

CITIZENS' FOUNDATION FOR
POLICY SOLUTIONS

Proposal to amend the law on

Stalking

(Section 354D of the Indian Penal Code)

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I. INTRODUCTION

Stalking refers to the repeated, unconsented, malicious and/or threatening behaviour, by an individual, such as following, spying, making harassing phone calls and interfering with the use of a person's property, which causes fear and substantial emotional distress in the mind of the victim. Often, causation of such behaviour also results in disruptions in the daily life of the victim, like change in employment, phone number and residence in order to escape the offender. At an initial stage, stalking might seem merely annoying or bothersome. However, more often than not, such conduct escalates to more violent, obsessive and potentially fatal offences such as rape, abduction and murder. The Committee on Amendments to Criminal Law, headed by Justice J.S. Verma, former Chief Justice of the Hon'ble Supreme Court of India, in the introduction to its report on Amendments to Criminal Law,¹ has also made a similar observation, by stating:

“Rape, sexual assault, eve-teasing and stalking are matters of serious concern – not only because of the physical, emotional and psychological trauma which they engender in the victim, but also because these are practices which are being tolerated by a society ostensibly wedded to the rule of law”.

The landmark judgment on physical stalking, *Santosh Kumar Singh vs State Through CBI*², widely known as the Priyadarshini Mattoo case, indicates that stalking can have far-reaching consequences. In the instant case, when the victim complained to the police that the accused harassed and stalked her, the accused was merely let off with a warning. However, he retaliated and later, brutally raped and killed the victim at her residence. This incident highlighted the inadequacies of the preventive mechanism of the Indian criminal justice system.

Studies by the National Crime Record Bureau (“**NCRB**”) indicate that, even after the law criminalising stalking came into force, the rate of conviction for stalking remained minimal at 26.4% in 2015³, down from 34.8 % in 2014.⁴ The data⁵ further indicates that, 6,266 instances of stalking, under section 354D of the Indian Penal Code, 1860, (the “**IPC**”) were reported in 2015. Maharashtra recorded the highest number of such incidents with 1,587 cases, while

¹ Report of the Committee on Amendments to Criminal Law; 23 January, 2013; Page 1; Available at: <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>; (Last accessed: 29 August, 2018)

² Santosh Kumar Singh v. State, (2010) 9 SCC 747

³ NCRB, Crime In India Statistics 2015, Table 5.6; Page 168

⁴ NCRB, Crime In India Statistics 2014, Table 5.6; Page 190

⁵ NCRB, Crime In India-2015 Compendium; Page 90

Delhi recorded the third highest number of 835 cases. 1,020 cases of stalking of children were registered in 2015⁶. It is pertinent to mention that, not only do several instances of stalking go unreported, but also that the methodology used to record such offences leads to significant under-reporting and misrepresentation of data. The NCRB follows the ‘*rule of principal offence*’⁷ wherein each crime is considered as a single unit and only the most severe of the concerned charges are counted on record. For instance, an incident involving stalking, rape and murder, will be listed as murder in the database to avoid duplication.

Moreover, with the advent of the internet and social media platforms such as Facebook and Twitter, cyber stalking has grown at alarming rates, offering the perpetrators the advantage of anonymity over physical stalking. According to Black’s Law Dictionary⁸, cyber stalking is defined as “*the act of threatening, harassing, or annoying someone through multiple email messages, as through the internet, especially with the intent of placing the recipient in fear that an illegal act or an injury will be inflicted on the recipient or a member of the recipient’s family or household.*”

Cyber stalking in India first came to light in the case of Ritu Kohli.⁹ The accused in this case, began chatting under the name of the wife of his former boss and revealed her personal information via a website. This was done with the motive of exacting revenge on the boss, who had fired him. On this pretext, the victim kept receiving indecorous calls from unknown persons.

Currently, stalking has been dealt with under Section 354D of IPC. However, in its present form, the law on stalking leaves more to be desired. For instance, one of the major drawbacks of the existing law is its gender specificity. This limits the understanding of stalking to a sexual offence alone. Lately, however, there have been attempts to amend the law on stalking for, *inter alia*, making it more gender neutral and gender inclusive. Further, first conviction on the charge of stalking is a bailable offence, which whittles down the deterrent effect of the provision. In light of the above, Citizens’ Foundation for Policy Solutions (“CFPS”) has come up with a proposal for a reformed legal framework on stalking for the National Capital Territory of Delhi.

⁶ NCRB, Crime In India-2015 Compendium; Page 100

⁷ NCRB, Crime In India-2015 Compendium , under Disclaimer

⁸ Bryan A Garner, Black’s Law Dictionary (9th edition), St. Paul, MN: West, 2009, p. 472

⁹ Ritu Kohli case was the first case of cyber stalking in which charges were pressed under Section 509 of the Indian Penal Code, 1860. The case remains unreported. Available at: <https://www.thehindu.com/2000/06/18/stories/14182186.html> (Last accessed: 29 August, 2018)

II. COMPARATIVE STUDY OF STALKING LAWS GLOBALLY

Stalking in general, and cyber stalking in particular, despite being a global phenomenon, have not been clearly defined in the civil or criminal jurisprudence of most countries.¹⁰ In Common Law countries, taking cue from England, provisions against stalking have been introduced but lack legislative creativity and merely reproduce the English provision.

1. England and Wales

The provisions under the Protection from Harassment Act, 1997, applicable to England and Wales, that deal with stalking (as amended by the Protection of Freedom Act, 2012) are reproduced below for ease of reference.

“Section 1: Prohibition of harassment.

- (1) *A person must not pursue a course of conduct—*
 - (a) *which amounts to harassment of another, and*
 - (b) *which he knows or ought to know amounts to harassment of the other.*

[A person must not pursue a course of conduct —

 - (a) *which involves harassment of two or more persons, and*
 - (b) *which he knows or ought to know involves harassment of those persons, and*
 - (c) *by which he intends to persuade any person (whether or not one of those mentioned above) –*
 - (i) *not to do something that he is entitled or required to do, or*
 - (ii) *to do something that he is not under any obligation to do.]*
 - (2) *For the purposes of this section [or section 2A(2)(c)], the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*
 - (3) *Subsection (1) [or (1A)] does not apply to a course of conduct if the person who pursued it shows—*
 - (a) *that it was pursued for the purpose of preventing or detecting crime,*
 - (b) *that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or*
 - (c) *that in the particular circumstances the pursuit of the course of conduct was reasonable.*

Section 2: Offence of harassment.

- (1) *A person who pursues a course of conduct in breach of [section 1(1) or (1A)] is guilty of an offence.*
- (1) *A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.*

Section 2A: Offence of stalking

- (1) *A person is guilty of an offence if—*
 - (a) *the person pursues a course of conduct in breach of section 1(1), and*
 - (b) *the course of conduct amounts to stalking.*
- (2) *For the purposes of subsection (1)(b) (and section 4A(1)(a)) a person's course of conduct amounts to stalking of another person if—*
 - (a) *it amounts to harassment of that person*
 - (b) *the acts or omissions involved are ones associated with stalking, and*
 - (c) *the person whose course of conduct it is knows or ought to know that the course*

¹⁰ "International Legislation." Stalking Risk Profile. <https://www.stalkingriskprofile.com/what-is-stalking/stalking-legislation/international-legislation> (Last accessed: 30 August, 2018).

- of conduct amounts to harassment of the other person.*
- (3) *The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking—*
- (a) following a person,*
 - (b) contacting, or attempting to contact, a person by any means,*
 - (c) publishing any statement or other material—*
 - (i) relating or purporting to relate to a person, or*
 - (ii) purporting to originate from a person,*
 - (d) monitoring the use by a person of the internet, email or any other form of electronic communication,*
 - (e) loitering in any place (whether public or private),*
 - (f) interfering with any property in the possession of a person,*
 - (g) watching or spying on a person.*
- (4) *A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, or a fine not exceeding level 5 on the standard scale, or both.*
- (5) *In relation to an offence committed before the commencement of section 281(5) of the Criminal Justice Act 2003, the reference in subsection (4) to 51 weeks is to be read as a reference to six months.*
- (6) *This section is without prejudice to the generality of section 2.”*

Section 2B empowers judges to issue search warrants to the police to investigate complaints of stalking, using reasonable force if necessary. While Section 2 cited above provides for imprisonment of 6 months, Section 3 expounds civil remedies to the victim by way of financial compensation or damages. Section 3A, cited below, provides for injunctions that can be sought by a victim to prevent stalking:

“Section 3A: Injunctions to protect persons from harassment within section 1(1A)

- (1) *This section applies where there is an actual or apprehended breach of section 1(1A) by any person (“the relevant person”).*
- (2) *In such a case-*
- (a) any person who is or may be a victim of the course of conduct in question, or*
 - (b) any person who is or may be a person falling within section 1(1A)(c),*
- may apply to the High Court or [the county court] for an injunction restraining the relevant person from pursuing any conduct which amounts to harassment in relation to any person or persons mentioned or described in the injunction.”*

New Zealand and Trinidad & Tobago have, without using the word ‘stalking’, largely drawn on the English provision to penalize stalking in their anti-harassment laws. In Common Law countries with federal constitutions, such as the United States and Australia (unlike England, which has a unitary constitution), different states/provinces have their own laws dealing with stalking, which do display considerable legislative creativity, though broadly following the same pattern. Both civil and criminal remedies are available in many cases, as in California, where a “restraining order” can also be issued, similar to the injunction provision stipulated in Section 3A of the Protection from Harassment Act, 1997 in England, and ‘restraining orders’ or ‘protection orders’ find a place in the criminal jurisprudence of many

countries even vis-a-vis stalking, be it in Common Law countries like the Bahamas or Civil Law countries like Denmark.

2. Australia

Section 35 of the Crimes Act, 1900, applicable to the Australian Capital Territory is considerably well-articulated in its use of relevant terms (unlike vague terms like ‘*monitoring*’ used in Protection from Harassment Act, 1997, in England, which several other countries have simply reproduced). The relevant provision is reproduced below.

“*Stalking:*”

- (1) *A person must not stalk someone with intent—*
 - (a) *to cause apprehension, or fear of harm, in the person stalked or someone else; or*
 - (b) *to cause harm to the person stalked or someone else; or*
 - (c) *to harass the person stalked.*

Maximum penalty:

 - (a) *imprisonment for 5 years if—*
 - (i) *the offence involved a contravention of an injunction or other order made by a court; or*
 - (ii) *the offender was in possession of an offensive weapon; or*
 - (b) *imprisonment for 2 years in any other case.*
- (2) *For this section, a person **stalks** someone else (the **stalked person**) if, on at least 2 occasions, the person does 1 or more of the following:*
 - (a) *follows or approaches the stalked person*
 - (b) *loiters near, watches, approaches or enters a place where the stalked person resides, works or visits;*
 - (c) *keeps the stalked person under surveillance;*
 - (d) *interferes with property in the possession of the stalked person;*
 - (e) *gives or sends offensive material to the stalked person or leaves offensive material where it is likely to be found by, given to or brought to the attention of, the stalked person;*
 - (f) *telephones, sends electronic messages to or otherwise contacts the stalked person;*
 - (g) *sends electronic messages about the stalked person to anybody else;*
 - (h) *makes electronic messages about the stalked person available to anybody else;*
 - (i) *acts covertly in a way that could reasonably be expected to arouse apprehension or fear in the stalked person;*
 - (j) *engages in conduct amounting to intimidation, harassment or molestation of the stalked person.*
- (3) *However, this section does not apply to reasonable conduct engaged in by a person as part of the person's employment if it is a function of the person's employment to engage in the conduct and the conduct is not otherwise unlawful.*
- (4) *Without limiting subsection (1), a person is also taken to have the intent mentioned in the subsection if the person knows that, or is reckless about whether, stalking the other person would be likely—*
 - (a) *to cause apprehension or fear of harm in the person stalked or someone else; or*
 - (b) *to harass the person stalked.*
- (5) *In a prosecution for an offence against subsection (1), it is not necessary to prove that the person stalked or someone else apprehended or feared harm or that the person stalked was harassed.*
- (6) *For this section:*

"harm" means physical harm, harm to mental health, or disease, whether permanent or temporary.

"harm to mental health" includes psychological harm.

"physical harm" includes unconsciousness, pain, disfigurement and physical contact that might reasonably be objected to in the circumstances, whether or not there was an awareness of the contact at the time."

3. Germany

Representing Civil Law countries, attention may be drawn to Germany and the Philippines (the latter has significant elements of Common Law as well). Section 238 of the German Criminal Code states that:

“Stalking is defined as:

- (1) Whosoever unlawfully stalks a person by
 1. seeking his proximity,
 2. trying to establish contact with him by means of telecommunications or other means of communication or through third persons,
 3. abusing his personal data for the purpose of ordering goods or services for him or causing third persons to make contact with him,
 4. threatening him or a person close to him with loss of life or limb, damage to health or deprivation of freedom, or
 5. committing similar acts and thereby seriously infringes his lifestyle shall be liable to imprisonment not exceeding three years or a fine.*
- (2) The penalty shall be three months to five years if the offender places the victim, a relative of or another person close to the victim in danger of death or serious injury.*
- (3) If the offender causes the death of the victim, a relative of or another person close to the victim the penalty shall be imprisonment from one to ten years.*
- (4) Cases under subsection (1) above may only be prosecuted upon request unless the prosecuting authority considers suo moto that prosecution is required because of special public interest.”*

4. Philippines

The anti-stalking law of the Philippines is detailed with well-defined terms. The style and structure of this provision has been co-opted in our draft provision.

“Section 1. Title. - This Act shall be known as the “Anti-Stalking Act of 2003.”

Section. 2. Declaration of Policy. - It is the policy of the State to protect and promote every individual's dignity, right to privacy, peace of mind, security of person and psychological and emotional welfare, to punish acts which undermine said rights, and to protect every citizen's safety and well-being.

Section. 3. Definition of Terms. - As used in this Act, the following terms shall mean or be interpreted and construed as hereunder defined:

- (a) Repeatedly - shall mean at least three (3) separate occasions closely related in time evidencing a continuity of purpose;*
- (b) Follows - shall mean maintaining a visible physical proximity to another person or pursuing or conducting surveillance upon that person over a period of time and without legitimate purpose so as to cause a reasonable person to suffer substantial emotional distress and to actually cause substantial emotional distress to the person followed or pursued;*
- (c) Harasses - shall mean a knowing and willful course of conduct directed at a specific person which seriously alarms, intimidates, torments or terrorizes the person and serves no legitimate purpose;*
- (d) Course of Conduct - shall mean a series of three (3) or more separate, noncontinuous acts, closely related over a period of time, however short, evidencing a continuity of purpose, including, but not limited to, unconsented contact with another person. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the person;*

- (e) *Unconsented contact - shall mean any contact with another individual that is initiated or continued in malicious and willful disregard of that individual's expressed desire that the conduct be avoided or discontinued and with the intent to place that person in reasonable fear of his or her safety, including, but not limited to:*
 - (1) *following or coming into visual presence of that individual;*
 - (2) *approaching or confronting that individual in a public place or on private property;*
 - (3) *placing that individual under surveillance by waiting at or outside the workplace, school or residence of that individual;*
 - (4) *entering onto or remaining on property owned, leased, or occupied by that individual;*
 - (5) *contacting that individual by telephone; individual; or damaging that individual's home or property.*
 - (6) *sending mail or other written communications to that individual; or*
 - (7) *damaging that individual's home or property.*
- (f) *Substantial emotional distress - shall mean severe mental anguish, fright, anxiety, wounded feelings, moral shock, social humiliation and similar injury.*
- (g) *Physical injury - shall mean those injuries defined and punished under Title Eight, Chapter Two, specifically Articles 262 to 266 of the Revised Penal Code;*
- (h) *Restraint - shall mean those offenses defined and punished under Title Nine, Chapter One, Section One, specifically Articles 267 and 268, and Title Eleven, Chapter Four, specifically Article 342, of the Revised Penal Code;*
- (i) *Sexual assault - shall mean those offenses defined and punished under Title Eleven, Chapter Two, specifically Articles 335 and 336 of the Revised Penal Code;*
- (j) *Family - shall mean the spouse, parent, child, any person related within the third degree of consanguinity, or any person who regularly resides in the household of the victim.*

Sec. 4. There shall be incorporated after Article 282 of the Revised Penal Code, as amended, a new section to read as follows:

“Article 282-A. Definitions of the Crime of Stalking. - Any person who willfully, maliciously, and with the intent to place another person in reasonable fear of death, physical injury, unlawful restraint or sexual assault, repeatedly follows or harasses the said person after having been given reasonable warning or request to desist by or on behalf of the person so followed or harassed, shall be guilty of Stalking, an offense punishable by prison correccional in its minimum and medium periods and/or a fine of not less than One Thousand Pesos and not more than Ten Thousand Pesos.”

“In case of conviction, the offender shall also be required to post a bond to keep the peace conditioned upon his undertaking that he will refrain from further committing acts of stalking against the same victim for a period and amount to be determined by the Court in its discretion. Should the person sentenced fail to give the bond as required, he shall be detained for a period which shall in no case exceed three (3) months.”

III. CURRENT LEGAL POSITION OF STALKING IN INDIA

Stalking as a separate offence under the Indian Penal Code, 1860 was introduced *vide* the Criminal Law Amendment Act, 2013. Prior to this amendment, stalking was either perceived as an activity preceding the commission of more heinous crimes such as murder, or in instances of cyber stalking, it was tried under Section 509 of the IPC read with provisions of Information Technology Act, 2000 (the “IT Act”).¹¹

The discourse around making stalking a separate punishable offence under the IPC dates back to 2006, when the National Commission for Women had proposed an amendment for addition of Section 509B through the Criminal Law Amendment Act, 2006¹², which dealt with stalking exclusively. However, this provision never saw the light of day in any form under the IPC.

The conversation around making stalking a punishable offence again picked up pace in 2013 with the overhauling of criminal law, as a reaction to the brutal Nirbhaya gang rape case in Delhi.¹³ The Committee on Amendments to Criminal Law, in the introduction to its report, has recognized stalking as “*a matter of serious concern*”.¹⁴

The report proposed the addition of Section 354C to IPC, the draft of which is reproduced below.

“354C (1) – Stalking: *Whoever follows a person and contacts, or attempts to contact such person to foster personal interaction repeatedly, despite or clear indication of disinterest by such person, or whoever monitors the use by a person of the internet, email or any other form of electronic communication, or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking.*

Provided that the use of conduct will not amount to stalking if the person who pursued it shows:

- i. That it was pursued for the purpose of preventing or detecting crime and the person accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the state; or,*

¹¹ Ritu Kohli case was the first case of cyber stalking in which charges were pressed under Section 509 of the Indian Penal Code, 1860. The case remains unreported. Available at: <https://www.thehindu.com/2000/06/18/stories/14182186.html> (Last accessed: 29 August, 2018)
See also: The State (Cyber Cell) v. Yogisha @ Yogesh Pandurang Prabhu r/o. Vashi C.C. No. 3700686/PS/2009

¹² Available at: <http://ncw.nic.in/PDFFiles/Amendments%20to%20laws%20relating%20to%20women.pdf> (Last accessed: September 3, 2018)

¹³ Mukesh and Anr. vs. State of NCT of Delhi & Ors.; Criminal Appeal No. 607 of 2017; Supreme Court of India

¹⁴ Report of the Committee on Amendments to Criminal Law; 23 January, 2013; Page 1; Available at: <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>; (Last accessed: 29 August, 2018)

- ii. *That it was pursued under any enactment or rule of law, or to comply with any condition or requirement imposed by any person under any enactment; or,*
- iii. *That in particular circumstances the pursuit of the course of conduct was reasonable*
- (3) *Whoever commits the offence described under 354C (1) shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to three years, and shall also be liable to fine.”*

Accordingly, the Criminal Law Amendment Act, 2013 incorporated Section 354D into the IPC, reproduced hereunder.

“354D. Stalking:

- (1) *Any man who –*
 - (i) *follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or*
 - (ii) *monitors the use by a woman of the internet, e-mail or any other form of electronic communication, commits the offence of stalking;*

PROVIDED that such conduct shall not amount to stalking if the man who pursued it proves that –

- (i) *it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or*
- (ii) *it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or*
- (iii) *in the particular circumstances such conduct was reasonable and justified.*
- (2) *Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.”*

Consequently, an amendment was also made to the Code of Criminal Procedure (CrPC), 1973, adding Section 354D to Schedule I, wherein stalking was classified as a cognizable offence and bailable where the imprisonment is up to 3 years and non-bailable where the imprisonment is up to 5 years.

While the initiative of the amendment to include stalking as a separate offence in the IPC was a noteworthy step forward in the direction of acknowledgement of stalking as a crime and exhaustively defining stalking, there still seems to be a prevailing general discontent with the present law.

IV. RECENT ATTEMPTS TO AMEND THE LAW ON STALKING

There have been recent attempts to amend Section 354D of the IPC. In 2017, Dr. Shashi Tharoor tabled a Criminal Law (Amendment) Bill, 2017¹⁵, seeking to add a third clause to the definition of stalking under Section 354D (1) to include “*watches or spies*” as *actus reus* of stalking and by adding that the listed activities should be carried out “*in a manner that results in a fear of violence or serious alarm or distress in the mind of such person..*” The bill also proposed an amendment to Schedule I of CrPC to make stalking a non-bailable offence, regardless of the term of imprisonment.

The most recent proposal to amend the law on stalking was made by Mr. Hussain Dalwai by introducing The Criminal Laws (Amendment) Bill, 2018, in the Rajya Sabha, in 2018.¹⁶ The provisions proposed in this bill were akin to the provisions proposed in the Criminal law (Amendment) Bill, 2017. This bill too sought to amend Schedule I of CrPC to make stalking a non-bailable offence in entirety. The only visible difference between the two bills was that after adding “*watches or spies*” as the third clause under 354D (1) it continues to add “*in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person....*”

Some developments, which are of prime importance, are that both the bills introduced in the Lok Sabha and the Rajya Sabha in 2017 and 2018, use the term “*person*” for both the victim and the perpetrator of the crime, thereby making the law more gender neutral as well as gender inclusive. This is in stark contrast with the existing provision on stalking in the IPC, which uses the terms “*man*” and “*woman*” and associates them to perpetrator and victim respectively. Although both the bills have, to a great extent, dealt with the problem of the offence being bailable in nature and being gender specific, however, other problems in the law, such use of vague terminology and failure to define important terms, still remain.

Given these lacunae, the Aam Aadmi Party government of Delhi took upon itself the task of introducing relevant reforms in this regard for the National Capital Territory of Delhi.

¹⁵ Available at: <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/2660LS%20As%20Int....pdf> (Last accessed: 29 August, 2018)

¹⁶ Available at: <http://164.100.47.4/BillsTexts/RSBillTexts/Asintroduced/criminal-E-20718.pdf> (Last accessed: 29 August, 2018)

V. CFPS's PROPOSED AMENDED DRAFT OF SECTION 354D

354D. Stalking— (1) Whoever, in a repeated course of conduct, amounting to unconsented contact:

- (a) follows a person; or,
- (b) loiters near, watches, approaches or enters a place where such person resides, works or visits; or,
- (c) interferes with property in the possession of such person; or,
- (d) sends, delivers or causes the delivery of letters, packages, facsimiles, or other objects to the person or leaving them where they will be found by, given to or brought to the attention of the person; or,
- (e) communicates through telephone or sends electronic messages to or otherwise contacts such person; or,
- (f) traces the person's use of the internet, e-mail or any other electronic communication, by any means, including accessing or securing access to such computer, computer system or computer network or computer resource of such person, directly or through an intermediary;
- (g) keeps such person under surveillance; or,
- (h) makes information about such person available to anybody else; or,
- (i) acts covertly or otherwise in a way that could reasonably be expected to cause substantial emotional distress to such person; or
- (j) instigates others to do any of the above acts;

commits the offence of stalking.

PROVIDED that such conduct shall not amount to stalking if the person who pursued it proves that:

- (i) it was pursued for the purpose of preventing or detecting crime and the person accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
- (ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or
- (iii) in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

(3) Whoever, being present at the time of commission of the offence of stalking and being able to prevent such offence, fails to prevent the commission of such offence or not being in position to prevent the commission of such offence, fails to give information of the commission of such offence to the nearest magistrate or the police officer, by any mode, with the intention of screening the offender from the legal punishment, shall be liable for abetment of such offence and shall be punished with imprisonment of either description which may extend to three years or with fine or with both.

(4) Whoever, on once engaging in any of the acts with an individual described in section 354D(1), repeats the same or any of the other acts enlisted thereunder with any family member of the said individual, over a period of time, evidencing a continuity of purpose, such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the said individual, shall also be held liable for the offence of stalking, and shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

EXPLANATION -

- I. The phrase **“repeated course of conduct”** shall mean a series of two (2) or more acts which are:
 - (a) separate;
 - (b) non-continuous;
 - (c) closely related over a period of time, however short; and
 - (d) evidencing a continuity of purpose.

The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the person.

Whoever, on engaging in any of the acts described in section 354D(1) once and then engaging in the same act or another of the acts listed thereunder, closely related over a period of time, evidencing a continuity of purpose, such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the person, shall be taken to exhibit repeated course of conduct for the purpose of this section.

- II. The phrase **“substantial emotional distress”** shall mean mental distress, suffering, or anguish, including depression, shame, humiliation, shock, embarrassment, grief, anxiety, or fear.

- III. The phrase **“unconsented contact”** shall mean:
- (a) any contact with another individual that is initiated or continued, despite clear indication of disinterest by that individual that the conduct be avoided or discontinued; or,
 - (b) any contact with another individual that is initiated by not providing the individual an opportunity to express disinterest by that individual that the conduct be avoided or discontinued; or,
 - (c) any contact with another individual that seeks to obtain consent by way of criminal intimidation, as defined under section 503 of the Indian Penal Code, 1860.
- IV. The word **“follows”** shall refer to maintaining a visible physical proximity to another person or pursuing without legitimate purpose so as to cause a reasonable person to suffer substantial emotional distress and to actually cause substantial emotional distress to the person followed or pursued.
- V. The phrase **“family member”** shall include the following:
- (A) spouse, child, grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or niece, of the victim, whether related by blood, marriage, or adoption;
 - (B) person who lives, or has previously lived, in a spousal relationship with the victim;
 - (C) person who lives in the same household as the victim; or
 - (D) person who is a former spouse of the victim or is or has been in a dating, courtship, or engagement relationship with the victim;
- VI. The words and phrases **“information”, “intermediary”, “access”, “computer”, “computer system”, “computer network”** and **“computer resource”** shall have the meanings assigned to them in section 2 of the Information Technology Act, 2008.

VI. LEGAL ANALYSIS OF PROPOSED AMENDMENTS

The act of stalking can be differentiated from acceptable behaviour by satisfying a three-pronged test, set out below.¹⁷

- i. Repetitive nature of the behaviour and content of communications, which together constitute the element of *actus reus*.
- ii. Intent to instill fear in, or cause harm to the victim, which constitutes the element of *mens rea*.
- iii. Outcome of the criminal conduct on the victim.

In Section 354D, the provision of stalking in the IPC, the first two factors are partly addressed while the third one is completely missing. This implies that even though the provision emphasises on the repeated nature of the conduct of the stalker and provides a proviso to exclude reasonable acts done in good faith or in compliance with the law, the section suffers from lack of clarity, precision and definitions. The proposed draft section will not only remove these lacunae but also insists on the third factor i.e. the requirement that actual harm should be caused to the victim. This is necessary to minimise the misuse of the provision by unscrupulous complainants intending to harass others.

As we have shown earlier in our analysis of various foreign legislations criminalising stalking, some jurisdictions, such as in Australia, have eliminated the requirements of intent to cause fear or harm to the victim.¹⁸ Thus, lawmakers face the dilemma that making a law which requires intent to cause fear or harm may not capture a wide range of behaviour that may be perceived as stalking by many victims.¹⁹ However, if the law solely depends upon the victim's perception of events, the potential for misuse of the provision increases substantially.²⁰ Any legislation devoid of *mens rea* is also at odds with the traditional measures of criminal

¹⁷ Denninson and Thomson, Identifying Stalking: The Relevance of Intent in Commonsense Reasoning, Law and Human Behaviour, Vol 26, No. 5 (Oct. 2002), pp. 543-561, as available at: <https://www.jstor.org/stable/1394526> Accessed:

¹⁸ Criminal Law Amendment Act [No. 1] 1998; Criminal Code [Stalking] Amendment Act 1999 [QLD]

¹⁹ Ogilvie, E. (2000). Stalking: Legislative, policing and prosecution patterns in Australia. Canberra, ACT: Australian Institute of Criminology Research and Public Policy Series, No. 34. Australian Institute of Criminology.

²⁰ Harris, J. (2000). An evaluation of the use and effectiveness of the Protection from Harassment Act 1997, Home Office Research Study No. 203. London: Home Office.

responsibility.²¹ This aspect is crucial in a densely populated and diversely cosmopolitan state like Delhi. Even the Supreme Court of India has shown concern and emphasised in its recent judgments that some women centric laws like the Domestic Violence Act, 2005 and Section 498A of the IPC have been misused.²² Therefore, the proposed draft provision includes clear definitions, requires only general intent, as opposed to specific intent, on part of the accused and also prescribes that actual harm should have been caused to the victim. Thus, it seeks to address all the existing gaps in the present law.

1. Making the offence Gender-Neutral and Gender-Inclusive

Presently, the section recognizes ‘women’ to be sole victims of stalking, thereby eliminating the possibility of other genders being accommodated in the definition. The gender-specificity of the current law is the reason why no such crimes against other genders are reported. There is mounting evidence to show that stalking is not an offence against women alone as here have been cases where men were stalked by women.²³ The leading case of entrepreneur Vijay Nair in which he was stalked and harassed by a female assaulter, serves as a reminder that such crimes can be committed by and against any gender. However, due to the absence of law on this subject, the victim was not able to take legal action against the perpetrator.²⁴ While pedophiles victimize both young boys and girls, perverts among the homosexuals and those on the lookout to force young boys into pornography must also be taken into consideration.

Further, making stalking a gender specific offence, limits the understanding of stalking as a sexual offence alone. However, stalking could also precede other offences such as robbery, assault and ‘non-sexual’ offences, which emphasizes the need to make the law more gender neutral and gender inclusive. This has also been addressed in the draft

²¹ He Kaw Teh (1985). 15 Australian Criminal Reports 203.

²² Rajesh Sharma vs The State of Uttar Pradesh on 27 July, 2017 CRIMINAL APPEAL NO. 1265 OF 2017

²³ Zara Khan, “Adam, what do you mean you were teased?”, The Hindu (May 2, 2017), Available at: <https://www.thehindu.com/thread/reflections/men-too-may-be-sexually-harassed/article18351375.ece> (last accessed on September 3, 2018)

²⁴ Vandana.Srivastawa. (2017, May 12). Vijay Nair, Founder and CEO of Only Much Louder, unmasks his cyber stalker; Twitterati horrified by story! Retrieved from <http://www.india.com/buzz/vijay-nair-founder-and-ceo-of-only-much-louder-unmasks-his-cyber-stalker-twitterati-horrified-by-story-2126067/>

proposed by Justice Verma committee in 2013.²⁵ Therefore, our proposed section has replaced the words “any man” with “whoever” to make the provision gender neutral.

2. Repeated Course of Conduct

The proposed draft section makes it mandatory that the conduct of the stalker should fall squarely within the construct of a ‘repeated course of conduct’ (“**RCC**”), which is defined under Explanation I of the provision. The definition states that the conduct should be:

- i. A series of two or more separate acts.
- ii. The acts must be non-continuous in nature.
- iii. The acts must be closely related to each other so as to depict continuity of purpose.
- iv. The nature and duration of acts must be such that it causes “substantial emotional distress” to a reasonable person.
- v. The same act need not be done repeatedly but can be a combination of any of the acts listed from (a) to (j) under sub-section (1).

If the actions of a stalker satisfy all these conditions, his or her conduct will clearly depict a course of conduct littered with prolonged, unwanted and unpredictable intrusions seeking to produce a sense of powerlessness and fear in the mind of the victim.²⁶ Research suggests that the longer stalking continues, the greater the potential for psychological, social and physical damage, making gauging the potential for persistence an important aspect of stalking risk assessment.²⁷ The anxiety and stress caused by prolonged stalking situation has been shown to occur even in the absence of stalking violence.²⁸

Another important aspect that is covered by this definition is that stalking may be done by a person using a combination of different acts listed under sub-section 1. Here, it is

²⁵ Report of the Committee on Amendments to Criminal Law; 23 January, 2013; Page 1; Available at: <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>; (Last accessed: 29 August, 2018)

²⁶ Kamphuis, J. H., & Emmelkamp, P. M. G. (2000). Stalking-a contemporary challenge for forensic and clinical psychiatry, *British Journal of Psychiatry*, 176, 206-209.

²⁷ Blaauw, E., Winkel, F. W., Arensman, E., Sheridan, L., & Freeve, A. (2002), The toll of stalking. The relationship between features of stalking and psychopathology of victims. *Journal of Interpersonal Violence*, 17(1), 50-63.

²⁸ Pathd, M., & Mullen, P. E. (1997), The Impact of Stalkers on their Victims, *British Journal of Psychiatry*, 170, 12-17.

imperative upon the lawmakers to understand that stalkers are broadly of two types – persistent ones and recurrent ones. A persistent stalker is the one whose behaviour continues in spite of intervention by the victim i.e. there may be fluctuations in intensity but there are no significant periods when the stalker does not intrude.²⁹ On the other hand, a recurrent stalker is different as they have chosen to cease their previous stalking behaviour for some reason. But such recurrent stalkers are more prone to starting new stalking episodes, which may be against the same or a different victim, signifying a return to their previous thought and behaviour patterns.³⁰ Incompetent suitor stalkers, who stalk with the aim of obtaining some sort of sexual gratification, usually present a low risk of persistent stalking and heightened risk of recurrent stalking.³¹ Persistency, especially in the face of rejection, distinguishes a genuine stalker from, for instance, a one-off incident such as the actions of an over-eager suitor.³²

Therefore, the course of conduct need not be perpetrated directly by the stalker or by just one person. It can be the cumulative effect of the words or actions of several persons or even non-human agents, such as the automatic and repeat sending of messages by software programming. In order to cover all such possible permutations, Explanation I clearly includes the use of different acts listed sub-section (1) as amounting to the repeated course of conduct.

3. Substantial Emotional Distress

The term “substantial emotional distress” (“**SED**”) appears in the definition of “repeated course of conduct” under Explanation I, definitions of “follows” under Explanation IV and in the residuary provision of 354D(1)(i). It is itself defined under Explanation II as including within its meaning:

- a. Mental distress; or,
- b. Suffering; or,

²⁹ McEwan et al., A Study of the Predictors in Stalking Situations, *Law and Human Behaviour*, Vol. 33, No. 2 (April, 2009), pp. 149 - 158, as available at: <https://www.jstor.org/stable/30219020>

³⁰ *Ibid.*

³¹ *Ibid.*

³² Warren Chik, Harassment through the Digital Medium - A Cross Jurisdictional Comparative Analysis of the Law on Cyber stalking, 3 *J. Int'l Com. L. & Tech.* 13 (2008)

- c. Anguish, including depression, shame, humiliation, shock, embarrassment, grief, anxiety or fear.

Some foreign jurisdictions have chosen to deliberately use vague definition in their anti-stalking law, such as in the UK, in order to maintain a balance between remedying stalking and preventing misuse of the law. They leave the burden of applying the law purposively on the wisdom of the courts which are empowered by the reasonableness standard to keep this in check.

Although the proposed draft section also retains the proviso that prevents a conduct to be excluded from stalking if it were reasonable and justified in the circumstances, we believe that it is better to define certain terms with an illustrative and non-exhaustive list of constituents which will guide both the police and the courts in applying the law in any given factual situation.

We have mentioned the prerequisite of distress having been caused so as to prevent misuse, such as in case of someone routinely visiting someone's office as a lover with no actual objections, but the family of the supposed victim seeking to make that an issue.

4. Unconsented Contact

The proposed provision has been drafted with a structure where the phrases "repeated course of conduct" and "unconsented contact" ("**UC**") together form the overarching umbrella under which any of the listed acts from (a) to (j), under sub-section 1, shall amount to stalking. This implies that RCC and UC together form the basic ingredients of the offence of stalking. While RCC reflects the persistence in the conduct of the stalker that leads to substantial emotional distress, UC covers the situations when the contact initiated by the stalker would be considered without consent. The phrase "unconsented contact", as defined under Explanation III, includes the following:

- a. When contact is initiated or continued despite clear indication of disinterest – it will cover most instances of physical stalking and even direct contact initiated through the internet.
- b. When contact is initiated without providing an opportunity to express disinterest – it will cover many instances of cyber stalking where a tech-savvy stalker may use various forms of untraceable and incognito modes of communication to harass the victim.
- c. When contact is initiated by way of criminal intimidation, as defined under section 503 of the Indian Penal Code, 1860 – it will cover instances where the victim is being threatened by the stalker from the very first interaction and forces the victim to act or omit to do any act he/she is not legally bound to do. The consent of the victim in such cases will be treated as vitiated due to criminal intimidation by the accused.

5. Adopting a combination of the List Model and the General Prohibition Model

Section 354D currently adopts a 'general prohibition model', which generally prohibits the offence of stalking, as compared to a 'list model' which specifically states the acts constituting stalking. It is generally agreed that “a crime is a crime, no matter how it is perpetuated” and hence a general prohibition model would *prima facie* be appropriate to cover all means of stalking.³³ Having said that, the unique features of non-physical and non-proximate cyber stalking would mean that some forms will not be covered under the general provision, thereby demanding special attention within the legislation. Accordingly, we have suggested that the amended Section 354D should follow the list model with an exhaustive list of common stalking and cyber stalking acts. The inclusion of such a list would give support and guidance to the courts, potential offenders, as well as victims in determining what constitutes stalking.³⁴

In order to prevent the provision from being narrowed down to the extent that some acts, presently outside our contemplation due to lack of imagination or non-existence of any sophisticated tool of communication that may exist in the future, may be excluded, the item (i) in the list under sub-section (1) brings within its purview all such acts which

³³ D Lamplugh and P Infield, 'Harmonising Anti-Stalking Laws' (2003) 34 George Washington International Law Review 853, 863-5.

³⁴ Anita Jay, Stopping Cyber stalking in Hong Kong, 4 City U. H.K. L. Rev. 113 (2013)

cause “substantial emotional distress” to the victim within the ambit of the stalking law. Inclusion of 354D (1) (i) makes the proposed draft section a combination of the list model and the general prohibition model. It serves as a residuary provision to make the ambit of the law wider and prevent the law from becoming outdated with any new form or means of stalking. In effect, it makes the seemingly exhaustive list of acts from (a) to (i) under sec-section 1 non-exhaustive in nature.

6. Physical Stalking

All possible acts of physical stalking are covered by entries (a), (b) and (c) which include:

- a. *Following a person:* as defined under Explanation IV, the term “follow” would include two situations:
 - i. Maintaining visible physical proximity; or
 - ii. Pursuing without legitimate purpose - Legitimate purpose has to be read with the provisos (i) and (ii) of this section which clearly lay down that a pursuit made for the purpose of preventing or detecting crime or made in order to comply with any legal requirement will not amount to stalking.
- b. *Loitering, watching, approaching or entering a place where the victim resides, works or visits:* Even if the stalker is not within the physical proximity of the victim but is repeatedly seen loitering around areas which are frequently visited by the victim, such an intrusive conduct is also covered.
- c. *Interference with property in the possession of the victim:* This item can have implications for both physical and cyber stalking. For example, deflating the tires of the victim’s car would need physical presence while introducing a computer virus to prevent the victim from using his or her computer can be achieved remotely.

7. Cyber Stalking

In this modern age of internet, cyber stalkers may send unwelcome, possibly obscene and threatening emails, mail bombs and/or viruses. They may also harass victims through live chats, post real or fake information about the victims on websites, bulletin boards,

chat rooms, discussion forums and newsgroups, as well as impersonate the victims to solicit unwanted contact.³⁵

Unlike stalking, cyber stalking does not involve any personal contact, which may in turn “encourage the projection of fantasy and the escalation of detrimental effects.”³⁶ Cyber stalkers generally find it easier and less risky to stalk online due to the Internet's anonymous nature and lack of cross-border restrictions. Cyber stalking may not involve any hacking, and interception or alteration of communication, but may be committed simply by obtaining the victims' information, and sending emails, spreading rumours, impersonating the victims or through other indirect means.³⁷ Further, social media networking services such as Facebook and Twitter afford access to a larger volume of potential victims.³⁸ Stalkers often demonstrate a sustained obsession with their victim that can be stimulated by the ease of access to, and, the volume of personal information placed online.³⁹

Cyber stalking has far-reaching and potentially devastating effects on its victims. Many well-known psychologists such as Mullen and Path⁴⁰ have found that victims in fear, and possibly their close relatives, are often forced to change their lifestyle, in addition to their homes, telephone numbers and jobs, to avoid their cyber stalkers. According to another psychologist, Mary Lee⁴¹, fear often escalates to severe psychological distress, including the development of post-traumatic stress disorder (PTSD). Such changes in lifestyle and emotional distress also frequently cause physical deterioration.⁴² Moreover, cyber stalking

³⁵ TM Gregorie, “Cyber stalking: Dangers on the Information Superhighway”, National Center for Victims of Crime 2001), as available at: <https://www.victimsofcrime.org/our-programs/stalking-resource-center/stalking-information/the-use-of-technology-to-stalk> (last accessed on September 3, 2018), p. 2-3

³⁶ M McGrath and E Casey, “Forensic Psychiatry and the Internet: Practical Perspectives on Sexual Predators and Obsessional Harassers in Cyberspace”, (2002) 30 *Journal of the American Academy of Psychiatry and the Law*, p. 81, 86.

³⁷ W Chik, “Harassment Through the Digital Medium: A Cross-Jurisdictional Comparative Analysis on the Law on Cyber stalking”, (2008) 3:1 *Journal of International Commercial Law & Technology*, p. 15

³⁸ Sen A., “Linking cyber-crime to the social media: a case study of victims in Kolkata”, In: Jaishankar K, Ronel N, editors. SASCV 2013 Conference Proceedings, 2013 Jan 11-13, Tamil Nadu, India: South Asian Society of Criminology and Victimology & Department of Criminology and Criminal Justice. Manonmaniam Sundaranar University; 2013. p. 378-382.

³⁹ Casey E. *Digital evidence and computer crime: forensic science, computers and the Internet*. 3rd ed. London: Academic Press; 2011.

⁴⁰ AW Burgess and T Baker, 'Cyber stalking' in J Boon and L Sheridan (eds), “Stalking and Psychosexual Obsession: Psychological Perspectives for Prevention, Policing and Treatment” (John Wiley & Sons Ltd, West Sussex 2002), p. 205

⁴¹ Email from Lee Wing Ming Mary to Public Consultation on Stalking (March 24, 2012), as available at: <http://www.cmab.gov.hk/en/issues/stalking.htm> (last accessed on September 3, 2018)

⁴² JR Meloy, “When Stalkers Become Violent: The Threat to Public Figures and Private Lives”, (2005) 33 *Psychiatric Annals*, p. 658-665

is likely to be a precursor to physical stalking and violence, including assault, rape and even murder.⁴³

A portentous aspect of cyber stalking is the potential anonymity or the use of pseudonyms and the stealth of cyber stalkers. Pseudonyms can cause a loss of social inhibitions and constraints, which may therefore facilitate, or even encourage stalking behaviour.⁴⁴ Besides spoofed emails or IP addresses, and untraceable proxy servers, cybercriminals use increasingly sophisticated and more readily available encryption tools to avoid detection and impede evidence-gathering.⁴⁵ It has been established that cyber stalking by an unknown stalker can augment the impact on victims since the anonymity afforded by electronic communication provides a shield for the stalker to hide behind whilst depersonalisation from the victim can make the nature of the offensive behaviour more relentless and ultimately, potentially more frightening.⁴⁶

Although cyber stalking is a stalking problem in a new domain overall, research has shown that both offline and cyber stalking victims suffer comparably high levels of psychological distress as a consequence of the experience.⁴⁷ It also identified that a large number of cyber stalking cases are perpetrated by total strangers, indicating a significant difference between offline and online stalking and that cyber stalking behaviour demonstrates specific adverse psychological, financial and emotional consequences on those against whom they are directed.⁴⁸ Some studies have also shown that cyber stalking victims engaged in more self-protective behaviour compared to physical stalking victims as the nature of cyber stalking elicits a very personal violation for victims.⁴⁹ Since many people spend more time communicating electronically than they do in person, often

⁴³ ML Pittaro, "Cyber Stalking: Typology, Etiology, and Victims" in K Jaishankar (ed), *Cyber Criminology: Exploring Internet Crimes and Criminal Behavior* (CRC Press, Boca Raton Florida 2011), p. 283

⁴⁴ J Clough, "Principles of Cybercrime" (Cambridge University Press, New York 2010), p. 367

⁴⁵ M Jackson, "Law Enforcement in Cyberspace: The Hong Kong Approach" in R Broadhurst and P Grabosky (eds), *Cyber-Crime: The Challenge in Asia* (HK University Press, HK 2005), p. 266

⁴⁶ Miller C, Blazakis D, Dai Zovi D, Esser S, Lozzo V, Weinmann R. *iOS Hacker's Handbook*. John Wiley & Sons; 2012.

⁴⁷ Emma Short, Andrew Guppy et. al, "The Impact of Cyber stalking", *Studies in Media and Communication*, Vol. 3, No. 2 (December, 2015), National Centre for Cyber stalking Research, University of Bedfordshire, as available at: <http://dx.doi.org/10.11114/smc.v3i2.970> (last accessed on September 3, 2018)

⁴⁸ *Ibid.*

⁴⁹ Matt R. Nobles, Bradford W. Reynolds, Kathleen A. Fox & Bonnie S. Fisher (2014), "Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyber stalking and Stalking Victimization Among a National Sample", *Justice Quarterly*, 31:6, 986-1014, DOI: 10.1080/07418825.2012.723030, p. 1007

described as the “tide of electronic hyper connection”⁵⁰, it is plausible that contact through cyberspace is just as personal as, or more personal than, face-to-face contact.

Section 354D(1)(2) of the IPC does acknowledge stalking through electronic communication as a prominent method, and states that whoever “*monitors the use by a woman of the internet, e-mail or any other form of electronic communication*” commits the offence of stalking. The word “*monitor*” in this clause is vague and vulnerable to misinterpretation. For instance, one probable interpretation of this clause can be mere tracking of the online activities of women. Consequently, any man who follows the activities of a woman on social networking websites like Facebook, Twitter etc. can be booked under this section.

Therefore, the proposed draft provision seeks to tackle all these concerns through paragraphs (e), (f) and (g) of sub-section 1:

(e) *Communication through telephone and sending of electronic messages*: This paragraph brings within its ambit all forms of communication on the internet or through the mobile such as phone calls, SMS, Email, WhatsApp, Facebook and other forms of social media. It also uses the term “or otherwise” to keep its scope wide enough to cover any other form of communication which may not technically be electronic in nature but could be used to remotely send messages to the victim.

(f) *Tracing the victim’s use of internet, email or any other electronic communication*: This paragraph is analogous to the cyber stalking provision in the present section 354D which uses the term “monitor” instead of “trace”.

- Firstly, the major drawback of using the term "monitor" in the present law is that it excludes the conduct of covert surveillance, which unlike monitoring, does not involve any interaction with the victims.⁵¹ This lacuna has been addressed in our proposed section by specifically including “covert acts” of the stalker that cause substantial emotional distress to the victim the residuary provision under paragraph (i).

⁵⁰ E. M. Hallowell, “The human moment at work”, Harvard Business Review (1998), 77, 58-64.

⁵¹ Anita Jay, “Stopping Cyber stalking in Hong Kong”, 4 City U. H.K. L. Rev. 113 (2013), p. 123

- Secondly, in the context of cyberspace, the term “trace” captures the essence of cyber stalking more directly as it hints towards an active part played the stalker to track online activity of the victim rather than being a mute spectator.
- Thirdly, paragraph (f) also specifically mentions that the tracing activity could be carried out by directly accessing the computer systems of the victim or through an intermediary like the social media platforms and mobile messengers. This exhaustive wording captures all possible ways and means that a stalker has to access the victim’s digital presence on the cyberspace.
- Explanation VI clarifies that all the terms related to informational technology used in the paragraph will bear the same meanings as assigned to them in the Information Technology Act, 2008.

(g) *Keeping the victim under surveillance*: Surveillance via the Internet is a growing problem in the 21st century and one of the major contributing factors to identity theft. Hackers and thieves often seek to gain personal information about an Internet user by using unsecured Internet connections or hacking password-protected accounts. With this information, a person's whereabouts, activities, private communications, and bank account or credit card information. This type of activity, particularly the interception of email or private communication, is usually considered illegal surveillance unless it is done by authorized law enforcement personnel as part of an ongoing investigation.⁵²

Although surveillance can be both through physical and digital media, physical surveillance is already covered under paragraphs (a) and (b). Other forms of digital surveillance, which may or may not require the stalker to commit the crime of hacking (punishable under section 66 of the Information Technology Act, 2008), are covered under this paragraph. This paragraph’s scope partly overlaps with paragraph (i) that seeks to incriminate “covert acts”, which include “surveillance, monitoring and tracking”⁵³, but has been retained nevertheless as we deem it necessary to clearly specify repeated or continuous surveillance as a punishable activity.

⁵² Margaret V. Sachs, Claiming Illegal Electronic Surveillance: An Examination of 18 U.S.C. 3504(a)(1), 11 Harv. C.R.-C.L. L. Rev. 632, 663 (1976)

⁵³ W Chik, “Harassment Through the Digital Medium: A Cross-Jurisdictional Comparative Analysis on the Law on Cyber stalking”, (2008) 3:1, Journal of International Commercial Law & Technology 13, p. 17

(h) *Making information about the victim available to anybody else*: The term “information” has been defined in section 2 of the Information Technology Act, 2008 and includes data, message, text, images, sound, voice, codes, computer programs, software etc. This exhaustive definition ensures that if the stalker makes information about the victim available to any third party, such unconsented disclosure of information would also amount to stalking. This provision seeks to cover the growing instances of ex-intimates, friends or family members who disclose personal information (which may have even been given to them earlier by the victim) about the victim on public fora, both in the physical and digital space.⁵⁴

(i) *Acting covertly or otherwise in a way that could reasonably cause substantial emotion distress*: This is a residuary provision, which seeks to cover not just other covert acts that are outside the scope of paragraph (g), but also any other act which the stalker ought to know could reasonably cause substantial emotional distress to the victim. This wide provision allows this section to retain the essence of the general prohibition model of drafting a penal provision while retaining the list model in its overall structure.

(j) *Instigating third parties to do any of the acts listed from paragraphs (a) to (i)*: The last paragraph includes the act of instigating others to commit acts of stalking. The Supreme Court of India has held in *Ramesh Kumar vs. State of Chhattisgarh*⁵⁵ that to instigate is to “goad, urge forward, provoke, incite or encourage to do an act”.

This paragraph seeks to cover those instances where a stalker may instigate his friends or associates to stalk a person to avoid coming under the ambit of “repeated course of conduct”. Instances of such concerted stalking have already reached our courtrooms⁵⁶ and the present law is not equipped to deal with them.

8. Person who fails to prevent Stalking to be charged for Abetment of Stalking

Sub-section (3) of the proposed section is borrowed from the section 354E inserted via Chhattisgarh’s state amendment⁵⁷ to the Indian Penal Code. The provision imputes criminal liability upon on person who fails to prevent the commission of the offence of

⁵⁴ "Youth uploads nude videos of college mates to Facebook, arrested", Times of India (September 4, 2018), as available at: <https://timesofindia.indiatimes.com/city/bengaluru/youth-uploads-nude-videos-of-collegemates-to-fb-arrested/articleshow/65664055.cms> (last accessed on September 4, 2018)

⁵⁵ AIR 2001 SC 3837

⁵⁶ *Kuldeep Jadon vs State of Madhya Pradesh*, Criminal Revision No. 3662/17, Madhya Pradesh High Court

⁵⁷ Section 4, Chhattisgarh Act of 25 of 2015, w.e.f. 21.07.2015

stalking or, if not in a position to prevent the crime, fails to give information of the commission to the nearest magistrate or police officer with the intention of “screening the offender from legal punishment. The requirement of intention will prevent idle bystanders and other bona fide person, who fail to act as good samaritans in the situation, from being held liable for their inaction. Only those who intend to screen the offender will be covered under sub-section (3).

9. Subjection of family members, friends and close associates to stalking

Sub-section (4) of the proposed section covers the stalking of family members, close acquaintances and loved ones of the stalking victim as well. The acts of stalking may not always be directed towards the victim and may even include person living under the same roof as the victim or towards those who have had a previous intimate relationship with the victim. Even in such cases, the victim can be put under substantial emotional distress as the relationship he or she shares his or her “family members” can be leveraged by the stalker to put the victim in fear, apprehension and distress.

It is to be noted that even though sub-section (4) uses the phrase “family member”, the definition of the phrase, as given under Explanation V goes beyond its literal meaning and includes other close associates of the victim as well. This wide definition ensures that every individual, who may be related to the victim through blood or otherwise and can be subjected to stalking, is brought within the ambit of the provision.

10. Making even the first offence of stalking Non-Bailable

Stalking has been classified as a bailable offence on the first conviction, when the term of imprisonment is up to three years, under Schedule I of the CrPC. This means that a first-time offender, on a bail application, will, as a matter of course be free from custody on securing bond and surety. This creates the risk of retaliatory crimes by the accused against the victim, watering down the deterrent effect of the provision, as is also evident from the reports of the NCRB.

According to the NCRB, the 2014-2015 data shows that there was a 33% rise in the number of cases reported (4,699 to 6,266).⁵⁸ While one of the possible reasons for the increase in cases reported could be the increase in awareness among women about the incriminating nature of stalking, however, it cannot be the sole reason for increase in the cases reported.⁵⁹ Significantly, out of the cases of stalking that were reported, the accused was able to get bail 85% of the time in 2014 and 83% of the time in 2015, while the pendency rates for stalking remained as high as 91% in 2014 and 84% in 2015.⁶⁰ This shows a serious deficiency of the present legal framework against stalking.

Alarming, there have been instances where the accused, after release on bail has posed a major threat to the safety of the woman. For instance, a woman was killed by her stalker in broad daylight in East Delhi after his release on bail and in order to take revenge from the woman, he stabbed her to death. The bailable nature of the offence makes the current legal framework vulnerable to abuse.⁶¹

While it can be argued that the scheme of Schedule 1 of CrPC is to categorize offences with imprisonment of three years or less, as bailable and non-cognizable, an exceptional case is made out for offences such as those under Section 355⁶² and Section 453⁶³ of the IPC, which have imprisonment for less than three years, but are categorized as non-bailable offences under Schedule I of CrPC.

It is important to understand that stalking is a crime where the accused can pose a major threat to the victim if no immediate action is taken. Acknowledging the serious consequences of no to minimal incarceration, it is important to restrain the access of the victim to the perpetrator, and in light of the same, we propose that Schedule 1 of the Code of Criminal Procedure, 1973 be amended and stalking be categorized as a non-bailable offence in its entirety.

⁵⁸ NCRB, Crime In India Statistics 2014 , table 5.5 at pg 187; See also: NCRB, Crime In India Statistics 2015, table 5.5 at pg 165

⁵⁹ TO DESIGNATE OFFENCE OF STALKING (s. 354D IPC) AS NON-BAILABLE. (2018). [ebook] The Quint, p.6. Available at: <https://www.thequint.com/quintlab/talking-stalking/assets/pdf/Petition-to-Designate-Stalking-as.pdf> [Accessed 22 Aug. 2018].

⁶⁰ *Ibid*, p.6.

⁶¹ *Supra* note 15, p.36.

⁶² Assault or criminal force with intent to dishonor person, otherwise than on grave provocation

⁶³ Punishment for lurking house-trespass or house breaking