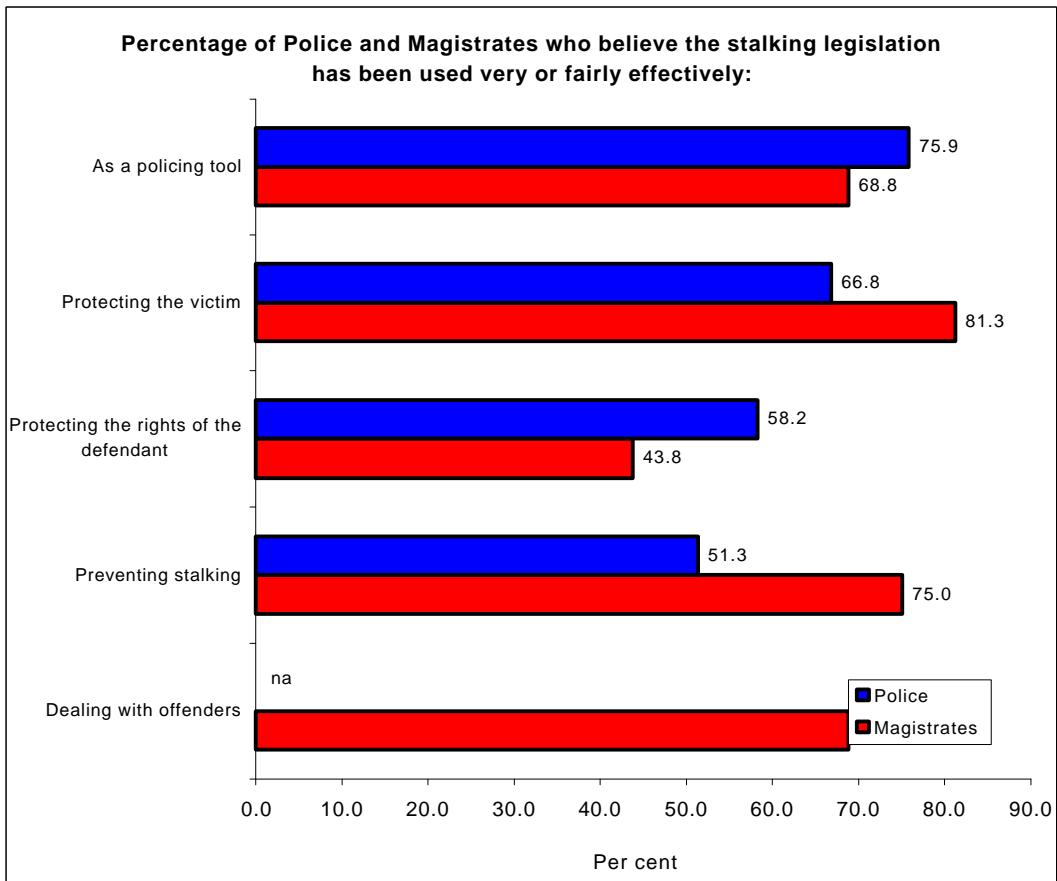
More police indicated that they were *reasonably* or *very familiar* with the criminal offence of stalking (80.6 per cent) than said they were *reasonably* or *very familiar* with the civil remedy for stalking (78.5 per cent). A slightly greater proportion of magistrates⁴ (81.3 per cent) said they were *reasonably* or *very familiar* with both the criminal and civil components of the stalking legislation.

For both magistrates and police the most common sources of information about stalking were their *own reading* and their *colleagues*. The main focus of this information was the *legislation*, followed by *evidentiary requirements* and information about how to deal with the *offender*. Least information was obtained about how to deal with the *victim* of stalking.

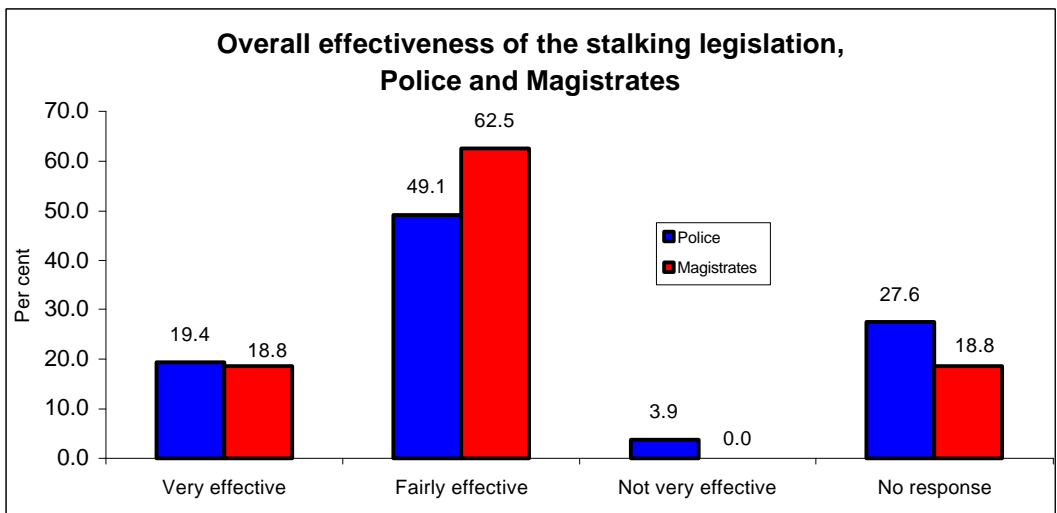
Effectiveness of Stalking Legislation

The legislation was frequently reported by magistrates as most effective in *protecting the victim* and as a means of *preventing stalking behaviour*. Magistrates less frequently rated the legislation as being effective in protecting the *rights of defendants*. By comparison, police found the stalking legislation most effective as a *policing tool* and in relation to the *rights of defendants*, but considered the legislation less effective in *preventing stalking behaviour*.

⁴ Only 16 questionnaires were returned by magistrates (a response rate of 16.8 per cent). Caution is strongly advised when results from Magistrates are considered, given their low response rate.



Most police (68.5 per cent) stated that the legislation (criminal and civil) was *very or fairly effective* overall. By comparison, 81.3 per cent of magistrates stated that the legislation was *very or fairly effective*.



Issues in Dealing With Stalking Cases

A minority of police and few magistrates identified issues in obtaining evidence of intent to harm (30.2 per cent and 31.3 per cent respectively) and a minority of police identified issues with respect to the harmful effect on the victim (21.3 per cent) – a number of magistrates indicated that on the facts, harmful effect was not difficult to determine.

Issues identified by police⁵ in dealing with stalking cases included: corroboration of evidence, locating the offender, surveillance of the offender, the offenders mental state or intellectual capacity and a lack of clarity in the terms of the legislation.

Suggested Improvements To Stalking Provisions

Suggested improvements by police⁵ to the criminal offence of stalking included: removing 'intention to cause apprehension or fear', more specific definitions (especially 'course of conduct') and harsher penalties. In respect of the operation of the legislation, suggestions included enabling the victim to legally tape phone calls and the creation of a two level offence.

Suggested improvements by police⁵ to intervention orders included: after hours access and timeliness, harsher penalties for breaches, increased police powers and making orders more difficult to obtain. In respect of the operation of the legislation, issues identified included difficulties in proof and ease in obtaining order.

Most Recent Stalking Case

All magistrates, with one exception, indicated they had experience with a stalking case since the introduction of the legislation, compared to around two-thirds (64.7 per cent) of police.

The police and magistrates who had experience with stalking cases were asked to provide details about their most recent stalking incident.

In the most recent case cited by police, the offender was most frequently identified as knowing the victim (35.4 per cent), as a stranger (24.8 per cent), or as a previous partner of the victim (22.9 per cent). By comparison, in the recent case cited by Magistrates, the offender was identified as a stranger (60.0 per cent), a previous partner (20.0 per cent), or some other known person (6.7 per cent).

The most recent case for police was most likely to have involved telephoning (14.9 per cent), watching (14.9 per cent), or following (14.7 per cent) the victim.

The most recent case for magistrates was most likely to have involved watching (18.4 per cent) or following the victim (12.2 per cent), or loitering around the home of the victim (12.2 per cent).

Police⁵ most frequently identified sexual attraction or infatuation (32.0 per cent) and inability to handle rejection or break-up of a relationship (33.3 per cent) as the motive for stalking in their most recent case. Less frequent motives included neighbourhood disputes (3.4 per cent) and 'road rage' situations (2.0 per cent). The experience of both police and magistrates demonstrates the importance of emotional relationships (not necessarily in a family context) suggesting a misconception on the part of the stalker about the feelings or wishes of the victim.

Both police and magistrates most often indicated that their recent stalking case occurred in or around the home of the victim (31.3 per cent and 36.0 per cent respectively) or in the street (28.4 per cent and 28.0 per cent respectively).

Most police (74.5 per cent) indicated that to the best of their knowledge, the most recent stalking case had ceased, while most magistrates indicated that they did not know whether the stalking had ceased (81.3 per cent).

⁵ Insufficient responses were received from magistrates in respect of this open-ended question to enable comparisons to be drawn with police answers.

Media Representations

One of the primary sources of information on stalking accessed by the general public is through the print media. An analysis was undertaken of 169 media articles covering a three year period prior and subsequent to the introduction of Victorian stalking legislation.

The analysis shows that the introduction of the Victorian stalking legislation in 1995 had a significant impact on media representations of the stalking issue in Victoria. Information on stalking available to the public through the print media has significantly increased from 1993-1998.

Articles reporting stalking in Victoria from a social, psychological, legal or theoretical perspective increased leading up to the introduction of the stalking legislation in 1995, with an increasing prevalence of feature articles over the period.

Typically victims of stalking reported in the media were women, especially young women. This reporting has occurred along side an increased media interest and growing public concern against paedophile and sex offenders.

The media also tended to focus on victims who have a high profile or have been the centre of recent media coverage for other reasons.

The most common media representations of stalking behaviour were following the victim and arousing apprehension or fear in the victim. The most often mentioned effect of stalking on victims reported by the media was fear, followed by a feeling of increased vulnerability.

Although media representation of stalking indicate that there is often no prior relationship between the offender and victim, the articles published indicate a general accuracy in reporting on the issue of stalking, as confirmed by comparing media data with survey and statistical information.

There was only sporadic coverage on the role of the justice system in dealing with stalking behaviour.

Discussion

Overall, both police and magistrates considered the Victorian stalking legislation to be effective. There appear to have been few difficulties in integrating the stalking legislation into the Victorian justice system. One concern articulated by police and magistrates was the increase in workload arising from the frequency of intervention order applications.

A small number of areas, namely neighbourhood disputes and 'road rage' incidents, were not considered to be 'true' stalking by police and magistrates, but are nevertheless dealt with by the stalking provisions, particularly intervention orders.

Some police considered the legislation less able to deal with cases where the stalking involves multiple victims but single encounters (*course of conduct*) or stalking which has an overtly sexual nature (*intent*).

The mental health of the stalking offender was considered relevant to the issue of intent and to the likelihood of the offending behaviour continuing. Psychiatric assessments may be appropriate for many stalking offenders and use of treatment orders for offenders exhibiting mental health problems would be useful.