
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 89 **Hearing Date:** April 11, 2023
Author: Ochoa Bogh
Version: January 17, 2023
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Crimes: stalking*

HISTORY

Source: Riverside County District Attorney's Office

Prior Legislation: AB 1982 (Ting), held Assem. Approps., 2014
SB 1320 (Kuehl), Ch. 832. Stats. 2002
SB 2184 (Royce), Chapter 1527, Statutes of 1990

Support: American Kennel Club; California District Attorneys Association; Crime Victims United; Social Compassion in Legislation

Opposition: California Public Defenders Association

PURPOSE

The purpose of this bill is to delete the current definition of stalking and instead provide that a person is guilty of stalking if the person has the intent to harm or the intent to place under surveillance for the purpose of harming another person, and engages in conduct that either places that person in reasonable fear of death or serious bodily injury to themselves, a family member, or a pet, service animal, emotional support animal, or horse that belongs to that person, or causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress.

Existing law states that any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of their immediate family is guilty of stalking. (Pen. Code, § 646.9, subd. (a).)

Existing law states that stalking is an alternate felony-misdemeanor, punishable by imprisonment in county jail for not more than one year, or by imprisonment in the state prison. (Pen. Code, § 646.9, subd. (a).)

Existing law provides that any person who violates a temporary restraining order, injunction, or any other court order in effect prohibiting stalking behavior against the same party shall be punished by imprisonment in the state prison for 2, 3, or 4 years. (Pen. Code, § 646.9, subd. (b).)

Existing law states that every person who, after having been convicted of domestic violence, violating a protective order, or criminal threats and commits stalking shall be punished by imprisonment in the state prison for 2, 3 or 5 years. (Pen. Code, § 646.9, subd. (c)(1).)

Existing law states that every person who, after having been convicted of felony stalking, commits stalking shall be punished by imprisonment in the state prison for 2, 3, or 5 years. (Pen. Code, § 646.9, subd. (c)(2).)

Existing law provides that in addition to the penalties provided above, the sentencing court may order a person convicted of felony stalking to register as a sex offender. (Pen. Code, § 646.9, subd. (d).)

Existing law provides the following definitions as it relates to the crime of stalking:

- “Harasses” means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.
- “Course of conduct” means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “course of conduct.”
- “Credible threat” means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of “credible threat.”
- “Electronic communication device” includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers.
- “Immediate family” means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household. (Pen. Code, § 646.9, subd. (l).) (Pen. Code, § 646.9, subs. (e), (f), (g), (h) and (l).)

This bill deletes the definition of “course of conduct,” “credible threat” and “electronic device” for purposes of stalking.

This bill deletes the current requirement that a person must willfully, malicious and repeatedly follow or willfully and maliciously harass another person and make a credible threat with the intent to place that person in reasonable fear for their safety, or the safety of their immediate family.

This bill instead provides that a is guilty of the crime of stalking if the person, with the intent to kill, injure, harass, or intimidate another person, or with the intent to place another person under surveillance for the purpose of killing, injuring, harassing, or intimidating that person, engages in conduct that does either of the following:

- Places that person in reasonable fear of the death of, or serious bodily injury to, that person, an immediate family member, a spouse or intimate partner, or the pet, service animal, emotional support animal, or horse of that person; or,
- Causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to one of the named categories of persons above.

COMMENTS

1. Need for This Bill

According to the author of this bill:

According to the Bureau of Justice Statistics Special Report: Stalking Victimization in the US, perpetrators of stalking tend to damage their victim's property, even going as far as to target the victim's loved ones, including pets. One National Crime Victimization Survey estimated that four in 10 stalkers threaten a "victim or the victim's family, friends, co-workers, or family pet," with 87,020 threats to harm a pet being reported.

Humans and animals form strong bonds that induce strong feelings of affection and connection, which can make a pet an easy target for threats and physical harm. California's law ignores how powerful a threat or injury to a beloved pet can be. Not updating state statute to conform to federal anti-stalking law leaves victims and their pets vulnerable to threats and attacks by a stalker. It is critical that California's anti-stalking law is updated in order to better protect victims and their pets.

2. Stalking and First Amendment Considerations

Stalking is generally understood as repeated threatening behavior that is intended to place the subject of the stalking in reasonable fear for their safety or the safety of their family. The elements of stalking are (1) repeatedly following or harassing another person, (2) making a credible threat, (3) with the intent to place that person in reasonable fear for their safety. (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210.) Because the crime of stalking punishes speech, the statute must be narrowly tailored in order to pass constitutional scrutiny under the First Amendment, which prohibits laws that abridge the freedom of speech. (U.S. Const., 1st Amend.) Generally, courts have upheld our stalking law as currently written finding that it is not vague or overbroad. (*People v. Halgren* (1996) 52 Cal.App.4th 122; *People v. Borrelli* (2000) 77 Cal.App.4th 703.) A statute may be challenged for vagueness if the statute does not provide fair notice of what conduct is prohibited. (*People v. Halgren, supra*, 52 Cal.App.4th at 1229-1230.) A challenge to a statute on the basis of overbreadth must demonstrate it inhibits a substantial amount of protected speech. (*In re M.S.* (1995) 10 Cal. 4th 698, 710.)

Credible Threat

Courts have found that credible threats fall outside the protection of the First Amendment. (*In re M.S.*, *supra*, 10 Cal.4th at 710; see *Watts v. United States* (1969) 394 U.S. 705, 706-708.) In the context of stalking, the term “credible threat” has been found to not be unconstitutionally vague. “The making of the credible threat alone is not punishable; a mere expression of anger or emotion does not fall within the provisions of the statute. The statute provides notice that a person is guilty of a felony if he or she willfully, maliciously, and repeatedly follows or harasses another person and also makes a credible threat with the specific intent to place the victim in reasonable fear for personal safety or the safety of immediate family members.” (*People v. Halgren*, *supra*, 52 Cal.App.4th at 1231.)

This bill deletes the requirement in the stalking statute that a credible threat must be made and instead provides that the person, with the intent to kill, injure, harass, or intimidate another person, or with the intent to place another person under surveillance for the purpose of killing, injuring, harassing, or intimidating engages in conduct that places the other person in reasonable fear of death or serious bodily injury. Without the requirement that a credible threat be made, the bill would make a person who never communicates or comes in contact with another person guilty of stalking.

Repeated Following or Harassment

Stalking requires either repeated following or harassment which necessarily includes multiple acts. (Pen. Code, § 646.9; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292-1293; *People v. Heilman* (1994) 25 Cal.App.4th 391, 400) “Repeated . . . simply means the perpetrator must follow the victim more than one time. The word adds to the restraint police officers must exercise, since it is not until a perpetrator follows a victim more than once that the conduct rises to a criminal level.” (*People v. Heilman*, *supra*, 25 Cal.App.4th at 400.) As discussed above, a First Amendment challenge can be based on overbreadth meaning the law inhibits a substantial amount of protected speech. (*People v. Halgren*, *supra*, 52 Cal.App.4th at 1231.) Angry or emotional speech that does not rise to a credible threat is still protected under the First Amendment.

This bill deletes the requirement of repeated following or harassment, thereby allowing a person to be guilty of stalking based on a single act.

3. Addition of Threats to Animals within Stalking Statute

Existing law requires intent to place a person in reasonable fear for their safety, or the safety of their immediate family as an element of stalking. “Immediate family” is defined as “any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.” (Pen. Code, § 646.9, subd. (1).)

This bill recasts those persons who the subject of the stalking may fear the safety of to include: (1) that person; (2) immediate family member; (3) a spouse or intimate partner; or (4) the pet, service animal, emotional support animal, or horse of that person. The definition of immediate family under existing law already includes spouse or any other person who regularly resides in the household which would in most instances would include an intimate partner. Pets, service animals and horses are not covered under “immediate family” nor are animals generally

considered “persons.” However, existing law does provide protections to animals under animal cruelty laws and allows courts to issue protective orders requiring persons to stay away from pets and other animals that live with the person needing protection.

4. Argument in Support

According to the American Kennel Club:

Numerous studies and feedback from law enforcement officers indicate that a significant percentage of domestic violence situations also involve threats of, and outright abuse of pets. Studies have shown that nearly half (48%) of women delay leaving an abusive situation out of concern for their pet and 70% of victims report their abuser threatened, injured or killed their pet. Sadly, many abusers often use maltreatment or threats of abuse against pets as leverage to prevent victims from fleeing abusive relationships. In one study, 25% of the participants reported that they returned to an abusive relationship out of concern for their pets.

Senate Bill 89 seeks to address these concerns by expanding what constitutes stalking to include behavior that seeks to harm or threaten a domestic violence victim’s pet, service animals, or emotional support animals. This would bill would bring California in line with the federal stalking statute.

5. Argument in Opposition

According to the California Public Defenders Association:

SB 89 would increase the number of criminal cases that could be brought against individuals for stalking but expanding the definition to include intimate partners, pets and other animals in the definition. It also removes the requirement that the acts be committed willfully, maliciously, and repeatedly and that the person have made a credible threat, defined as a verbal or written threat in order to constitute stalking. It also removes from the definition of harassment that willful course of conduct constitutes two or more acts over a period of time and does not include constitutionally protected activity. SB 89 also includes causing or attempting to cause substantial emotional distress to the crime of stalking.

CPDA sympathizes with crime victims, but SB 89 expands the definition of stalking too broadly and with overly vague terms such as “substantial emotional distress” that allow overly zealous prosecution of conduct that doesn’t rise to a true threat. It also allows for the penalization of constitutionally protected activity in the definition of stalking in violation of the First Amendment.

-- END --