

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON 2007 HB 2473**

NOVEMBER 30, 2007

BACKGROUND

In June, 2007, Rep. Mike O’Neal, Chair of the House Judiciary Committee, requested that the Judicial Council study and make recommendations to the Legislature regarding 2007 HB 2473, which repeals and replaces K.S.A. 21-3438, the Kansas stalking statute. The Kansas Judicial Council assigned the study to the Criminal Law Advisory Committee (hereinafter “the Committee”).

COMMITTEE MEMBERSHIP

The members of the Committee taking part in this study are as follows:

1. **Stephen E. Robison, Chair**; practicing attorney in Wichita and member of the Judicial Council.
2. **James W. Clark**, Lawrence; Kansas Bar Association Legislative Counsel.
3. **Edward G. Collister**; Practicing attorney in Lawrence.
4. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
5. **Patrick M. Lewis**, Olathe; Johnson County Public Defender’s Office.
6. **Hon. Michael Malone**, Lawrence; District Judge in the 7th Judicial District.
7. **Steven L. Opat**, Junction City; Geary County Attorney.
8. **John M. Settle**, Larned; Pawnee County Attorney.
9. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
10. **Loren L. Taylor**, Kansas City; Police trainer.
11. **Debra J. Wilson**, Topeka; Appellate Defender’s Office.
12. **Ron Wurtz**, Topeka; Assistant Federal Public Defender.

The Committee invited Joyce Grover to join the Committee for this study. Ms. Grover is the Legal Advocacy Coordinator for the Kansas Coalition Against Sexual and Domestic Violence.

The Committee also heard testimony from Rep. Kasha Kelley of Arkansas City, who authored and introduced 2007 HB 2473.

INTRODUCTION

Stalking is much more prevalent than one might think. The following statistics appeared in a U.S. Department of Justice Report:

- 8 percent of women and 2 percent of men in the United States have been stalked at some time in their life; an estimated 1,006,970 women and 370,990 men are stalked annually.
- Most (78 percent) stalking victims are female and most (87 percent) stalking perpetrators are male.
- Women are significantly more likely than men (59 percent and 30 percent, respectively) to be stalked by intimate partners, about half of whom stalk their partners while the relationship is intact.
- There is a strong link between stalking and other forms of violence in intimate relationships: 81 percent of women who were stalked by a current or former husband or cohabiting partner were also physically assaulted by that partner and 31 percent were also sexually assaulted by that partner.
- Less than half of all stalking victims are directly threatened by their stalkers, although the victims, by definition, experience a high level of fear.
- About half of all stalking victims report their stalking to the police. About a quarter of stalking cases reported to the police result in suspects being arrested.
- About 12 percent of all stalking cases result in criminal prosecution, and about a quarter of female stalking victims and about a tenth of male stalking victims obtain restraining orders against their stalkers. Of all victims with restraining orders, 69 percent of the women and 81 percent of the men said their stalkers violated the order.
- Thirty percent of female stalking victims and 20 percent of male stalking victims seek psychological counseling as a result of their victimization. Stalking victims are significantly more likely than nonstalking victims to live in fear for their personal safety and to carry something to defend themselves.
- The average stalking case lasts 1.8 years. Nearly a fifth of all stalking victims move to new locations to escape their stalkers.

Patricia Tjaden and Nancy Thoennes, "*Stalking in America: Findings from the National Violence Against Women Survey*," (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1998), 2, <http://www.ncjrs.gov/pdffiles/169592.pdf>, (accessed November 18, 2007).

California was the first state to pass a stalking law in 1990. Today, there are anti-stalking laws on the books in all 50 states and the District of Columbia, and there are federal statutes as well. Kansas enacted K.S.A. 21-3438 in 1992, and substantially amended it in 1993 and 1994. The 1994 version of the statute was declared unconstitutional in *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996). K.S.A. 21-3438 was amended again in 1995, and that version passed constitutional muster in *State v. Rucker*, 267 Kan. 816, 987 P.2d 1080 (1999). The statute has been amended twice more. In 2000, language was added to include communications via “electronic means,” a definition of which was also added. In 2002, the statute was amended as part of the new Protection From Stalking Act to increase the severity level of a conviction under K.S.A. 21-3438(a) if the violation occurs when there is already an order in place under the Act.

The Kansas stalking law came under scrutiny again earlier this year in connection with the murder of Jodi Sanderholm, a 19-year-old college dance team member from Arkansas City. According to media reports, local police were aware that the man charged with Ms. Sanderholm’s kidnapping, rape and murder was stalking members of the dance team.

The Committee heard testimony from Rep. Kasha Kelley, whose district includes the Arkansas City area. Rep. Kelley was approached by the local police department about reviewing the stalking laws. She spoke to local law enforcement agencies and the county attorney and was told that K.S.A. 21-3438's requirement of a “credible threat” makes it more difficult for the police to intervene when stalking is reported and makes it more difficult for the county attorney to be able to prove a case and get a conviction under the statute. Rep. Kelley introduced 2007 HB 2473 in response to these concerns.

STATUTORY AMENDMENTS PROPOSED IN 2007 HB 2473

2007 HB 2473 proposes to repeal and completely replace the existing stalking statute, K.S.A. 21-3438. Copies of the bill and existing statute are attached to this report.

Rep. Kelley patterned HB 2473 after a model stalking statute drafted by the National Center For Victims of Crime (“NCVC”). NCVC released a policy report recommending a major update to the 1993 *Model Anti-Stalking Code for the States*, which was developed by the National Institute of Justice, U.S. Department of Justice. See *The Model Stalking Code Revisited: Responding to the New Realities of Stalking* (Washington, DC: National Center for Victims of Crime, 2007), <http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=41822>, (accessed November 18, 2007).

As noted above, HB 2473 proposes an entirely new stalking statute. Although there are many other differences between the existing K.S.A. 21-3438 and HB 2473, most of them flow from the way that “stalking” is defined in the first paragraph of each.

K.S.A. 21-3438 states that “Stalking is an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person’s safety.”

HB 2473 states that “Stalking is engaging in a course of conduct directed at a specific person when it is known or should be known that the course of conduct would cause a reasonable person to: (1) Fear for such person’s safety or the safety of the third person; or (2) suffer other emotional distress.

COMMITTEE’S REVIEW OF 2007 HB 2473

The Committee met on August 24, October 5 and November 2, 2007. In addition to review of the new stalking statute proposed in 2007 HB 2473, the Committee explored the Model Stalking Code on which the bill was based, Kansas case law, stalking statutes from other states and federal stalking laws. The Committee also looked at statistics regarding stalking convictions under Kansas and federal laws and the number of orders issued pursuant to the Protection From Abuse and Protection From Stalking Acts.

The Committee first considered whether any changes to K.S.A. 21-3473 were necessary or desirable. Rep. Kelley had been told that it was difficult to prove stalking and that the element of “credible threat” was problematic. There was some agreement with this position. Although many Committee members noted that stalking is rarely charged in their jurisdictions, the reason for this was not necessarily just due to any perceived problem with proving the crime. Committee members agreed that charging decisions are also influenced by the fact that a conviction for stalking carries a presumption of probation for a defendant with no prior convictions, while convictions of other related misdemeanors could result in jail time.

That stalking is not often charged is borne out by statistics obtained from the Kansas Sentencing Commission. Recent statewide statistics for convictions under the stalking statute are as follows:

<u>Year</u>	<u>Convictions</u>
2003	7
2004	21
2005	14
2006	19

The Committee agreed that the Kansas stalking law could be improved, but had several serious concerns with the statute proposed in 2007 HB 2473:

1. The legislation casts too wide a net. “Course of conduct” is defined as “two or more acts, including, but not limited to, acts in which the stalker directly, indirectly or through third parties, by any action, method, device or means, follows, monitors, observes, surveils, threatens or communicates to or about a person, or interferes with a person’s property.” The Committee was able to describe many situations in which non-stalking activities could conceivably fall within the language of the bill, which could mean that the statute is unconstitutionally overbroad.
2. The Committee found it especially troubling that the defendant need not intend to cause fear or emotional distress, rendering this a “general” as opposed to “specific” intent offense. The U.S. Supreme Court has relied in part on the absence of an intent requirement to strike down laws as unconstitutionally vague. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972).
3. While the Committee acknowledged that it is legitimate to include language relating to “third parties” in stalking laws, the term is not defined in this proposed statute and is overly broad.
4. The Committee was opposed to inclusion of the term “emotional distress.” Fear for one’s safety is the basis for the emotional distress, and the additional term is not necessary.

The Committed unanimously agreed that it would not support the adoption of HB 2473. However, it was also agreed that Rep. Kelley's desire to rid the Kansas stalking statute of the "credible threat" element had merit. The Committee agreed to draft a new statute to propose in place of HB 2473. The Committee reviewed statutes from other states and chose the New Hampshire law as a starting point. The statute drafted by the Committee is fully set out below in the next section.

COMMITTEE'S RECOMMENDATIONS REGARDING 2007 HB 2473

The Judicial Council Criminal Law Advisory Committee recommends against the adoption of 2007 HB 2473. The proposed stalking statute is both overly broad and too vague to give sufficient warning of the proscribed conduct. The Committee is opposed to transforming the crime of stalking in Kansas to one that no longer requires specific intent. Finally, the Committee is opposed to expanding the crime of stalking to proscribe causing someone "emotional distress."

The Committee agreed that K.S.A. 21-3438 is in need of amendment. The Committee has drafted a proposed statute as an alternative to 2007 HB 2473. The Committee's proposal accomplishes the following:

1. Removes the "credible threat" requirement found in the current statute. Stalking behavior in and of itself is often not overtly threatening. The key is how the behavior is perceived by the targeted person, whose particular history may transform a seemingly innocuous act into something more sinister and frightening.
2. Contains a tighter and more helpful definition of "course of conduct."
3. Changes the law to include fear for the safety of third parties, but limits this expansion to members of the targeted person's immediate family (a term that is defined).

4. Does not expand the crime of stalking to include criminalization of causing “emotional distress.”
5. Does not transform stalking into a general intent crime. The Committee instead added a “reckless” element, which is consistent with the Kansas criminal code.

COMMITTEE’S PROPOSED LEGISLATION

The first part of this proposal is the stalking statute, intended to be a replacement for K.S.A. 21-3438. Also included are suggested revisions to K.S.A. 21-3843 and 60-31a06.

(a) A person commits the offense of stalking if such person:

(1) Intentionally or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for his or her personal safety or the safety of a member of that person’s immediate family, and the person is actually placed in such fear;

(2) Intentionally engages in a course of conduct targeted at a specific person, which the actor knows will place that person in fear for his or her personal safety or the safety of a member of that person’s immediate family; or

(3) After being served with, or otherwise provided notice of, any protective order included in K.S.A. 21-3843 and amendments thereto that prohibits contact with a specific person, intentionally or recklessly engages in at least one act of conduct that: (i) violates the provisions of the order, (ii) is listed in subsection (b)(1), and (iii) would cause a reasonable person to fear for his or her personal safety or the safety of a member of that person’s immediate family, and the specific person is actually placed in such fear.

(b) As used in this section:

(1) “Course of conduct” means 2 or more acts over a period of time, however short, which evidence a continuity of purpose. A course of conduct shall not include constitutionally protected activity, nor shall it include conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person. A course of conduct may include, but not be limited to, any of the following acts or a combination thereof:

- (i) Threatening the safety of the targeted person or a member of that person's immediate family.
- (ii) Following, approaching, or confronting that person, or a member of that person's immediate family.
- (iii) Appearing in close proximity to, or entering the person's residence, place of employment, school, or other place where the person can be found, or the residence, place of employment or school of a member of that person's immediate family.
- (iv) Causing damage to the person's residence or property or that of a member of the person's immediate family.
- (v) Placing an object on the person's property or the property of a member of that person's immediate family, either directly or through a third person.
- (vi) Causing injury to that person's pet, or a pet belonging to a member of that person's immediate family.
- (vii) Any act of communication.

(2) "Communication" means to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer. For purposes of this section, "computer" means a programmable, electronic device capable of accepting and processing data.

(3) "Immediate family" means father, mother, stepparent, child, stepchild, sibling, spouse, or grandparent of the targeted person, any person residing in the household of the targeted person, or any person involved in an intimate relationship with the targeted person.

(c) For the purposes of this section, a person who engages in acts which would constitute stalking after having been advised by a uniformed law enforcement officer, as defined in K.S.A. 21-3110(10), that the person's acts were in violation of this chapter concerning any like future acts, or a person who has been served with a protective order included within K.S.A. 21-3843 and amendments thereto, shall be presumed to have acted intentionally as to any future act targeted at the person or persons named in the advisement or order.

(d) In any complaint, information, or indictment brought for the enforcement of any provision of this statute, it shall not be necessary to negate any exception, excuse, or exemption contained herein and the burden of proof for any exception, excuse, or exemption shall be upon the defendant.

(e)(1) Any person who is convicted of a violation of subsection (a)(1) shall be guilty of a class A misdemeanor. Any person convicted of a violation of subsection (a)(1) who has one or more prior stalking convictions in this state or another state when the second or subsequent offense occurs shall be guilty of a severity level 7, person felony.

(2) Any person who is convicted of a violation of subsection (a)(2) shall be guilty of a class A misdemeanor. Any person convicted of a violation of subsection (a)(2) who has one or more prior stalking convictions in this state or another state when the second or subsequent offense occurs shall be guilty of a severity level 5, person felony.

(3) Any person who is convicted of a violation of subsection (a)(3) shall be guilty of a level 9, person felony. Any person convicted of a violation of subsection (a)(3) who has one or more prior stalking convictions in this state or another state when the second or subsequent offense occurs shall be guilty of a severity level 5, person felony.

(f) If any provision or application of this section or the application thereof to a person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provisions or applications, and to this end the provisions of this section are severable.

21-3843. Violation of a protective order. (a) Violation of a protective order is knowingly or intentionally violating:

(1) A protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106 and 60-3107, and amendments thereto;

(2) a protective order issued by a court or tribunal of any state or Indian tribe that is consistent with the provisions of 18 U.S.C. 2265, and amendments thereto;

(3) a restraining order issued pursuant to K.S.A. 2006 Supp. 38-2243, 38-2244 and 38-2255 and K.S.A. 60-1607, and amendments thereto;

(4) an order issued in this or any other state as a condition of pretrial release, diversion, probation, suspended sentence, postrelease supervision or at any other time during the criminal case that orders the person to refrain from having any direct or indirect contact with another person;

(5) an order issued in this or any other state as a condition of release after conviction or as a condition of a supersedeas bond pending disposition of an appeal, that orders the person to refrain from having any direct or indirect contact with another person; or

(6) a protection from stalking order issued pursuant to K.S.A. 60-31a05 or 60-31a06, and amendments thereto.

(b) As used in this section, "order" includes any order issued by a municipal or district court.

(c) No protective order included in this section shall be construed to prohibit an attorney, or any person acting on the attorney's behalf, who is representing the defendant in any civil or criminal proceeding from contacting the protected party for a legitimate purpose within the scope of the civil or criminal proceeding; provided, that the attorney or person acting on behalf of the attorney: identifies himself or herself.

(ed) Violation of a protective order is a class A person misdemeanor.

(de) This section shall be part of and supplemental to the Kansas criminal code.

60-31a06. Orders; time periods; amendments; costs. (a) The court may issue a protection from stalking order granting any of the following orders:

(1) Restraining the defendant from following, harassing, telephoning, contacting or otherwise communicating with the victim. Such order shall contain a statement that if such order is violated such violation may constitute stalking as provided in K.S.A. 21-3438, and amendments thereto, and violation of a protective order as provided in K.S.A. 2005 Supp. 21-3843, and amendments thereto.

(2) Restraining the defendant from abusing, molesting or interfering with the privacy rights of the victim. Such order shall contain a statement that if such order is violated, such violation may constitute stalking as provided in K.S.A. 21-3438, and amendments thereto, assault as provided in K.S.A. 21-3408, and amendments thereto, battery as provided in K.S.A. 21-3412, and amendments thereto, and violation of a protective order as provided in K.S.A. 2005 Supp. 21-3843, and amendments thereto.

(3) Restraining the defendant from entering upon or in the victim's residence or the immediate vicinity thereof. Such order shall contain a statement that if such order is violated, such violation shall constitute criminal trespass as provided in subsection (a)(1)(C) of K.S.A. 21-3721, and amendments thereto, and violation of a protective order as provided in K.S.A. 2005 Supp. 21-3843, and amendments thereto.

(4) Any other order deemed necessary by the court to carry out the provisions of this act.

(b) A protection from stalking order shall remain in effect until modified or dismissed by the court and shall be for a fixed period of time not to exceed one year, except that, on motion of the plaintiff, such period may be extended for one additional year. Before the expiration of an order for protection from stalking, a victim, or a parent on behalf of the victim, may request an extension of the protection from stalking order for up to one additional year on showing of continuing threat of stalking.

(c) The court may amend its order at any time upon motion filed by either party.

(d) The court shall assess costs against the defendant and may award attorney fees to the victim in any case in which the court issues a protection from stalking order pursuant to this act. The court may award attorney fees to the defendant in any case where the court finds that the petition to seek relief pursuant to this act is without merit.

(e) A no contact or restraining provision in a protective order issued pursuant to this section shall not be construed to:

(1) Prevent contact between counsel for represented parties; or

(2) Prevent a party from appearing at a scheduled court or administrative hearing; or

(3) Prevent a defendant or defendant's counsel from sending the plaintiff copies of any legal pleadings filed in court relating to civil or criminal matters presently relevant to the plaintiff.