

Personal Protection and the Law: Stalking, Domestic Violence and Peace and Good Behaviour.

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“Every move you make, every step you take, I’ll be watching you...”¹

Introduction

Stalking is an amorphous term. Wells describes it as ‘pursuit by one person of what appears to be a campaign of harassment or molestation of another’.²

Often stalking behaviours are intrusive and cause fear to the victim. Stalking complaints have ranged from the annoying, such as hosing a neighbour’s visitors to the dangerous, sometimes ending in serious injury or death to the victim.³ In two recent Western Australian cases the perpetrator ultimately killed members of their families but only after hiding in the roof and watching their movements from the ceiling.⁴ However, although stalking is often associated with sexual obsession this is not always the case, many stalking incidents are reported between neighbours and work colleagues.⁵ In the USA where stalking legislation was first put in place a major concern was celebrity

¹ The Police ‘Every Breath You Take’ (song) from the Album *Synchronicity* 1987.

² Celia Wells, ‘Stalking: The Criminal Law Response’ [1997] Crim LR 463.

³ See for example *R v Gill*, Unreported decision, Queensland Court of Appeal, [2004] QCA 139 (30 April 2004) also Marilyn McMahon and John Willis, ‘Neighbours and Stalking Intervention Orders: Old Conflicts and New Remedies.’ (2002) 20 (2) *Law in Context* 95 at 108.

⁴ Carolyn Johnson, *Familicide and Disputed Residency Contact (Western Australia 1989-1999)* (self published, 20 February 2002) copy available from the author.

⁵ See Marilyn McMahon and John Willis, ‘Neighbours and Stalking Intervention Orders: Old Conflicts and New Remedies.’ (2002) 20 (2) *Law in Context* 95 at 107 where they suggest that one quarter of stalking incidences arise between neighbours.

stalking. This is a concern that is not mirrored in Australia.⁶ There is also some debate about the nature of true stalking. The literature tends to focus on stranger or intimate stalking rather than, for example, neighbourhood disputes.

Women are also disproportionately represented as victims of stalking in available statistics. In a 1996 survey of Australian women, 15% of the respondents reported that they had been stalked at some point in their lives.⁷ American statistics about stalking suggest that stalking is a gendered crime frequently among those well-known to each other.⁸ Women are significantly more likely than men to be stalked by their intimates.⁹ These factors make the response within domestic-violence specific legislation particularly important. In Queensland the stalking legislation was prompted by the activist work of the Women's Legal Service and other women's organisations.¹⁰

The impact of stalking on victims has been well-researched. Serious economic and social problems have been identified among victims of stalking.¹¹ Impacts include physical and psychological illness, loss of employment, moving away, changing appearance and cutting off ties with community.¹² The level of impact has been one of the reasons for the push for legislation in this area.

⁶ R A Swanrick, 'Stalkers Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26. Although Helen Razer, a fairly prominent Australian radio journalist talked about her experience of being stalked in recent times.

⁷ Australian Bureau of Statistics *Women's Safety Australia* (ABS, Canberra, 1996) at 62.

⁸ American research: 78% of victims female, 87% stalkers male. See Karen Sampford 'Stalking Laws' *Research Bulletin 7/98* (Queensland Parliamentary Library, Brisbane, 1998) at par 1.4.

⁹ 59% of women victims were stalked by their intimates cf 30% of male victims stalked by their intimates. See Karen Sampford, 'Stalking Laws' *Research Bulletin 7/98* (Queensland Parliamentary Library, Brisbane, 1998) at par 1.4.

¹⁰ Some of you here will be familiar with Zoe Rathus' work. She was the director of the Women's Legal Service throughout the 1990's and a prime mover in relation to the development of stalking legislation in Queensland. In discussing the background to the Queensland criminal legislation I have been very much assisted by her notes and materials.

¹¹ Eric Blaauw et al, 'Designing Anti-Stalking Legislation on the Basis of Victim's experiences and Psychopathology' (2002) 9 (2) *Psychiatry, Psychology and the Law* 136 at 139.

¹² See also Michele Pathe and Paul Mullen, 'The Impact of Stalkers on their Victims' (1997) 170 *British Journal of Psychiatry* 12

Stalking legislation was introduced in all Australian states and territories during the 1990's, with Queensland first to introduce stalking legislation in 1993.¹³ In the following discussion I will examine the legislative response to stalking in Australia with a particular focus on Queensland. The crime of stalking and civil responses to such behaviour is still in rather early stages of development in Australia. Already the stalking legislation in Queensland has been amended several times since its introduction, as has also been the case in other jurisdictions in an effort to fine-tune its operation.

Stalking types

Holmes¹⁴ lists several types of stalkers. The common forms which are reflected in Queensland case-law are noted below. The 'lust-stalker' is motivated by a sense of predation and their victims are usually strangers.¹⁵ The 'love-scorned stalker' stalks someone known and has usually misunderstood the depth of their relationship. The predator believes that once the victim realises the perpetrator's love she (or he) will return it.¹⁶ The 'domestic-stalker' is similar to the 'love-scorned stalker' except that they have been in an intimate relationship. Often this type of stalking is long-term with tragic consequences.¹⁷ For example Millar's¹⁸ view of his own stalking was that:

"...ten years ago they would call this chivalry – now it is called stalking."¹⁹

Millar had been convicted of stalking his ex-partner. Shortly after the couple had separated his stalking behaviour began. It had included telephone calls, threats, letters, the delivery of numerous objects to his ex-partner's home and

¹³ Emma Ogilvie, 'Stalking: Policing and prosecuting Practices in Three Australian Jurisdictions' *Trends and Issues Paper* (Australian Institute of Criminology, Canberra, 2000) at 2.

¹⁴ Ronlad Holmes, 'Stalking in America; Types and Methods of Criminal Stalkers' (1993) 9(4) *Journal of Contemporary Criminal Justice* 317.

¹⁵ See *R v Vidovich* unreported [2002] QCA 422 10 October 2002.

¹⁶ *R v Leach* unreported [2004] QCA 189 2 June 2004

¹⁷ *R v Foodey* unreported [2003] QCA 310 25 July 2003

¹⁸ *Millar v Chief Executive* unreported [2005] QSC 2 February 2005

¹⁹ A statement made by Millar who had been convicted of stalking his ex-partner. His stalking *Millar v Chief Executive* unreported [2005] QSC 2 February 2005

had culminated in several incidences where he had tried to run her car off the road.

As I have noted celebrity stalkers seem to feature less in Australia. According to Holmes the celebrity stalker stalks someone unknown but publicly well-known and the end point is often fatal.²⁰ Recently the Australian actress, Nicole Kidman, alleged a different form of celebrity stalking by photographers who had placed an electronic listening device on her home and followed her to photograph her. She applied successfully for a temporary restraining order which was later removed on the basis that the photographers could photograph her away from her home and would not harass or intimidate her.²¹

Other stalking type descriptors have included the rejected, intimacy-seeking, incompetent, resentful and predatory stalker.²²

Criminal provisions

Like other new crimes, computer hacking for example, the legislative response to stalking has posed challenges for the criminal law. It does not fit neatly into the more traditional concepts associated with criminal law. There is often no physical injury to the victim or damage to property. In fact there is often no direct contact between the victim and perpetrator. Many of the behaviours undertaken by stalkers are apparently harmless or innocent on their face, for example telephoning or sending letters or emails.²³ Even the mental element for the crime of stalking can be less clear-cut than for other

²⁰ Ronald Holmes, 'Stalking in America; Types and Methods of Criminal Stalkers' (1993) 9(4) *Journal of Contemporary Criminal Justice* 317 at 322.

²¹ Associated Press, 'Judge Orders Nicole Kidman to work out Stalking Issues.' 2 November 2005.

²² Emma Ogilvie 'Stalking: Policing and Prosecuting Practices in Three Australian jurisdictions' *Trends and Issues Paper* (Australian Institute of Criminology, Canberra, ACT) noting Pathe and Mullens characteristics; see Michele Pathe, Rachel Mackenzie and Paul Mullen, 'Stalking by law: damaging Victims and rewarding Offenders (2004) 12 *Journal of Law and Medicine* 103.

²³ See R A Swanwick, 'Stalkers Strike Back- The Stalkers Stalked: A review of the First two years of stalking Legislation In Queensland.' (1996) 19 *University of Queensland Law Journal* 26 at 26.

offences. It is however generally the mental elements that make for a stalking offence. Ultimately the key question appears to be related to the perpetrators state of mind. However the test has proved difficult to formulate. In the following sections I will examine the Queensland criminal law response to stalking followed by a consideration of the criminal law response in other Australian jurisdictions. This will be followed by a discussion of civil law responses.

Queensland 1993

In 1993 the Queensland parliament passed the first stalking laws in Australia. The legislation came about as a result of a general government review of the Queensland Criminal Code. Consultation during the review process had suggested that the criminal law did not provide adequate protection for a person who was followed, placed under surveillance, contacted or sent offensive items in circumstances where the victim felt 'harassed, intimidated or threatened.'²⁴ This was a particular concern of women's groups. The underlying position expressed in the explanatory notes to the 1993 legislation was that there was a risk that stalking type behaviours might lead to violence. Thus the new legislation was designed to protect people from the potential for violence.²⁵

The 1993 provision which came into effect in November of that year stated that a person unlawfully stalks the victim if:

- a) the offender engages in a *course of conduct* involving doing a *concerning act* on at *least two occasions* to another person or other persons
- b) the offender intends that the victim be aware that the course of conduct is directed at the victim (even where the concerning acts are directed at property or at another person.)
- c) the victim is aware that the concerning conduct is directed at the victim.

²⁴ Explanatory Notes *Criminal Law Amendment Bill* (Qld) 1993 .

²⁵ Explanatory Notes *Criminal Law Amendment Bill* (Qld) 1993 at 2.

- d) The course of conduct would cause a reasonable person in the victim's circumstances serious concern that an offensive act may happen.²⁶

A 'concerning act' was defined as following, loitering, approaching, telephoning, contacting, loitering near, watching, interfering with property, leaving offensive material, and general acts of harassment.²⁷ One commentator registered her concern that internet related stalking was not clearly specified by the legislation and that this was a problem.²⁸ A concerning offensive act was defined as an unlawful act of violence to the victims person or property or to someone the victim was concerned about. The penalty for stalking was set at five years in aggravated cases or in other cases three years.²⁹ At this time it was the same as the penalty for assaults. In 1995 the penalty for stalking was reviewed and increased to five years and seven years in aggravated cases.³⁰ Some aggravated forms of stalking were also added to the code including stalking with violence, stalking while armed and stalking in contravention of a court order.³¹

The 1993 provisions were reviewed by the Queensland Police service in 1995.³² The review found that stalking was primarily committed against women victims by men. Women victims comprised 81.3% of victims and only 17.9% of suspects were women. About half the suspects and about half the victims were aged between 15 and 30 years. Over 30% of cases the relationship between the victim and offender was a previously intimate one. The most common methods of stalking were by telephone and following the victim. The operation of the provision was reviewed again by Queensland Police Service for the years 1995 to 1996.³³ The figures for the latter period show similar patterns. This later study showed that in 24% of cases the relationship between the victim and offender was a previously intimate one.

²⁶ See s359A(1) *Criminal Law Amendment Bill* 1993

²⁷ s359A(7) *Criminal Law Amendment Bill* 1993.

²⁸ Sally Kift, 'Stalking Law Reform Under Lawful Scrutiny' (1998) September *Proctor* 19.

²⁹ S359A(6) *Criminal Law Amendment Bill* (Qld) 1993s133 1993

³⁰ *Criminal Law Amendment Bill* (Qld) 1995 s133

³¹ *Criminal Law Amendment Bill*(Qld) 1995 division 4.

³² Domestic Violence Coordination Office, 'Unlawful Stalking in Queensland' (Queensland Police Service, Brisbane, 1995)

³³ Regional Domestic Violence Coordinator, Metropolitan South Police Region 'Unlawful Stalking in Queensland' (Queensland Police Service, Brisbane, 1996)

This is still a significant proportion. Again the most common mode of stalking was telephoning and following. The report noted that in one particular case a stalker made 100 calls in a two-month period. In general the 1993 provision was heavily criticised. The key criticisms are discussed below.³⁴

- Course of conduct

There was some uncertainty about the requirement for a 'course of conduct' and the requirement for at least two 'concerning acts'. It was not clear from the provisions how or whether the concerning acts needed to be separated and whether they could be made up of two isolated and unconnected concerning acts. Another question raised was whether the two concerning acts had to be the same kind of acts, for example two occasions of telephoning the victim. Alternatively could the two concerning acts be quite different, for example telephoning and then following the victim. The definition was insufficient. The case of *Hubbuck* did not assist much, in this case the judge found that the jury must agree on the same two concerning acts.³⁵ Swarick suggested that the term 'course of conduct' implied some degree of continuity between discrete acts.³⁶ Certainly another problem identified was that one prolonged activity would not satisfy the requirements of the provision.³⁷

- Intent

The element of intent was also problematic. Intent under the provision required that the offender intend that the victim should *be aware* that the course of conduct was directed at the victim. One judge interpreting the

³⁴ These are discussed and set in some detail by R A Swarick, 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26.

³⁵ *R v Hubbuck* unreported Queensland Court of Appeal, 17 February 1998 per Pincus J and see *R v Carlile* [1999] QCA 363..

³⁶ R A Swarick, 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 29.

³⁷ Sally Kift, 'Stalking Law Reform Under Lawful Scrutiny' (1998) September *Proctor* 19 at 20.

provision suggested that this was a subjective test.³⁸ Importantly this provision does not require that the stalker intended to cause physical or psychological injury or to cause the victim to be fearful. This point was well illustrated by *Kyriakou's* case where the defendant had, on several occasions approached the defendant and danced around her and spoken nonsense to her. At his trial he insisted that he did not want to cause the victim to fear him and that he did not intend to harm her. The intention element was satisfied however because the defendant conceded that his conduct might cause a reasonable person in the victim's circumstances to believe that a 'concerning act' may occur.³⁹ However without this admission a conviction may have been difficult to obtain. For example in a situation where the defendant is particularly dim or a very good liar and expresses his belief that he didn't intend the victim to be aware of the course of conduct a conviction is unlikely. Issues related to this are discussed further below.

- State of mind of the victim and the reasonable person test.

The 1993 provision required some awareness of the victim of the behaviour of the stalker. Thus in situations where detriment is caused to a third party through stalking behaviour of the defendant but where the victim of stalking is unaware, stalking may not be made out.⁴⁰ Pursuant to the 1993 framework it was possible that a very brave person could not be the victim of stalking in situations where another person subjected to the same course of conduct may be. Swanrick was concerned that under the 1993 provision it may be the case that where the stalking was 'vigorous' but the victim was unaware or where the victim was aware of vigorous stalking behaviour but the victim did

³⁸ See R A Swanrick, 'Stalkers Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 29 .

³⁹ *R v Kyriakou* (1994) 75 A Crim R 1 also see Sue Harbidge, 'Stalking – The Queensland Legislation' (1996) 17 *The Queensland Lawyer* 67 at 68.

⁴⁰ This point was made in the Explanatory Notes *Criminal Law Amendment Bill* (Qld) 1999 at 1.

not intend this awareness the offence would not be made out.⁴¹ The following part of the provision also caused some concerns:

359A(2) A person unlawfully stalks another... if -

(d) the course of conduct would cause a reasonable person in the victim's circumstances serious concern that an offensive act... may happen

(3) For the purpose of subsection (2)(d), the victim's circumstances are those known or foreseen by the offender and those reasonably foreseeable by the offender.

'Concerning offensive acts' were defined as 'an unlawful act of violence' by the defendant against the property or person of the victim or certain third parties.⁴² Judges also disagreed on the interpretation of these parts of the provision. There was a question of whether the victim should actually be 'seriously concerned' or whether it was enough that the ordinary person would be 'seriously concerned' for the crime to be made out. Further the question of how to establish 'serious concern' that an 'offensive act' may happen was unresolved by the case-law. The appropriate approach was still uncertain at the time the legislation was subsequently reviewed in 1998. Courts suggested that the test under ss3 was both subjective and objective.⁴³ Judges have allowed evidence of past violence by the defendant towards the victim as part of the victim's circumstances.⁴⁴ Judges who applied and interpreted this part of the legislation generally agreed that there did not need to be a threat of violence or damage to property, the serious concern could be based on threats implied from the behaviour of the stalker.⁴⁵ Considering that the stalking provision was enacted to broaden the operation of the *Criminal Code Qld*, this to have been the appropriate interpretation. Threats actually made

⁴¹ R A Swanrick, 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 29.

⁴² s359A *Criminal Law Amendment Bill* (Qld) 1993

⁴³ *R v Ryder* unreported, QSC (1995) Trafford-Walker SJ; referred to in R A Swanrick, 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 30

⁴⁴ *R v Irwin* (1995) Unreported district Court, Maroochydoore Robertson DCJ, referred to in R A 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 30.

⁴⁵ R A Swanrick, 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 30 referring to *R v Ryan* (1995) Unreported District Court Cairns, White DCJ.

can be prosecuted under s359 of the *Criminal Code Qld*, a provision that existed some time before the stalking provisions were introduced.⁴⁶ Similarly courts have subsequently determined that threats as concerning acts pursuant to s359A (7)(g) could be inferred from conduct as long as the conduct communicated the threat to the victim.⁴⁷ Rathus has pointed out that many stalking victims (and reasonable people) may not develop a 'serious concern' that an 'unlawful act of violence' is likely to happen.⁴⁸ Their concern may be more nebulous. They may be worried that something bad will happen without being able to say exactly what that might be. Rathus pointed out that the idea of stalking legislation was to 'nip things in the bud' so the community would never know how bad things may have become.⁴⁹ In this sense the protection under the 1993 legislation was perhaps not broad enough.

- Defences

The 1993 provision included a reverse onus defence to stalking. The legislation required the defendant to prove that the 'course of conduct engaged in was for the purpose of a genuine labour dispute or political or other issue carried on in the public interest.'⁵⁰ However this limited defence failed to prevent a number of indigenous youths from being successfully prosecuted for stalking. Their behaviour involved habitually hanging about near a shopping centre.⁵¹ This particular case was a concern when the stalking provisions were subsequently redrafted.⁵² Given the possibility of a custodial sentence, stalking should entail relatively serious offending. Again the case involving the indigenous youths reflects one of the central concerns

⁴⁶ Sue Harbidge, 'Stalking – The Queensland Legislation' (1996) 17 *The Queensland Lawyer* 67 at 67.

⁴⁷ *R v Allie* (1999) 1 QdR 618 at 619 per Davies JA.

⁴⁸ Sally Kift, 'Stalking Law Reform Under Lawful Scrutiny' (1998) September Proctor 19 at 20.

⁴⁹ Zoe Rathus, email to Women's Legal Service (Qld) staff, 6 August 1998

⁵⁰ *Criminal Law Amendment Bill* (Qld) 1993.s359A(4)

⁵¹ Richard Evans, 'Every Step you Take: The Strange and Subtle Crime of Stalking' (1994) 68 (11) *Law Institute Journal* 1021. This behaviour could now be prosecuted under the *Police Powers and Responsibilities Act* (Qld) 2000 ss 36-41. Under this legislation police can ask individuals standing in certain areas to move on. If the person fails to move on they can be prosecuted for failing to obey a police direction.

⁵² Women's Legal Service note on a meeting with the Attorney General (Qld) Matt Foley MLA 17 August 1998

of stalking law: that is when to define behaviour as non criminal and what it is that makes similar behaviour into a crime of stalking.

- Scope

Some feared that the addition of stalking to the criminal law arsenal would simply mean that defendants were loaded up with more charges.⁵³ Stalking law was originally put in place to fill a gap rather than to increase the number of offences a person could be charged with. Thus generally stalking should be charged only when other traditional type offences cannot be made out. Other concerns were raised as to the scope of the legislation. One judge suggested that for stalking to be satisfied the defendant would need to be doing more than simply being a nuisance.⁵⁴ This point is important and reflects concerns echoed elsewhere in relation to abuses of restraining orders for example. However the dividing line between behaviour which is a mere nuisance compared with behaviour that is stalking behaviour and thus potentially more dangerous, is often a very shadowy one. The problem of defining the scope of stalking legislation has been a continuing one. Clearly the 1993 Queensland framework covered a broad range of situations including partner stalking. The original stalking legislation in New South Wales was confined to domestic situations.⁵⁵ While in this form there were very few prosecutions.⁵⁶ However this was broadened in 1994 and is now general in application. There are now many more prosecutions. There has been continued debate about coverage of the Queensland provisions. During consultations about the Queensland legislation in 1998 there were suggestions that it should apply only to 'courting type' relationships.⁵⁷ The concern here was that the 1993 law could apply to

⁵³ Matthew Goode, 'Stalking: A Crime of the Nineties' (1995) 19 *Criminal Law Journal* 21 at 26.

⁵⁴ R A Swanrick, 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 30 referring to *R v Ryan* (1995) Unreported District Court Cairns, White DCJ.

⁵⁵ Crimes Act 1900 (NSW) ss562A and s562AB

⁵⁶ R A Swanrick, 'Stalkees Strike Back – the Stalkers Stalked: A Review of the First two Years of Stalking Legislation in Queensland' (1996) 19 (1) *University of Queensland Law Journal* 26 at 40.

⁵⁷ Women's Legal Service note on a meeting with the Attorney General (Qld) Matt Foley MLA 17 August 1998.

situations such as loitering around shops (discussed above) and neighbourhood disputes. Ultimately this narrower approach was not taken up.

Queensland 1999

The various concerns discussed above supported a growing push for amendment of the stalking legislation in Queensland. In 1998 the Attorney General circulated a discussion paper on the offence of stalking.⁵⁸ Draft legislation was circulated with the discussion paper.

Ultimately the 1999 legislation, among other matters:

- clarified some definitional problems;
- clarified and expanded the conduct which is considered to be unlawful stalking (previously this was described as 'concerning acts');
- included matters immaterial for unlawful stalking;
- expanded the defences;
- provided a mechanism for the court to restrain the defendant from unlawful stalking.

The current provision has been greatly simplified and has three essential elements: intention of the stalker, one or more occasion(s) of stalking conduct and that the stalking conduct would cause the stalked person apprehension or fear or alternatively that the stalking actually caused detriment to the person stalked (or a third party).

Stalking is charged reasonably frequently and there is a reasonable rate of successful prosecution. Most stalking matters are dealt with in the Magistrates and District Courts. The table below sets out current rates of prosecution and conviction.⁵⁹

⁵⁸ Sally Kift, 'Stalking Law Reform Under Lawful Scrutiny' (1998) September Proctor 19 at 20.

⁵⁹ Information obtained from Statistics Analysis Unit, Queensland Government.

Court	Year	Non-conviction	Conviction	Total
District	01-02	100	105	205
Magistrates	01-02	207	89	296
Sub-total	01-02	307	194	501
District	02-03	50	53	103
Magistrates	02-03	188	75	263
Sub-total	02-03	238	128	366
District	03-04	50	68	118
Magistrates	03-04	184	80	264
Sub-total	03-04	234	148	382
Total	All years	779	472	1251

The 'all years' total shows a conviction rate of around 37%. This is slightly higher than the conviction rates associated with sexual assaults but lower than the rates of conviction associated with other assaults.⁶⁰ It is not clear why this is the case. Government statistics are not clear in relation to the contextual information about who is being charged. I note that Anecdotal information suggests that it is unlikely that Indigenous women are making complaints.⁶¹

The explanatory notes emphasised that 'course of conduct' had been difficult to determine and that proof of stalking should not depend on a 'technical count' of the number of acts done, nor should concerning acts be required to be the same concerning acts.⁶² Further the problem of intention of the stalker

⁶⁰ See David Brown et al *Criminal Laws* (Federation Press, Leichardt, 1996) at 848-849.

⁶¹ Discussion with Keryn Ruska, solicitor Aboriginal and Torres Strait Islander Women's Legal Service. See also generally Larissa Behrendt, *Alternative Dispute Resolution* (Federation Press, Leichardt, 1995).

⁶² Explanatory Notes *Criminal Code (Stalking) Amendment Bill* (Qld) 1999 at 1. I note that the definition of stalking discussed in the draft Bill annexed to the South African Law Reform Commission's discussion paper on stalking avoids these problems by describing stalking conduct as 'a single act or a number of acts that form part of a pattern of behaviour', See South African Law Reform Commission *Discussion Paper 108, Project 130 Stalking* (SALRC, Pretoria, 2004) at annexure A, p ii.

and awareness and concern of the victim was recognised and addressed by the new legislation. The legislation states that:

s359B *Unlawful stalking* is conduct-

- (a) intentionally directed at a person;
- (b) engaged in on any 1 occasion if the conduct is protracted or on more than one occasion; and
- (c) consisting of 1 or more acts....(of a certain type)

- Intention of the stalker

Although the stalker must intentionally direct his conduct at the victim, it is now immaterial whether or not the stalker intends that the victim is aware that conduct is directed at the victim.⁶³ This avoids the convoluted assessment that appeared to be necessary in the previous legislation, which required proof that the stalker intended the stalked person to be aware of the conduct. It is also immaterial whether the stalker intended to cause apprehension, fear or detriment.⁶⁴ This is an important inclusion. Often stalkers believe that they stalk their victim because they love them and / or they will insist that that they meant no harm.⁶⁵ Mistake on the part of the stalker as to the identity of the stalked person is also immaterial.⁶⁶ The risk of such a broad characterisation of intent might be that there are inappropriate prosecutions in some circumstances. It might also be possible for a vindictive person to claim that they have been stalked when the behaviour of the proposed stalker is actually appropriate. To that extent there is some reliance placed on the discretion of prosecutors and judges in relation to charges and conviction. In *Bowles v Sanders*⁶⁷ the question of intent under the new legislation was examined. On two occasions Bowles had gone into a household garden and looked in through windows of the house occupied by the supposed victim and her mother. In the lower court the Magistrate found that stalking was proved.

⁶³ See s359C(1) (a) *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

⁶⁴ See s359C(4) *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

⁶⁵ See *R v Kyriakou* (1994) 75 A Crim R 1.

⁶⁶ See s359C(1) (b) *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

⁶⁷ *Bowles v Sanders* unreported [2002] QDC 13 15 February 2002.

Although the victim was fearful and the acts were listed as stalking acts,⁶⁸ Bowles appealed on the basis that an element of the charge, '*intentionally directed*' at the stalked person, was not proved beyond a reasonable doubt. The judge accepted that there was no evidence that Bowles had been aware who lived at the house, he did not look directly at the complainant nor did he remain at the house. The judge ultimately accepted that there was no evidence that the behaviour was intentionally directed at anyone in particular. The Judge allowed the appeal and set aside the conviction on this basis.

- The stalking act or acts

The current legislation appears to require either one protracted act of stalking or alternatively two or more occasions of stalking conduct. Where there are two or more occasions of stalking conduct the conduct can be the same or different acts.⁶⁹ This part of the provision was discussed in the 2003 case of *C v H*.⁷⁰ In that case the stalker (C) was the victim's (H) adoptive father. In 1995 C had been convicted of indecent dealing and the victim in that matter was H. In 1995 C had been sentenced to imprisonment and duly served his sentence. There was no contact between C and H for some years. In 2002 H received a letter from C. At the suggestion of the police her husband had telephoned C to ask him to desist. Then another letter, that was two pages long, arrived from C. The charge sheet had linked the three incidents together as a 'protracted act' of stalking and C had been convicted of stalking in the lower court on this basis. C appealed on the basis that 'protraction' could not be proven. However the District Court found that the three acts could be linked because the telephone call had been provoked by the defendant. Alternatively, the court found that the conviction could stand on the basis that there were two separate incidences of stalking (the two letters) and thus no need to prove 'protraction'. The Court of Appeal ultimately refused leave to appeal on the

⁶⁸ "watching" see s359B(c)(i) *Criminal Code (Stalking) Amendment Bill* (Qld)1999

⁶⁹ See s359C(3) *Criminal Code (Stalking) Amendment Bill* (Qld) 1999. Kift has pointed out that this articulation has picked up on the interpretation of the Victorian provision proffered by McDonald J in a 1996 case. Sally Kift 'Stalking in Queensland: From the Nineties to YK2' (1999) 11 *Bond LR* 144 at 151; *Gunes v Pearson and Tunc v Pearson* (1996) 89 A Crim R 297 at 306

⁷⁰ *C v H* unreported QCA 493 7 November 2003.

basis that two stalking acts (the letters) had been proven and that this was enough for the stalking conviction.⁷¹ They also noted that the length of the letter could not lead to characterisation of the conduct as 'protracted'.⁷²

The range of acts potentially caught under this legislation have been expanded to include email contact or contact through the use of any technology.⁷³ The notion of threat has also been clarified. Where previously the 1993 provision noted a concerning act was

1993- s359A(7)(g) an act of harassment, intimidation or threat against another person...

the replacement provision reads:

1999- 359B(c)(vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence.

This revision ensures that a threat pursuant to the definition in the *Criminal Code* Qld does not need to be made out.

To this point all the court need to be satisfied of is that the stalker carried out certain conduct intentionally directed at the victim. Many of the acts listed in the 1999 provision are on their face generally rather innocuous; telephoning, approaching and so on. This takes us to the next question of the relevance of the stalked person's experience of the acts.

- State of mind of the person stalked

It is in relation to the third element of the offence that the provision shifts to the state of mind of the victim. The previous provision required an effect of apprehension or fear to be produced in the victim by the stalking behaviour, this is no longer required. The 1999 provision states that:

⁷¹ *C v H* unreported QCA 493 7 November 2003.

⁷² *C v H* unreported QCA 493 7 November 2003.

⁷³ See s359B(c)(2) *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

359B Unlawful stalking is conduct-

(d) that-

- (i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; **or**
- (j) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

'Circumstances'⁷⁴ is defined to include those of the stalker and those circumstances of the stalked person that are known, foreseeable or foreseen by the alleged stalker. 'Circumstances' also include 'any other relevant circumstances.' This is clearly very broad in scope and would allow decision makers to take into account background material relating to the history of the stalker and victim's relationship. For example a couple of silent telephone calls may not suggest much to an outsider but to the stalked person they may indicate imminent harm.⁷⁵ A notion of detriment was not included in the 1993 provision. 'Detriment'⁷⁶ in the new provision is defined to include, but is not limited to, apprehension or fear of violence and serious mental, psychological or emotional harm. It is also defined to include prevention or compulsion with respect to lawful rights. This takes account of situations where a person feels that they can no longer walk along certain routes or where they believe they have to sell their house.⁷⁷ One commentator has suggested that the meanings of the variants of psychological, mental or emotional harm remain unclear.⁷⁸ This commentator notes, for example, that it is not clear whether emotions such as fear, panic or distress fit within emotional harm.⁷⁹ The *Women's Legal Service*, in their response to earlier drafts of the provision, were also concerned about the lack of specificity in the definitions. They suggested that without clearer definition expert evidence would be needed which may be a

⁷⁴ s359A *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

⁷⁵ This is Wells example see Celia Wells 'Stalking: The Criminal Law Response' (1997) *Criminal Law Review* 463 at 467.

⁷⁶ s359A *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

⁷⁷ Note the Hughes felt compelled to sell their house after being stalked by their neighbours the Alis. See *R v Ali* unreported [2002] QCA 064 15 March 2002

⁷⁸ Sally Kift, 'Stalking in Queensland: From the Nineties to YK2' (1999) 11 *Bond LR* 144 at 149. ,

⁷⁹ Sally Kift 'Stalking in Queensland: From the Nineties to YK2' (1999) 11 *Bond LR* 144 at 149.

particular problem for impecunious clients.⁸⁰ In the case of *Ali* there was medical evidence of health problems experienced by one of the victims which could be attributed in part to the stalking. The Court accepted that this evidence could constitute 'serious emotional harm' under the definition of detriment.⁸¹ It may be that the definitions need to be clarified although their broad nature does offer some advantage to victims.

On a more positive note, the either / or aspect of this part of the provision means that the stalked person may not apprehend or fear violence to property or person, it would seem that it is enough that the stalking behaviour would cause fear or apprehension in the ordinary person. This means that there can be stalking in spite of the fact that a victim is particularly stoic and fearless.⁸² Further wherever there is detriment to the stalked person or a third party arising from the stalking behaviour, stalking can be made out. This suggests that the person at whom the stalking is directed may be oblivious to it. Importantly though, the reverse is true and detriment is not necessary to ensure a conviction. The extension to the definition of detriment (after consultations) to include prevention or hindrance from behaviour is important, victims may not get to the stage of fear or apprehension because they move to a new house for example. I note that the question of detriment will always be relevant to penalty. The court in *Bowles v Sanders* found that a lack of detriment would operate to mitigate penalty.⁸³ Similarly one would assume that the greater the level of detriment to the victim as a result of stalking, the greater the penalty regardless of the level of vulnerability (or stoicism) of the victim.⁸⁴

⁸⁰ Womens' Legal Service; Letter to the Attorney General dated 24 August 1998.

⁸¹ *R v Ali* unreported [2002] QCA 064 15 March 2002

⁸² Explanatory Notes, *Criminal Code (Stalking) Amendment Bill* (Qld) 1999 at 4.

⁸³ *Bowles v Sanders* unreported [2002] QDC 13 15 February 2002.

⁸⁴ Ian Freckleton, 'Editorial: Stalker Sentencing and protection of the Public.' (2001) 8 *Journal of Law and Medicine* 233 at 234

- Defences

The range of 'defences' have also been expanded in the form of a section detailing conduct that 'is not unlawful stalking'.⁸⁵ None of these defences reverse the onus of proof. These include the defences set out in the previous provision relating to industrial, political and public disputes but now also include:

- Acts done in the execution of law, administration of an Act or for a purpose authorised by an Act
- Reasonable conduct engaged in by a person for the person's trade, business or occupation;
- Reasonable conduct engaged in to give information.

In the case of *Ali* that involved a protracted neighbourhood dispute there was evidence that both parties had behaved inappropriately. For their part the victims, the Hughes, had painted racist slogans on a placard on their fence and on some occasions racially taunted the Alis next door. The Ali's had carried out over 150 relevant stalking acts in response. The appellant, Ali, argued on appeal that the reasonableness of his actions should be taken into account in considering liability. The court disagreed, noting that aside from the reference to 'reasonably' arising in s359B(d),⁸⁶ no other element of the offence 'imports any notion of reasonableness into the requirements for liability for stalking.'⁸⁷ In situation such as a neighbourhood dispute the legislation relies on the discretion of prosecuting authorities.

- Sentencing and restraining orders.

Since 1995 the offence of stalking attracts a maximum penalty of five years imprisonment and seven years in certain situations where the offence is aggravated.⁸⁸ An offence is aggravated if any of the acts constituting the stalking include the threat of or use of violence to a person or property, the

⁸⁵ s359D *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

⁸⁶ *Criminal Code (Stalking) Amendment Bill* (Qld) 1999

⁸⁷ *R v Ali* unreported [2002] QCA 064 15 March 2002

⁸⁸ See s 359E *Criminal Code Amendment Bill* 1995 (Qld)

possession of a weapon, or the contravention of an injunction or order imposed by a court. The latter aggravation is common and includes breaches of domestic violence orders. For example in the case of *Foodey*⁸⁹, the defendant separated from his wife of 14 years and she had obtained a protection order pursuant to the domestic violence legislation.⁹⁰ While the protection order was in place he had threatened, followed, visited and assaulted her. He received a penalty of 18 months to be suspended for five years after serving 168 days of the sentence. The suspended period allowed for supervision of the defendant over a long period. I note in *Millar*'s case the judge pointed out that the fact that stalking followed the break-up of an emotional relationship should not mitigate penalty.⁹¹

The maximum penalty of seven years has recently been meted out. In the case of *Vidovich*⁹², there were 52 complainants. The stalking included numerous incidences of telephone calls where 'sexually deviant' suggestions were made, letters including pornographic photos were sent and the facts also suggested that women were watched. The victims had been selected at random from the telephone book. *Vidovich* had adopted accents when telephoning and wore gloves when sending letters in an effort to disguise his identity. He received the maximum penalty.

Given the pathological issues associated with many incidences of stalking this is frequently a consideration in relation to appropriate penalty. Behavioural therapy has sometimes been recommended as part of sentence. In at least one case the defendant was sentenced to a period of nine months imprisonment followed by probation for three years conditioned upon him attending various psychiatric and counselling services.⁹³

Finally, in certain situations where stalking has been prosecuted, and regardless of conviction, the current provisions incorporate a mechanism for

⁸⁹ *R v Foodey* unreported [2003] QCA 310 25 July 2003

⁹⁰ *Domestic and Family Violence Protection Act 1989* (Qld)

⁹¹ *R v Millar* unreported [2002] QCA 382 25 September 2002 per Jersey CJ.

⁹² *R v Vidovich* unreported [2002] QCA 422 10 October 2002.

⁹³ *R v Leach* unreported [2004] QCA 189 2 June 2004

the court to make a restraining order when it is 'desirable' to do so.⁹⁴ Whether or not to impose a restraining order is subject to the decision-maker's discretion. There is no time limit imposed on the magistrate or judge. Recently a restraining order was made under this provision for a period of fifteen years.⁹⁵ The judge in this case found that such an order provided 'sensible protection for the complainants and should not unreasonably inconvenience the appellant.'⁹⁶ Restraining order proceedings are not criminal proceedings and can be remitted to the lower courts. Once made such an order is effected in much the same way as other restraining orders with respect to conditions, service and breach. A breach of such an order is an offence. For those not covered by Queensland domestic violence legislation there is only limited protection offered under the *Peace and Good Behaviour Act* Qld, so this addition would appear to be very important in certain cases.⁹⁷

The Restraining Order mechanism provided pursuant to the stalking provisions is mirrored in Part 3A (Non-Contact Orders) *Penalties and Sentencing Act 1992 Qld*. A non-contact order can be made with or without conviction and a breach of a non-contact order is a punishable offence.⁹⁸ In reality very few non-contact orders are made via the stalking legislation. Generally judges and magistrates have made non-contact orders via the sentencing legislation. The number of non-contact orders made in the past few years is listed below.⁹⁹

Financial Year	Court	No. Orders	Average Length in Months
2002-2003	District	2	24
2002-2003	Magistrates	7	21
2003-2004	Magistrates	5	22
2004-	District	1	60

⁹⁴ s359E *Criminal Code (Stalking) Amendment Bill* (Qld) 1999.

⁹⁵ See *R v Ali* [2002] QCA 064 15 March 2002.

⁹⁶ *R v Ali* [2002] QCA 064 15 March 2002 per McMurdo P at para 26.

⁹⁷ Sally Kift, 'Stalking in Queensland: From the Nineties to YK2' (1999) 11 *Bond LR* 144 at 155.

⁹⁸ See ss 43A and 43F *Penalties and Sentencing Act 1992 Qld*

⁹⁹ Statistics provided by Statistic Analysis Unit, Corporate Governance Branch, Queensland Government.

Only two defendants were found guilty of breaches of non-contact orders. The first defendant was ordered to undertake 100 hours of community work and 12 months of probation. In the second case the defendant received 3 months imprisonment.

Criminal Responses in Other Australian Jurisdictions

Unfortunately the legislative response to stalking is subtly different in every state and territory.

- Intention of the stalker.

In Tasmania, South Australia and the NT¹⁰⁰ the alleged stalker must intend to harm to the victim or intend to cause the victim to be fearful.¹⁰¹ The ACT mirrors this position but also includes an alternative that the alleged stalker intended to harass the victim.¹⁰² In WA the alleged stalker must intend to 'intimidate' the victim.¹⁰³ The NSW provision requires that the alleged stalker intends to cause fear or harm. However for the purposes of this requirement the legislation states that intention is assumed where the alleged stalker *knows* that their behaviour is *likely* to cause fear or harm.¹⁰⁴ A form of wilful blindness is suggested here. Victoria spreads a wider net picking up and extending the NSW position to include situations where the alleged stalker 'ought to have understood' that engaging in the specific conduct would be likely to cause harm or arouse fear in the victim.¹⁰⁵ This appears to import 'an ordinary person' test into the intent. Apart from the Victorian approach, none of these provisions would cover the sexually obsessive stalker who believes that they love their victim and do not intend harm or cause fear. Western

¹⁰⁰ I have used the following abbreviation: NT Northern Territory; WA Western Australia; SA South Australia; ACT Australian Capital Territory.

¹⁰¹ *Crimes Act* Victoria s 21A(2); *Criminal Code Act* 1924 s192 (1); Criminal Law Consolidation Act SA s19AA(1)(b) (in SA the harm or apprehension must be 'serious'); Criminal Code of the Northern Territory s189(1)

¹⁰² *Crimes Act* 1900 ACT s35(1)

¹⁰³ *Criminal Code*, WA s338E(1)

¹⁰⁴ *Crimes Act* 1900 ACT s562AB(3)

¹⁰⁵ *Crimes Act* Victoria s 21A(3)

Australia provides for an alternative offence of stalking with a much lower penalty in situations where ‘a person ... pursues another...in a manner that could reasonably be expected to intimidate...’.¹⁰⁶ The low penalty provided here may fail to reflect the seriousness of the impact of offending in many cases where the stalker does not intend harm.

- The stalking act / or acts

The problematic language of ‘course of conduct’ is retained in Victoria and Tasmania.¹⁰⁷ Similarly to Victoria, NSW and the NT does not clearly make any allowance for a ‘prolonged’ single act of stalking requiring that there be ‘repeated’ incidences or a ‘combination’ of certain acts.¹⁰⁸ South Australia and the ACT¹⁰⁹ also requires ‘at least two separate occasions’ of certain acts. Except in the case of ‘watching’ Western Australia requires certain behaviours to be done ‘repeatedly’.¹¹⁰ Although stalking acts listed in the various jurisdictions are similar some of them are more detailed than others.

- The state of mind of the person stalked.

Neither the ACT, WA, SA, NSW¹¹¹ nor the Victorian legislation requires proof of any actual effect of stalking on the victim. In the case of Victoria the requirement was removed in the most recent amendments to the legislation in 2003.¹¹² In NT a successful prosecution of stalking requires that the stalking caused the victim to fear for her safety or be harmed.¹¹³

The Tasmanian provision is awkward on this point. The offence of stalking there does not mention the requirement of fear or harm to the victim. However a later part of the provision notes that:

¹⁰⁶ *Criminal Code* WA s338E(2) maximum penalty 12 months or fine.

¹⁰⁷ *Crimes Act* Victoria s21A(2); *Criminal Code Act* 1924 Tasmania s192

¹⁰⁸ *Criminal Code of the Northern Territory* s189(1)

¹⁰⁹ *Criminal Law Consolidation Act* SA s19AA(1), *Crimes Act* 1900 ACT s35(2)

¹¹⁰ *Criminal Code* WA s338D(1)

¹¹¹ *Crimes Act* 1900 NSW s562AB(4)

¹¹² *Crimes (Stalking) Act* 2003 Act No. 105 of 2003 Victoria, s4.

¹¹³ *Criminal Code of the Northern Territory* s189(1)

A person who pursues a course of conduct of a kind referred to...and so causes another person physical or mental harm or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm or to be apprehensive or fearful.¹¹⁴

Pursuant to this part of the provision it is not clear whether it is necessary for the victim to be fearful or harmed as a result of stalking or whether the fact of harm or fear as a result of stalking behaviour will operate to deem intent.

- Other points

Instead of providing a restraining order power as an addition to the stalking offence the Victorian legislation refers decision-makers to the *Crimes (Family Violence) Act 1987* and allows the court to make an intervention order under that act.¹¹⁵ This might be a more simple route than the one offered by the Queensland legislation. One of the concerns in Queensland has been that courts may not exercise the stalking restraining order power readily because it is within the criminal law, or alternatively, that police may not act on breaches of such orders as readily as they do in relation to domestic violence type orders.

Penalties range from a ten-year maximum sentence of imprisonment in Victoria¹¹⁶ down to five years maximum in most other jurisdictions.¹¹⁷

Civil Responses:

All States and Territories in Australia have enacted legislation that provides for civil orders to be made which restrain certain behaviours. Generally the

¹¹⁴ *Criminal Code Act 1924* Tasmania s192(3)

¹¹⁵ *Crimes Act* Victoria s21A(5)

¹¹⁶ s21A(1)

¹¹⁷ Maximum penalty 5yrs imprisonment ACT, SA, NSW, NT: *Criminal Law Consolidation Act* SA 19AA(2); *Crimes Act 1900* NSW s562AB(1); *Criminal Code of the Northern Territory* s189(2); *Crimes Act 1900* ACT s35(1). Maximum penalty 8yrs imprisonment - *Criminal Code* WA s338E(1)(a)

burden of proof which must be satisfied to the decision-maker is that relevant criteria are made out on the 'balance of probabilities', that is there is a civil standard of proof.¹¹⁸ Further, generally it is a criminal offence to breach a restraining order that has been granted. The burden of proof in this context must be satisfied to the criminal standard, that is: 'beyond reasonable doubt.'¹¹⁹ An overview of current legislative regimes reveals a mixture of approaches. There is very little consistency between jurisdictions within Australia. During the 1980's responses to domestic violence were separated out from responses to other forms of violence.¹²⁰ More recently there has been a tendency for legislation to reintegrate domestic violence into general acts.¹²¹ Given that one of the reasons for its separation from other forms of violence was in response to a view that people did not recognise domestic violence as 'real'¹²² this may be a positive step. Alternatively it may suggest a regressive approach. Below I discuss the Australian legislative response to making civil orders in response to claims of stalking.

- Queensland

The *Domestic Violence (Family Protection) Act (Qld)* was enacted in 1989 primarily to provide a process for women living in situations of violence to obtain restraining orders against offending parties. This legislation was amended in 2002 and renamed the *Domestic and Family Violence Protection Act*. The amendments significantly expanded the kinds of relationships covered by the Act and now include spousal, intimate, family or carer

¹¹⁸For example Queensland – re *Peace and Good Behaviour Act 1982* (Qld) see *Laidlaw v Hulett ex parte Hulett* [1988] 2 Qd R per Macpherson JA and Sheperdson J (Fitzgerald P not deciding), re *Domestic and Family Violence Protection Act 1989* (Qld) see s9.

¹¹⁹ For example Queensland – re: *Peace and Good Behaviour Act 1982* (Qld) s10(1), re: *Domestic and Family Violence Protection Act 1989* (Qld) s80.

¹²⁰ Note for example Report of the Queensland Domestic Violence Taskforce, *Beyond these Walls*, (Brisbane, 1988).

¹²¹ See for example *Domestic and Family Violence Protection Act 1989* (Qld) broadening of relationships and also see *Restraining Orders Act 1997* (WA).

¹²² See Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 32 at 33, 42.

relationships.¹²³ The expanded range of relationships has made allowance for certain relationships considered particularly important by Indigenous people. For example 'intimate personal relationship' includes those betrothed according to cultural or religious traditions.¹²⁴ A 'relative' includes a person regarded by the applicant as a relative and the provision notes that Aboriginal and Torres Strait Islanders may have a wider conception of relative.¹²⁵ In situations where stalking is alleged there is provision to make an application for a protection order under this Act. For the purposes of the Act 'domestic violence' includes 'intimidation or harassment of the other person.'¹²⁶ A number of suggested scenarios are listed to explain the concept of intimidation or harassment, these include repeated telephoning, following or loitering. Thus it is clearly envisaged that stalking can form the basis of an application for a protection order under this act.

Currie's research examined whether the civil and criminal response to stalking Queensland 'dovetailed'.¹²⁷ She surveyed a number of magistrates asking two questions. First she asked how well the *Domestic and Family Violence Protection Act* dovetailed with the criminal code provisions on stalking. Second she asked magistrates how comfortable they were making orders when the harassment complained of was something like sending flowers or driving past the victim's house. Her research suggested that stalking in a domestic context was often considered by magistrates best dealt with via the *Domestic and Family Violence Protection Act*. She reports that two of the magistrates she surveyed believed that women made allegations of non-physical violence in order to end the relationship, she suggests that constructions of women as deceitful and devious continue.¹²⁸

¹²³ See *Domestic and Family Violence Protection Act 1989* (Qld) s11A, 1, 12A, 12B for relationships now covered by the act.

¹²⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s12A.

¹²⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s12B(2)

¹²⁶ See s11(1) (c) *Domestic and Family Violence Protection Act* (1989) Qld

¹²⁷ Susan Currie 'Stalking and Domestic Violence: Views of Queensland Magistrates' Unpublished paper presented at the *Stalking: Criminal Justice Responses Conference*, convened by the Australian Institute of Criminology Sydney, 7-8 December 2000.

¹²⁸ Susan Currie 'Stalking and Domestic Violence: Views of Queensland Magistrates' Unpublished paper presented at the *Stalking: Criminal Justice Responses Conference*, convened by the Australian Institute of Criminology Sydney, 7-8 December 2000 at 5. Previous research of Douglas and Godden has also suggested a tendency of police to deal

The *Domestic and Family Violence Protection Act Qld* is supplemented by the *Peace and Good Behaviour Act (1982)* which provides a framework for obtaining restraining orders more generally. The operation of this Act is currently the subject of a reference to the *Queensland Law Reform Commission*.¹²⁹ Only those affected and those who have the 'care or charge' of someone affected by threats about certain matters can make an application for a restraining order under this act.¹³⁰ The threat must be against the complainant (or a person in their care or charge) or their property and the complainant must be in fear of the defendant.¹³¹ As the focus of the Act is on threats the Act does not appear to cover actual damage or injury that has already occurred nor does the Act appear to cover certain forms of stalking. In situations where the person is subjected to forms of stalking which are harassing but not violent or overtly threatening, it would seem that restraining orders would not be available under this Act.

Thus unless a person can demonstrate that they are in a relationship covered by the *Domestic Violence (Family Protection) Act (Qld)* or they set a prosecution for stalking in train and the decision-maker decides to make a restraining order pursuant to the *Criminal Code* provisions,¹³² they may not be able to obtain a civil restraining order against stalking behaviour in Queensland. This is a gap in the legislation that has been noted in a forthcoming discussion paper of the Queensland Law Reform Commission.¹³³

with domestic violence with civil responses. See Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction Between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 32 at 42.

¹²⁹ See Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982* Discussion paper (QLRC, Draft discussion paper, forthcoming).

¹³⁰ See s4 *Peace and Good Behaviour Act (Qld) 1982*

¹³¹ see s4(1) (a), (b), (c),(d) *Peace and Good Behaviour Act (Qld) 1982*

¹³² s359E *Criminal Code Qld* discussed above.

¹³³ Queensland Law Reform Commission *A Review of the Peace and Good behaviour Act 1982* Discussion paper (QLRC, Draft discussion paper, forthcoming) at 34-36.

- Other Australian jurisdictions:

The ACT has one relevant piece of legislation that makes provision for the granting of protection orders in situations of ‘personal violence’, ‘personal violence in the workplace’ and ‘domestic violence.’ Definitions for these terms include ‘harassing or offensive’ behaviour towards the aggrieved person.¹³⁴ Stalking behaviour would fit into the category of ‘harassing or offensive behaviour’.

In NSW an ‘apprehended violence order’ (AVO) may be made if the court is satisfied that a person has reasonable grounds to fear and in fact fears intimidation, stalking and harassment.¹³⁵ The legislation is very general in its application and in practice ultimately either an Apprehended Domestic Violence Order (ADVO) or an Apprehended Personal Violence Order (APVO), can be made depending on the relationship between the applicant and defendant. The regime is included within the *Crimes Act* in order to reflect the seriousness of the behaviours dealt with.¹³⁶ Stalking is specifically defined as:

the following of a person about or the watching or frequenting of the vicinity of or an approach to a person’s place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.¹³⁷

This legislation was recently reviewed by the NSW Law Reform Commission. The Commission found that the legislative regime was generally perceived to be effective and no major changes were recommended with respect to the

¹³⁴ Re: Domestic violence s9(1)(e) Personal violence s10(1)(c) personal violence in the workplace’ s44 *Protection Orders Act 2001* (ACT)

¹³⁵ *Crimes Act 1900* (NSW) s562A(1), there are also some other minor differences in procedure depending on the relationship between the applicant and the other person.

¹³⁶ New South Wales law Reform Commission, Report *Apprehended Violence Orders* (NSWLRC, Report 103, October, 2003) 1.13, 1.54

¹³⁷ *Crimes Act 1900* (NSW) s562A(1) definition.

way the legislation approaches the provision of AVOs in situations involving stalking.¹³⁸

The *Domestic Violence Act NT* covers those involved in a domestic relationship. 'Domestic relationship' is defined extremely broadly to include a wide range of relationships. Generally 'blood' relatives within two generations are included within the definition as are those who have or have had a personal relationship and those regularly residing with the other person.¹³⁹ Over one quarter of the population in the NT is Indigenous and the definition of 'domestic relationship' here also includes 'a relative according to Aboriginal tradition or contemporary social practice'.¹⁴⁰ Under this act, the court may make a restraining order where, among a range of alternatives, it is satisfied on the balance of probabilities that:

- (i) the defendant has behaved in a provocative or offensive manner towards a person in a domestic relationship with the defendant;
- (ii) the behaviour is such as is likely to lead to a breach of the peace including, but not limited to, behaviour that may cause another person to reasonably fear violence or harassment against himself or herself or another; and
- (iii) the defendant is, unless restrained, likely again to behave in the same or a similar manner.¹⁴¹

It is not immediately clear whether such behaviour would cover stalking behaviour. The behaviour listed in this part of the provision does not reflect the definition of stalking contained in the *Criminal Code NT*.¹⁴² Although stalking behaviour may often be considered offensive or provocative, this may not always be the case.¹⁴³ Those who fall outside the concept of a 'domestic

¹³⁸ New South Wales Law Reform Commission, Report *Apprehended Violence Orders* (NSWLRC, Report 103, October, 2003) para 1.41. I note that some problems with implementation were recognised.

¹³⁹ see *Domestic Violence Act NT* s3(2)

¹⁴⁰ *Domestic Violence Act NT* s3(2) (viii)

¹⁴¹ *Domestic Violence Act NT* s4(c)

¹⁴² s189 *Criminal Code Act NT* Schedule 1.

¹⁴³ I note here that provocative act is defined in the Criminal Code 'any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an

relationship' can apply for an order pursuant to the *Justices Act 1928 NT*. Under this legislation a general order may be made that the defendant keep the peace or be of good behaviour.¹⁴⁴ No grounds for the application of such orders are set out in the legislation but in practice such orders are applied for and granted in a broad range of circumstances. Presumably the applicant for such an order would need to show that there was a risk of a breach of the peace. However this concept has not clearly been defined in legislation or by the Common Law.¹⁴⁵ Historically it appears that actual or threatened violence to people or property is an element of the concept of 'breach of the peace'.¹⁴⁶ Thus the concept may cover some but not all situations where stalking is alleged.

In South Australia the Domestic Violence Act (1994) SA covers situations involving domestic violence. Under this act the court may make a 'domestic violence restraining order where there is a 'reasonable apprehension that the defendant may, unless restrained, commit a domestic violence act'.¹⁴⁷ Only family members of the perpetrator can apply for an order and family member is defined fairly narrowly to include spouse, former spouse and children of the perpetrator.¹⁴⁸ A domestic violence act is defined to include surveying and following a family member or loitering around a place frequented by them, it also includes giving, sending (or leaving where they may find) offensive material to the family member.¹⁴⁹ Electronic publishing or sending of offensive material in such a way that it might be brought to the attention of a family member is also domestic violence for the purposes of this act.¹⁵⁰ Clearly this legislation is designed to cover incidences of stalking.

ordinary person, to deprive him of the power of self-control; Criminal Code Act NT, schedule 1, s1.

¹⁴⁴ *Justices Act* NT s99(3)

¹⁴⁵ *Cintana v Burgoyne* [2003] NTSC 106 (4 November 2003)

¹⁴⁶ see Queensland law reform Commission A Review of the Peace and Good Behaviour Act 1982 Discussion Paper No 59 (QLRC, 2005) at para 4.1-4.2.

¹⁴⁷ *Domestic Violence Act* 1994 SA s4(1)

¹⁴⁸ *Domestic Violence Act* 1994 SA s3 for more specific definitions.

¹⁴⁹ *Domestic Violence Act* 1994 SA s4(2)(c)

¹⁵⁰ *Domestic Violence Act* 1994 SA s4(2)(iv)(B)

In situations where the perpetrator and victim are not family members there is provision to apply under the *Summary Procedure Act 1921 (SA)* for a restraining order. To obtain an order the court must be satisfied that the defendant, unless restrained, might cause injury or damage to property or behave in an 'intimidating or offensive manner'.¹⁵¹ The definition of 'intimidating or offensive manner'¹⁵² mirrors the definition of 'domestic violence act' – discussed above. It appears that civil restraining orders are also available to those who experience or apprehend stalking behaviours from the defendant.

In Tasmania a person can be granted a restraint order where, among other alternative scenarios, the defendant has stalked the victim. Restraint orders can also be granted where the defendant has stalked a third party where this behaviour has caused the victim to feel apprehension or fear. For example in circumstances where the defendant stalked a friend of the victim there may be grounds for a restraint order. Stalking is defined broadly in this legislation and largely mirrors the behaviour set out in the South Australian legislation discussed above but also includes behaviours that 'could reasonably be expected to arouse another persons' apprehension or fear'.¹⁵³ In Tasmania there is no distinction in approach based on the context of the relationship.

Generally in Victoria, family violence intervention orders are provided for under the *Crimes Act 1958 (Vic)* and all other matters are dealt with pursuant to the *Magistrates Court Act 1989 (Vic)*.¹⁵⁴ However the context of the relationship is not relevant where the behaviour complained of is stalking. The definition of stalking closely reflects the definition under the *Justices Act 1959 (Tas)*.¹⁵⁵ Where stalking behaviour has occurred the victim can apply for an intervention order via the *Crimes Act 1958 (Vic)*.¹⁵⁶ The Victorian Law Reform Commission is currently reviewing family violence laws. In a recent consultation paper they reported that the community were unsatisfied with this

¹⁵¹ *Summary Procedure Act 1921 (SA)* s99(1)

¹⁵² *Summary Procedure Act 1921 (SA)* s99(2)

¹⁵³ *Justices Act 1959 (Tas)* s 106A(1)

¹⁵⁴ s126A(1)

¹⁵⁵ s106A(1)

¹⁵⁶ s21A(5)

approach. Some of those consulted suggested that the legislation was being used in ways that were not intended, for example in neighbourhood disputes. This perceived abuse was said to be leading to intervention orders being taken less seriously by magistrates, court staff and police.¹⁵⁷

In response to a spate of deaths arising out of situations of domestic abuse, Western Australia has recently overhauled its restraining order legislation.¹⁵⁸ Under the *Restraining Orders Act 1997* (WA) the court may make a violence restraining order where the victim reasonably fears that the defendant will commit an act of abuse against victim.¹⁵⁹ An act of abuse includes stalking. Specifically the definition states:

- causing the person or a third person to be pursued-
- (i) with intent to intimidate the person; or
- (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person...¹⁶⁰

The legislation refers to the *Criminal Code WA* for definitions of pursue and intimidate.¹⁶¹ These same definitions are applied to the crime of stalking in WA.

Conclusion: Issues and problems

Within Australia it would be ideal if there could be a co-ordinated response to stalking. The lack of consistency between relevant legislation risks causing uncertainty for victims, for alleged perpetrators and also for policing. There is a high rate of mobility between states and territories in Australia especially for those who experience domestic violence and are trying to escape it. Although there is cross recognition

¹⁵⁷ Victorian Law Reform Commission, *Consultation Paper, review of Family Violence Laws* (November 2004) at para 4.36-4.39.

¹⁵⁸ Carolyn Johnson, *Familicide and Disputed Residency Contact (Western Australia 1989-1999)* (self published, 20 February 2002) copy available from the author.

¹⁵⁹ *Restraining Orders Act 1997* (WA) s11A

¹⁶⁰ *Restraining Orders Act 1997* (WA) s54(2)(c)

¹⁶¹ *Restraining Orders Act 1997* (WA) s54(4) and *Criminal Code* ss338D and 338E.

of restraining orders and stalking acts which occurred in one state may be recognised when there is subsequent prosecution in a second state this is not always the case.¹⁶² Similarly there is a lack of consistency between states as to what constitutes domestic violence and which relationships are outside of this category.

The restraining order power within the Queensland criminal legislation¹⁶³ appears to be an important addition but we do need more information about its current operation to make any conclusive decision. Failing the inclusion of such a power the Victorian referring power would seem to provide the necessary mechanism for decision-makers to make restraining orders.¹⁶⁴ It continues to be suggested that policing bodies are uncomfortable about recognising domestic stalking as a crime. Some incentive is needed to encourage police officers confronted with a victim claiming stalking in a domestic context to investigate and prosecute this behaviour as a crime rather than simply referring victims off to civil protection order legislation. Perhaps magistrates could require that police prosecutors provide reasons for lack of prosecution where there are stalking allegations made in restraining order applications.

In relation the elements of the stalking crime the type of intent required pursuant to the Victorian legislation seems ideal.¹⁶⁵ This formulation disposes of the need for any assessment of impact on the victim except in relation to penalty. The formulation covers incidences where stalkers do not intend harm or fear to their victim. In relation to the acts required for stalking, it would seem that the Queensland formulation is ideal.¹⁶⁶ Unlike other jurisdictions it allows for a prolonged incident of stalking (watching over for a period of days for example) and it avoids the problematic language of 'course of conduct'.

¹⁶² s21A(7) *Crimes Act* Victoria; see division three of the *Domestic and Family Violence Protection Act* (1989) Qld.

¹⁶³ s359E *Criminal Code* Qld

¹⁶⁴ s21A(5) *Crimes Act* Victoria

¹⁶⁵ s 21A(3) *Crimes Act* Victoria

¹⁶⁶ s359C *Criminal Code* Qld

On a final note of warning Pathe, Mackenzie and Mullen raise important concerns about the application of stalking law in a recent article.¹⁶⁷ They have explained how stalkers have on some occasions subverted the aims of the legal system. For example stalkers have used the legal system to re-trace their victims. One stalker apparently advised police that he had been involved in a hit and run accident. This precipitated a police search that located the victim for the stalker to effectively continue his campaign.¹⁶⁸ They note that stalkers may attempt to avoid prosecution 'getting in first' by ensuring that the victim is prosecuted for stalking. This obviously entails a high level of stress for the victim. Further, in any prosecution, the victim is usually required to come face to face with his / her stalker, forcing a kind of double victimisation; first by the stalker and then by the stalker assisted by the court.¹⁶⁹ The authors also note the high rate of dismissal of stalking charges and their frequent downgrading to lesser offences. By the same token they also note the use of stalking charges in inappropriate and trivial cases.¹⁷⁰ In a warning to correctional facilities the authors point out that stalkers, disturbingly, often continue their harassment campaign from prison.¹⁷¹

¹⁶⁷ Michele Pathe, Rachel Mackenzie and Paul Mullen, 'Stalking by Law: Damaging Victims and Rewarding Offenders' (2004) 12 *Journal of Law and Medicine* 103.

¹⁶⁸ *Ibid.* at 104

¹⁶⁹ *Ibid.* at 106

¹⁷⁰ *Ibid.* at 107

¹⁷¹ *Ibid.* at 110.