

SUBJECT: Revising the stalking offense

COMMITTEE: Select Committee on SB 97 — favorable, with amendment

VOTE: 8 ayes — Place, Talton, Farrar, Greenberg, McCall, Nixon, Pickett, Pitts
0 nays
1 absent — Solis

SENATE VOTE: On final passage, January 16 — 29-0

WITNESSES: For — Kenneth R. Johnson, City of Houston; Walter Hinojosa, AFL-CIO; Laura Lyons, Texas Association Against Sexual Assault; Hannah Riddering, Texas National Organization for Women; S.C. Van Vleck, Ft. Worth Police Department and the City of Ft. Worth; Mike Denton, Deborah Corley, Larry W. Cordle, Moira Dolan, representing themselves

Against — None

On — Keith S. Hampton, Texas Criminal Defense Lawyers Association

BACKGROUND: In September 1996 the Texas Court of Criminal Appeals ruled that the state’s stalking law, as enacted in 1993, was unconstitutionally vague. Because current law prohibiting stalking contains large parts of the 1993 law, the decision, *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996), effectively nullified current law outlawing stalking.

The 1993 law, enacted as SB 25 by Moncrief, made stalking a form of criminal harassment. In 1995 SB 26 by Moncrief moved the stalking portion of the harassment offense to a new, separate section of the Penal Code, sec. 42.071, and amended the 1993 provisions. Under both the 1993 law and the 1995 revisions, it is a Class A misdemeanor to, on more than one occasion, engage in certain types of conduct directed specifically toward another person, including following the person. The conduct must be reasonably likely to harass, annoy, alarm, abuse, torment or embarrass the person, and the offender must on at least one occasion threaten to inflict bodily injury or to commit an offense against the person, his or her family or property.

Persons prosecuted for stalking may claim as an affirmative defense that they were engaged in conduct that consisted of activity in support of constitutionally or statutorily protected rights. Repeat offenses are third-degree felonies.

For more information, including a detailed discussion of the court's ruling, see House Research Organization Session Focus 75-2, *Rewriting the Stalking Law*, January 10, 1997.

DIGEST:

SB 97, as amended, would make it illegal for a person to engage in certain kinds of conduct generally associated with stalking. The conduct would have to occur on more than one occasion and be pursuant to the same scheme or course of conduct directed specifically at another person. The conduct could include following another person.

The conduct would have to meet these tests:

- ◆ The accused would have to know or reasonably believe the other person would find the conduct threatens bodily injury or death to the person or a member of the person's family or household or that an offense would be committed against the person's property;
- ◆ The conduct would have to cause the other person or a member of the person's family or household to fear bodily injury or death or that a crime would be committed against the person's property; and
- ◆ The conduct would have to cause a reasonable person to fear bodily injury or death for himself or herself or for a member of the person's family or household or that an offense would be committed against the person's property.

The offense would be a Class A misdemeanor (maximum penalty of one year in jail and a \$4,000 fine) and repeat offenses a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000).

The Penal Code provision prohibiting stalking, sec. 42.071, would be repealed and replaced with the new prohibition.

SB 97 would be take immediate effect if approved by a two-thirds vote of the membership of the House and the Senate.

SUPPORTERS
SAY:

SB 97 would help protect potential stalking victims and punish offenders while passing constitutional muster. Stalking is a serious problem, with almost 900 stalking arrests statewide from June 1995 through September 1996. SB 97 should be approved immediately because every day that Texas does not have a viable stalking statute victims are harmed, terrorized and threatened without an effective remedy.

A specific stalking statute is necessary to intervene in situations before violence escalates. It also would prohibit behavior not covered by other laws such as a stalker's repeatedly sending a victim a seemingly harmless gift, such as a dead rose, calculated to terrorize the victim.

The Court of Criminal Appeals outlined four problems with the 1993 statute: the vagueness of the language describing the prohibited conduct and the lack of a "reasonable person" standard for determining when conduct constitutes stalking; the lack of a requirement that two acts of stalking have a link or "nexus;" the law's pre-1995 requirement that one previous incident of stalking have been reported to law enforcement for an offense to occur; and the presence of an affirmative defense to prosecution, which could contribute to the vagueness problem.

SB 97 would meet the court's objections in three ways:

- ◆ it would set a standard for determining if stalking has occurred: victims or their families or members of their households would have to be placed in fear of injury or death, *and* a reasonable person would have to fear injury or death;
- ◆ it would require that stalking episodes be part of a course of conduct; and
- ◆ the stalker would have to "know or reasonably believe" the victim would find the conduct threatening, thereby excluding someone who meant no harm to a victim.

SB 97 would address the problem identified by the court of whose perspective on the alleged crime is to be considered. It would require that alleged victims

or a member of their family or household be placed in fear of injury or death, that a reasonable person fear injury or death *and* that the stalker know or reasonably believe the victim would find the conduct threatening. Also, the proposal no longer characterizes prohibited conduct in terms the court found vague, such as conduct reasonably likely to “annoy,” “alarm” or “embarrass.”

The committee amendment to the bill would set standards for the threatening behavior — bodily injury, death or property offenses — to ensure that innocent behavior does not fall under the law. Another committee amendment would include members of alleged victims’ households among those who can be harmed by stalkers, to help protect those persons who do not fall under the definition of “family” but may be living with the alleged victim.

Prosecutors would have to prove in court that the stalking was part of a “course of conduct,” a phrase understood by courts and used in other parts of the Penal Code. This would ensure that a person could not be considered a stalker for a one-time event or for unrelated behavior.

The bill would prohibit only criminal behavior and is specific enough that it could not be used against constitutionally protected activities. The standards for determining whether stalking has occurred are designed to ensure that the statute is used only against stalkers and not picketers or protesters.

The revised stalking statute should not include an affirmative defense to prosecution for constitutionally or statutorily protected rights, as in the 1993 and 1995 stalking laws, because these rights are always protected without specific mention in the statute. Including an affirmative defense in the statute would place a burden on defendants to prove their constitutional rights on a case-by-case basis and could create another vagueness problem. The Court of Criminal Appeals ruling said an affirmative defense provision merely restates well-settled constitutional restrictions and people are always on notice that constitutionally protected conduct is exempt from prosecution. An affirmative defense for constitutionally protected rights would inappropriately require juries to judge constitutional issues of law when their role is to consider fact issues. Concerns that SB 97 could be abused and used to violate First Amendment rights can be adequately addressed by establishing clear legislative intent that the statute is to be used only against criminal stalkers.

OPPONENTS
SAY:

It is unnecessary to replace the stalking statute thrown out by the Court of Criminal Appeals with another specific offense for stalking. The situations described in these proposals are already covered by Penal Code provisions on harassment, assault, terroristic threat, disorderly conduct or others. Establishing a specific offense for stalking would be a step backward from recent Penal Code revisions that established broad categories of offenses and eliminated many special offenses and separate provisions.

The provision in the bill requiring behavior to be part of the same “course of conduct” is vague and undefined and could lead to persons being accused of stalking for unrelated events that prosecutors are somehow able to string together.

Lawful demonstrators such as union picketers or abortion clinic protestors, whom some may consider threatening, need some protection against abuses of SB 97 to protect their First Amendment rights. The bill should contain an affirmative defense to prosecution for constitutionally protected activities, or it should clearly state that the law is not intended to be used against constitutionally protected activities.

OTHER
OPPONENTS
SAY:

SB 97 would not adequately protect stalking victims who could still be terrorized by a series of events before an offense under the statute actually occurred. Stalkers would be able to intimidate and harass victims before the criminal justice system could intervene. Victims need protection before they are seriously threatened or harmed by stalkers.

NOTES:

The committee amendments would:

- ◆ specify the type of behavior that the accused would have to know or reasonably believe an alleged victim would find threatening. The alleged victim would have to find the behavior threatens bodily injury or death to the person or his or her family or household or that an offense would be committed against his or her property; and

- ◆ include members of the alleged victim’s household as well as family members among those affected by the accused’s behavior.