

A large version of the CODEBLACK logo, with the word "CODE" in red and "BLACK" in black, preceded by the stylized icon.

## Stalking Consultation Paper

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Victorian Law Reform Commission (VLRC)

*Being Safe, Feeling Safe*

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16 August 2021

## [About Code Black](#)

Code Black Psychology is a boutique agency in Melbourne providing interdisciplinary services in cases of interpersonal harms, such as cases of stalking, bullying, harassment, family violence and coercive control. Our core offering brings curiosity and critical thinking to situations previously thought of as either too complex or too ingrained to be resolvable. Our team thrives on supporting the resolution of these low base rate, high impact situations. Our focus includes articulating the subtleties of problematic behaviours and the evidence base methods to create change. We provide the insights, opinion and advice in complex cases providing for case reconceptualization that supports our clients who are seeking to provide case resolution that provides their clients a path forward with confidence by avoiding protracted cases that fail to resolve and increasing wins for clients.

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## Responses to stalking, harassment and similar conduct, and the related use of Personal Safety Intervention Orders

### Code Black Psychology Submission: “Being safe, feeling safe.”

#### Situation

The VLRC has been asked to review and report on Victoria’s legal responses to stalking, harassment and similar conduct, including the statutory framework for and operation of the Personal Safety Intervention Order (PSIO) system, drawing upon best practice from the family violence system, criminological research and victim support services. The review should identify barriers to current law effectively responding to stalking, harassment and similar conduct, and make recommendations to address these barriers and improve the justice system’s response, with victim safety and wellbeing the paramount consideration.

Stalking behaviours can occur in both a family violence and non-family violence context. However, while a specialist, cohesive approach to these behaviours has been developed in a family violence context, less attention has been devoted to the non-family violence response. Additional measures may be required to maximise victim safety and wellbeing and perpetrator accountability, and to allow for more effective early interventions in cases of high or escalating risk. The review may consider mechanisms from the family violence context, such as family violence safety notices and the prohibition on cross-examination by the respondent/accused person. New measures responding to stalking in both family violence and non-family violence contexts should also be considered, such as electronic monitoring as a condition of an intervention order, and responses that address technology-facilitated abuse.

While stalking is committed by people of all genders, the VLRC is requested to note that most perpetrators of stalking are men, and most victims of stalking are women.

#### Terms of Reference

The review should consider:

- the law on stalking, harassment or similar conduct including:
  - operation of the *Personal Safety Intervention Orders Act 2010* (Vic), including consideration of how the legislative framework and operation differs from the scheme for Family Violence Safety Notices and Family Violence Intervention Orders under the *Family Violence Protection Act 2008*
  - how breaches of personal safety intervention orders are treated under the relevant legislation and responded to within the context of those statutory frameworks
  - the existing criminal offences applying to stalking, harassment and similar conduct, including consideration of the scope, elements and adequacy of the offence of stalking in the *Crimes Act 1958* and the evidence required to establish the offence
  - how the law could be strengthened to promote and enhance victim/survivor safety and wellbeing
  - the interaction between existing laws where the conduct occurs online
  - ancillary laws of evidence and procedure

- barriers to reporting for victim/survivors of stalking
- sentencing practices and available sentencing options.

In conducting this review, the Commission should have regard to:

- The findings of the Royal Commission into Family Violence (2016) and the actions taken by the Victorian Government and justice system in response to the Royal Commission's recommendations.
- Reports of the Royal Commission into Victoria's Mental Health System (2019).

The VLRC is required to:

- prepare an interim report by 31 December 2021, with the content of such a report to be determined by the Commission, in consultation with the Department of Justice and Community Safety; and
- prepare a final report on the reference by 30 June 2022.

## Submission Questions

**Question 1.** What are the factors that influence whether people who experience stalking report their experiences to police? Are there barriers to reporting that need to be addressed?

The factors that influence whether people who experience stalking report their experiences to police:

- Determining whether the situation is stalking or not
- Help seeking when overwhelmed by the impact of the intrusions
- Help seeking when fearful for personal safety
- Frustration that the situation has not resolved despite their attempts to stop the stalking

The barriers to reporting that need to be addressed:

- Uncertainty that the situation would meet the definition of stalking and the belief that the situation is either not serious enough or that it meets the definition of stalking
- Being concerned they won't be taken seriously
- Myths about the "paper shield" and the ability of an IVO to keep them safe
- Pessimism about the system's ability to make them stop
- The legal processes requiring each stalking behaviour to be re-lived for evidentiary purposes [CBTM stalking log service]
- The legal processes not being trauma informed meaning that the process of reporting and participating in the justice system compound and magnify the trauma of being stalked

**Question 2.** Should a risk assessment framework be developed to help police and courts identify the course of conduct and manage risk of serious harm in the context of stalking? If so, how should it work?

- This question has been conceptualised as what risk assessment framework current exists versus where the need for new or updated frameworks is indicated.
  - Existing frameworks:

- Mullen et al. typology (Mullen PE, Pathé M, Purcell R. *Stalkers and their victims*. Cambridge, UK: Cambridge University Press; 2000.)
- Existing structured professional judgement (SPJ) risk assessment tools:
  - Australia: Stalking Risk Profile (SRP) ([https://www.rma.scot/wp-content/uploads/2019/09/RATED\\_SRP\\_August-2019\\_Hyperlink-Version.pdf](https://www.rma.scot/wp-content/uploads/2019/09/RATED_SRP_August-2019_Hyperlink-Version.pdf))
  - Canada: Stalking Assessment and Management (SAM) ([https://www.rma.scot/wp-content/uploads/2019/09/RATED\\_SAM\\_August-2019\\_Hyperlink-Version.pdf](https://www.rma.scot/wp-content/uploads/2019/09/RATED_SAM_August-2019_Hyperlink-Version.pdf))
- Need for new or updated frameworks:
  - Mullen et al. typology – becoming dated, been validated
- Need for new or updated tools:
  - SRP – becoming dated, authors noted no plan to update

**Question 3.** What else might help agencies to identify the risk of serious harm in a stalking situation? For example, should there be special training or guidelines, or expert advice?

There are several variables that are often overlooked in legal settings that would support the identification of harm and the choice of effective legal responses:

- Harm: A clear and inclusive definition of harm. For example, Code Black Psychology defines harm as any perpetrator behaviour that causes the victim/survivor to experience offence, fear, or trauma.
- Seriousness: Improved clarity in the threshold for “serious” that considers the implication of the legal threshold differing from that of the victim/survivor. Developing a shared understanding of the situations that are “serious enough” to require a legal intervention would empower all members of the community to recognise and react to stalking effectively to prioritise the safety and wellbeing of victim/survivors.
- Patterns: Recognising patterns of behaviour and the significance of each behaviour as part of a trajectory of conduct.
- Impact: Being heard, taken seriously, and validated is an important outcome of reporting in every case brought to the attention of the law. This can be achieved in several ways:
  - Single incidents can be misunderstood when considered through the lens of a reasonable person test. For example, the “reasonable” person’s response to receiving an unwanted gift or email.
  - The impact looks like post-traumatic stress disorder (PTSD) but is ill-suited to that diagnosis as stalking cannot be considered “post”. Even if there is a pause for a period [such as the stalker being incarcerated], victim/survivors can never be given a guarantee the situation will not recur. The impact is closer to that of survivors of complex trauma – trauma that is cumulative and arises from repeated, interpersonal interactions.

- What the victim/survivor deems as serious harm versus what the legal system defines as serious harm.
- Legal recognition for psychological impact being:
  - Cumulative and nonlinear – adds up over time, but not in a consistent pattern between victim/survivors or for the one person.
  - Nuanced or different to what might be reasonably expected – feeling angry not frightened.

**Question 4.** What approaches or techniques should be used by law enforcement agencies when investigating stalking complaints?

- Approaches which should be used by law enforcement agencies when investigation stalking complaints:
  - Being trauma informed – having adequate knowledge and skills to avoid re-traumatising victim/survivors when following due process. The principles of this approach are safety, trustworthiness, choice, collaboration, and empowerment [see the *Blue Knot Foundation*].
  - Being cognisant of the patterns of the stalking as well the incidents constituting the current report.
- Techniques which should be used by law enforcement agencies when investigation stalking complaints:
  - Advice around evidence gathering – how to create a stalking log, including when and where to outsource the collation of the stalking log when doing so is re-traumatising (e.g.: lawyers, victim/survivor support agencies with specialist knowledge in this field such as private forensic psychologists).
  - Educating victim/survivors about the strengths and limitations of a legal response (such as a PSIO). Addressing the limitations by encouraging as standard practice a discussion of range of personal safety measures a victim/survivor can take to be safe and feel safe. Examples include:
    - Re-enforcing the reasons to not respond to the stalker under any circumstances, instead referring that task to police.
    - Basic information to self-audit the victim/survivor’s online identity to keep out of the public domain information they want private.
    - 000 training – encouraging victim/survivors to call for help anytime they perceive an imminent threat to their safety.

**Question 5.** In the family violence intervention order system, information sharing is allowed. Should there be a similar framework for information sharing between agencies providing services for stalking? If so, how should it work?

- Yes, there be a similar framework for information sharing between agencies providing services for stalking. What it would need:

- How actual and perceived barriers to third party reporting would be addressed (e.g.: how a professional defined as an information sharing entity would bypass consent requirements).
- Feedback loops that outline the ongoing flow of information to avoid the risks inherent to agencies working in silos, such as victim/survivors having to tell their story multiple times and victim/survivors not being the key to joining the dots to fully identify the pattern of the stalking.
- A clear message that articulates how the information sharing is consistent with and enhances the current privacy provisions.

**Question 6.** Should there be a specific police Code of Practice for reports of stalking? If so, what should it cover?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 7.** Should there be an option under the *Personal Safety Intervention Orders Act 2010 (Vic)* for police to be able to issue the equivalent of a Family Violence Safety Notice? Why/why not?

- The legalities of this question is beyond the role of Code Black Psychology and therefore no response is included on potential legal mechanisms.
- Practically, the advantage would be that stalking of any person (regardless of whether they are a family member or not) is given equal priority by the legal system.

**Question 8.** Should a person making an application for a personal safety intervention order be able to do so online? If yes, in what circumstances?

- Yes, a person making an application for a personal safety intervention order be able to do so online in any circumstance when appearing in person is a *barrier to help-seeking*. For example, during the COVID-19 pandemic or where being online feels less confrontational than presenting to a court for this help.

**Question 9.** Should respondents be prevented from personally cross-examining the affected person in some personal safety intervention order matters? If so, in what circumstances?

- Yes, stalkers should be prevented from personally cross-examining the affected person in some personal safety intervention order matters. It is our submission that a trauma-informed approach would be giving this *choice* to the victim/survivor who can opt-out of being personally cross-examined whenever they would like to.

**Question 10.** Should courts be able to order respondents to personal safety intervention order applications to attend treatment programs? If so, what kinds of programs and in what circumstances?

- Ordering stalkers to attend treatment orders can be a consideration in every circumstance where a criminal court considers a breach of an intervention order.
- If, however, the IVO is viewed as a stop message that sets out what the stalker cannot do, it is keeping with the least restrictive principle to use as IVO as an incentive to stop. If the stalker fails to do so, treatment via a program such as *Forensicare's Problem Behaviour Program* can

then be used as something the court does want them to do - being treatment to better understand why the stalking continued despite the stop message.

**Question 11.** Should there be additional offences in the *Personal Safety Intervention Orders Act 2010* (Vic) to address more serious breaches? If so, what should they cover?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 12.** Should the restrictions on publication in the *Personal Safety Intervention Orders Act 2010* (Vic) be expanded to cover adults?

- This question is beyond the role of Code Black Psychology and therefore no response is included.
- Any publication may become a reinforcer if the stalker sees their name published with the victim/survivor.

**Question 13.** Should there be free legal representation in some personal safety intervention order matters? If yes, what eligibility criteria should apply?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 14.** Should the appeals process for intervention orders be changed to improve the experience of victim survivors? If so, how?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 15.** Are there any other aspects of the *Family Violence Protection Act 2008* (Vic) that should be replicated in the *Personal Safety Intervention Orders Act 2010* (Vic)?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 16.** Can the criminal law response to stalking be improved?

- It is our experience of working in the corporate sector and with clinicians stalked by current or past patients that the number of times a breach is reported before a criminal case is commenced is too high. The lived experience of the victim/survivors we provide psychological services to consistently includes feeling like “a sitting duck” as the criminal process can take so long.
- It is also our experience that victim/survivors experience re-traumatisation via the workload required of them to produce evidence of the stalking, impact statements and administration associated being aware of court dates and professionals involved.
- Finally, all but the most psychologically robust victim/survivors report some level of disempowerment stemming from being a witness in the case rather than a party to the matter. As an example, advocating for their voice to be considered can feel confusing and overwhelming.



**Question 17.** You might like to consider whether:

(a) there are any challenges in identifying when a person has engaged in a course of conduct or in obtaining evidence to demonstrate a course of conduct

- The challenges that we have observed in our work at Code Black are:
  - Gaining agreement between the parties as to when the course of conduct is enough to warrant it being labelled “a course.” This is more than a matter of numbers, it is an issue supporting victim/survivors to be left alone when they seek the help of any agency (such as legal, clinical, health etc.) to send a stop message.
  - When some of the conduct is difficult to understand as harmful when considered in isolation. For example, giving gifts or praising someone online.
  - When the course of conduct is difficult for those outside the situation to view as impactful. For example, in one case of a high-profile professional who had a strong online presence, the stalker posted critical comments in their own social media pages. Colleagues were dismissive saying it was a common hazard of having a digital workplace. The outcome was a significant delay in our client being willing to acknowledge the considerable psychological harm they had experienced. Harm that had the potential to be avoided if the behaviours has been defined as a course of harmful conduct far earlier.

(b) the list of conduct in section 21A(2) of the *Crimes Act 1958* (Vic) covers all types of stalking behaviour

- This question is beyond the role of Code Black Psychology. The only consideration we can offer is the degree to which this legislation can look beyond the behaviours and support the right to be left alone both when feeling apprehensive/fearful and when the help of the legal system is sought for no other reason than wanting to be left alone having been unsuccessful in telling the person to stop.

(c) cyberstalking is adequately covered

- Our colleagues in New Zealand speak highly of the *Harmful Digital Communications Act 2015*, and the ability of the Act to empower them to hold people accountable when they use technology to cause harm.
- Our experience has been that online stalking can be harder to prove the identity of the stalker, especially those who use multiple aliases and are more sophisticated in their use of IT.
- The research is clear that the impact of cyberstalking is just as great as real-world stalking.

(d) the law presents any barriers to investigating, charging and prosecuting offenders for stalking conduct.

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 18.** Should there be more protections for victim survivors in stalking prosecutions? If so, what kind?

- The protections should include creating as many barriers as possible between the stalker and victim/survivor during the legal processes. For example, offering the victim/survivor options

when giving their evidence without any interaction (not appearing in person, camera for videoconferencing turned-off or giving all evidence via documents).

- Our experience is that these sorts of protections are available but not offered as standard practice. It is an area where the victim/survivor has needed to advocate for themselves.
- Another protection that may be considered is support for the collation of evidence (i.e., creating a stalking log). This can be a time consuming and immersive experience that is highly impactful to victim/survivors who say this process means they experience each stalking behaviour twice. In cases where family, friends and colleagues offer to do the collating, victim/survivors report significant relief.

**Question 19.** Should the court be able to request specialist risk assessment reports for stalking? If yes, in what circumstances?

- Yes, the courts should be able to request specialist risk assessment reports for stalking in two circumstances:
  - 1) Assessing the stalker’s risk of persisting, escalating in their stalking behaviours (more frequent, more severe), and causing themselves psychosocial harms that detracts from them investing in any functional aspects of their lifestyle. Incorporating analysis of the stalker’s justifications for the stalking to guide the choice of dissuaders, from treatment through punishment.
  - 2) In the circumstance where the court would benefit from expert opinion on the impact the stalking has had on the victim/survivor to date and the risks faced by the victim/survivor should the stalking continue. This would include the risk of cumulative psychological harm, ongoing lifestyle disruption and financial strain.

**Question 20.** Should electronic monitoring be introduced to monitor people who have been assessed as posing a high risk of ongoing stalking behaviour? If yes, in what circumstances?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 21.** How can we improve victim services so that people who experience stalking have their needs met?

- It is our view that victim/survivor services would be greatly improved by having two evidence-based focuses that in many ways mirror that provided in the family violence sector. They are:
  - 1) Working collaboratively with the victim/survivor to “be safe”, meaning what are the opportunities available to them to maximise their physical and psychological safety if the stalking were to continue.
  - 2) Working collaboratively with the victim/survivor to “feel safe”, meaning validation for the impact the stalking has already had and opportunities to psychologically rehabilitate and return to “pre-stalking” levels of daily functioning.
- There are no agencies in Victoria specifically funded to address the needs of victim/survivors of stalking outside of family violence.
- There are specialists in the private sector, such as Code Black, that is user-pays.

**Question 22.** How can the financial support scheme for victims of crime be improved so that it better meets the needs of victim survivors of stalking?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 23.** How can we better integrate victim services with relevant public and private services and systems so that people are supported while they are being stalked?

- See response to Question 21.

**Question 24.** How responsive are rehabilitation and reintegration interventions to the diverse needs of people who commit stalking?

- The rehabilitation and reintegration interventions in Victoria are primarily provided by two programs, Forensicare's Problem Behaviour Program (PBP) and, in the case of high-profile individuals, the Victorian Fixated Threat Assessment Centre (VFTAC). The degree to which these programs can cater for the diverse needs of stalkers is a matter for them to comment upon.
- Beyond the public sector, it is a vexed issue to provide safe and suitable services in the private sector as agencies and private practices are not funded to have the site and security measures inherent to the public setting. That said, there are skilled practitioners within the sector who provide their expertise through consultation to a range of agencies on stalking cases, such as assessment for court or Corrections.
- A strength of the private sector is the ability to consult to workplaces to support their ability to provide for the physical and psychological safety of the workplace when the stalker is (or has been) a staff member or is targeting the victim/survivor at work.
- The heterogeneity of stalkers is in part based in the range of reasons that stalking commences. The psychology of the beginning and ending of professional rapport and personal relationships is skewed and distorted for stalkers. Many seek relationships that are incongruent to the situation (such as befriending a treating clinician) and are inured to the cues to cease and desist. Bolstering the cease-and-desist message is a critical role for the justice system as interventions orders can be viewed as an early intervention to prevent persistence and escalation. Effective change does, however, require the psychology of stalking to be addressed in a therapeutic setting making the collaboration between the justice and health (public/private) crucial.

**Question 25.** Could some specialist courts and programs help address some of the issues that may co-occur alongside stalking behaviour? If so, how?

- There is merit in considering the role of a specialist stalking court that can encompass the range of situations in which stalking occurs, including family violence. This would require a diversification of the Family Violence Court Division to include situations where the originating association between the parties was outside the family context.
- The significant reform that has occurred in the family violence area provides more options to address the violence as swiftly as possible, with the greatest degree of certainty available given to victim/survivors. The opportunity for all stalking victim/survivors and all offenders who persistently harm their victim could hold great benefit.
- The economic benefit should also be considered, as the cost of preventing stalking persistence and escalation is far less than the cost of the stalking continuing.

**Question 26.** How well are prison and post-prison rehabilitation or reintegration measures working for people who have committed stalking? How can they be improved?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 27.** Are there relevant learnings from the reforms to the family violence system that could be applied to the way the system responds to people who commit stalking?

- See response to Question 5, 7, 21 and 25.

**Question 28.** What are the barriers that some victim survivors experience when seeking help for cyberstalking?

- See response to Question 1.
- Beyond these barriers is the dilemma between wanting/needing to have an online presence and not knowing how it might be possible to stop the cyberstalking.
- In essence, the victim/survivor's online world feels increasingly vulnerable to being exposed to public and private attacks. Unplugging is not a solution.

**Question 29.** If a person suspects that they are being kept under surveillance using cyberstalking, what kind of help do they need to ensure that they are safe?

- This question is beyond the role of Code Black Psychology and therefore no response is included.

**Question 30.** In what ways can apps and smart devices be used to facilitate stalking? What controls could be put in place to prevent apps and smart devices being used to facilitate stalking?

- This question is beyond the role of Code Black Psychology and therefore no response is included.