

# 13. Stalking and intimidation

- Incidence of stalking and intimidation
- Elements of the offence
- Harassment causing distress or detriment

13.1 Section 562AB of the Crimes Act provides that it is an offence to stalk or intimidate another person:

A person who stalks or intimidates another person with the intention of causing the person to fear physical or mental harm is liable to imprisonment for 5 years, or to a fine of 50 penalty units, or both.<sup>1</sup>

13.2 Since the offence is contained in Part 15A, it is necessary for this review to determine whether these provisions remain appropriate for securing the policy objectives of the Part. The policy objectives are to ensure the safety and protection of all people who experience violence, and to reduce and prevent violence.<sup>2</sup>

13.3 Stalking has only been recognised as a criminal offence relatively recently. All Australian jurisdictions enacted anti-stalking legislation between 1993 and 1996,<sup>3</sup> and there is similar legislation in the United States, the United Kingdom, Ireland, Canada and New Zealand.<sup>4</sup> The widespread enactment of anti-

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1. Crimes Act s 562AB.
  2. Crimes Act s 562AC. Although these are the stated objectives of the AVO provisions, they are also relevant to the offence of stalking and intimidation, given its place in Part 15A and the gist of the parliamentary debates on s 562AB: see New South Wales, *Parliamentary Debates (Hansard) Legislative Assembly*, 17 November 1993 at 5614-5621, and 18 November 1993 at 5723-5760; Legislative Council, 23 November 1994 at 5623-5625 and Legislative Council, 25 November 1999 at 3674-3676.
  3. See *Crimes Act 1900* (ACT) s 34A; *Criminal Code Act* (NT) s 189; *Crimes Act 1900* (NSW) s 562AB; *Criminal Code Act 1899* (Qld) s 359A; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code Act 1924* (Tas) s 192; *Crimes Act 1958* (Vic) s 21A; *Criminal Code Compliance Act 1913* (WA) s 338D and s 338E.
  4. Stalking was first criminalised in the United States in California in 1990. Similar legislation has now been enacted in every other state, and a Model Anti-Stalking Code has been developed by the National Institute of Justice: see United States of America, *Stalking and Domestic Violence: the Third Annual Report to Congress under the Violence Against Women Act*, (US Department of Justice, 1998). See also *Protection from Harassment Act 1997* (UK); *Non-Fatal Offences Against the Person Act 1997* (Ireland) s 10;

stalking legislation aimed to fill a perceived gap in the law. Previously, people who were subjected to persistent unwanted attention had no legal remedy if the behaviour in question was not in itself criminal.

13.4 The stalking and intimidation offence was inserted into the Crimes Act in 1993.<sup>5</sup> It was introduced in the context of domestic violence, and originally only applied to people who were in a domestic relationship. In 1994 this limitation was removed, recognising that stalking and intimidation can occur regardless of whether or not the parties are in a domestic relationship.<sup>6</sup> In 1999, the offence was expanded again. Previously, the offender had to cause fear of “personal injury”, which failed to recognise that stalking, as an expression of power and control, may not aim to arouse fear of physical violence.<sup>7</sup> As amended, it is an offence to cause fear of “physical or mental harm”.<sup>8</sup>

13.5 Anti-stalking legislation is inherently difficult to draft.<sup>9</sup> The offence is by nature imprecise, as behaviour which is otherwise considered quite ordinary becomes threatening in context: “the difficulty in defining stalking as a concept lies in its paradoxical

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*Criminal Code*, RSC 1985, cl C-46 (Canada) s 264; *Harassment Act 1997* (NZ). The Law Reform Commission of Hong Kong has recommended that stalking and harassment should be criminalised: *Stalking* (Report, 2000).

5. *Crimes (Domestic Violence) Act 1993* (NSW).
6. *Crimes (Threats and Stalking) Amendment Act 1994* (NSW).
7. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3676.
8. *Crimes Amendment (Apprehended Violence) Act 1999* (NSW).
9. See E Ogilvie, *Stalking: Legislative, Policing and Prosecution Patterns in Australia* (Australian Institute of Criminology, 2000) at 53; Commonwealth of Australia, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person Report*, (Model Criminal Code Officers Committee, 1998) at 53; S Kift, “Stalking in Queensland: From the Nineties to Y2K” (1999) 11 *Bond Law Review* 144 at 145; D Wiener, “Stalking: Does the law work?” (2001) 75(8) *Law Institute Journal* 67; J Mountfort, “The Civil Provisions of the *Harassment Act 1997*: A Worrying Area of Legislation?” (2001) 32 *Victoria University of Wellington Law Review* 999.

status as an act that is ambiguously located somewhere between crime and conformity".<sup>10</sup> While stalking is qualitatively different from the legitimate pursuit of a love interest, it is difficult to clarify at what point the behaviour warrants criminal sanction.<sup>11</sup> Because of this inherent imprecision, it is difficult to set clear parameters in the legislation.

13.6 There is significant overlap between AVOs and stalking and intimidation. The same conduct may give rise to an offence of stalking and intimidation and also constitute grounds for an AVO. Both deal with action which may not be criminal in isolation but, in context, could be serious enough to warrant legal intervention. A court can grant an AVO where the person seeking protection has reasonable grounds to fear, and in fact fears, harassment, molestation, intimidation or stalking, sufficient to warrant the making of the order.<sup>12</sup> The AVO provides a means of stopping the offending behaviour, as it prohibits the defendant from stalking or engaging in conduct that intimidates the protected person.<sup>13</sup> If a person is charged with stalking or intimidation, the court must make an interim AVO for the protection of the alleged victim.<sup>14</sup> A final order is made if the accused is found guilty.<sup>15</sup> The Bureau of Crime Statistics and Research has found that AVOs are very effective in preventing stalking.<sup>16</sup>

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10. E Ogilvie, *Stalking: Legislative, Policing and Prosecution Patterns in Australia* (Australian Institute of Criminology, 2000) at 12.

11. Ogilvie at 7-14.

12. s 562AE(1) and s 562AI(1).

13. s 562BC.

14. s 562BF(1).

15. s 562BE(1).

16. An overwhelming majority of protected persons reported a reduction in stalking after taking out an order: L Trimboli and R Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, Sydney, 1997) at para 3.4.1.

## INCIDENCE OF STALKING AND INTIMIDATION

13.7 Stalking and intimidation occurs at a reasonably high rate.<sup>17</sup> Perpetrators are more often men and victims are more often women. The parties may be intimates, former intimates, acquaintances or strangers. In a majority of cases, the perpetrator is somebody known to the victim. Motives for offending vary – the offender may wish to initiate or renew a relationship, or may wish to control or instil fear in the victim. While some stalkers may be psychotic or delusional, most are not. Stalking and intimidation is clearly linked to domestic violence, as associated violence is more likely to occur between intimates than between strangers or acquaintances. Intimates or former intimates are more likely to be threatened or assaulted or have their property damaged, and also experience stalking-type behaviour of a longer duration and wider variety.<sup>18</sup>

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17. Statistics tend to vary depending on the definition used. A recent Australian study found that 23.4% of respondents had been subject to repeated unwanted behaviour which provoked fear: R Purcell, M Pathé and P Mullen, “The prevalence and nature of stalking in the Australian community” (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114. A study conducted by the Australian Bureau of Statistics in 1996 into women’s safety found that 15% of respondents reported having been stalked: *Women’s Safety Australia* (Survey, 1996, Cat No 4128.0). The 1998 British Crime Survey found that 11.8% of adults aged 16 to 59 could recall being subject to persistent and unwanted attention at some time in their lives: T Budd and J Mattinson, *The extent and nature of stalking: findings from the 1998 British crime survey* (Home Office, London, 2000) at v. The US National Violence Against Women Survey conducted in 1996 found that “Stalking is more prevalent than previously thought: 8% of women and 2% of men in the United States have been stalked at some time in their life”: P Tjaden and N Thoennes, *Stalking in America: Findings From the National Violence Against Women’s Survey* (National Institute of Justice Centers for Disease Control and Prevention, 1998) at 3.
  18. See R Purcell, M Pathé and P Mullen, “The prevalence and nature of stalking in the Australian community” (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114.

13.8 The number of convictions under section 562AB has steadily increased since the offence was introduced in 1993.<sup>19</sup>

## ELEMENTS OF THE OFFENCE

13.9 It is an offence to stalk or intimidate a person with the intention of causing fear of physical or mental harm. The offence includes causing a person to fear harm to another person with whom he or she has a domestic relationship.<sup>20</sup> For example, conduct which causes a person to fear for the safety of his or her child is covered.

13.10 In deciding whether a person's conduct amounts to intimidation, the court can have regard to any pattern of violence in the person's behaviour, especially violence constituting a domestic violence offence.<sup>21</sup> Relationship evidence is also admissible in order to determine whether the conduct in question was likely to cause fear. Such evidence puts the conduct in question "into a true and realistic context, in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act".<sup>22</sup>

### Actus reus – what type of behaviour is covered?

13.11 The legislation outlines the types of behaviour which may constitute stalking or intimidation. "Stalking" is 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.

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19. For example, there were 189 convictions under s 562AB in 2000, compared with 111 in 1987: information supplied by the Bureau of Crime Statistics and Research (24 July 2002).

20. s 562AB(2).

21. s 562A(2).

22. *R v Atroushi* [2001] NSWCCA 406 (12 October 2001) at para 33 (Carruthers AJ).

13.12 “Intimidation” is broader, and more open ended. It means:

- (a) conduct amounting to harassment or molestation, or
- (b) the making of repeated telephone calls, or
- (c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.

13.13 Intimidation could therefore include keeping a person under surveillance, driving past a person’s house, interfering with a person’s property or sending unwanted emails, letters, faxes, unsolicited gifts or offensive material. Cyberstalking would also fall within the definition of intimidation.<sup>23</sup>

### **Mens rea – the intention to cause fear of harm**

13.14 The offender must intend to cause the other person to fear physical or mental harm. To prove the requisite intent, the prosecution must satisfy the court beyond a reasonable doubt that the person knows the conduct is likely to cause fear in the other person. It is not necessary to prove the victim actually feared physical or mental harm.

13.15 Some jurisdictions require proof of an intention to cause fear or apprehension.<sup>24</sup> This has proved to be a significant barrier

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23. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 10 April 2001 at 13405; E Ogilvie, “Cyberstalking” *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, No 166, 2000); A Davidson, “Stalking in Cyberspace” (2000) 20(3) *Proctor* 31.

24. For example, the South Australian model requires the prosecution to prove that the accused stalked the victim with intent to cause serious physical or mental harm, or serious apprehension or fear: *Criminal Law Consolidation Act 1935* (SA) s 19AA. The Model Criminal Code Committee recommended that proof of an intention to cause serious fear or apprehension be retained, so that people who caused fear without intending to could not be prosecuted: Commonwealth of Australia, *Model Criminal Code Chapter 5 Non*

to prosecution, and as a result there has been a shift towards more objective tests which focus on whether offenders *should have known* that their behaviour would cause fear.<sup>25</sup> In NSW, there is no need to prove that the accused subjectively intended to cause fear, only that the accused knew that the behaviour in question was *likely* to cause fear.

13.16 One area of potential ambiguity is where the accused did not intend the victim to find out about the conduct in question, for example where a stalker secretly keeps a victim under surveillance. Arguably, such activities may fall outside the scope of the offence, if they are not “likely” to cause fear.<sup>26</sup> Another area of ambiguity is where the behaviour is directed at more than one person. For example, if a person regularly follows different people about, and does not target the same victim more than once, does this constitute stalking?<sup>27</sup>

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*Fatal Offences Against the Person* (Model Criminal Code Officers Committee, Report, 1998) at 61.

25. The Western Australian legislation was amended for this reason: “The stalking provisions need to be extended to cover those situations where there is no intent on the part of the accused but the victim nevertheless fears for his or her safety or is prevented from going about his or her normal lifestyle. Therefore, the [*Criminal Law Amendment Bill 1997*] provides for a new simple offence of stalking which does not involve any intent on the part of the accused.” Western Australia, *Parliamentary Debates (Hansard)* Legislative Council, 11 November 1997 at 7465. There are now two separate offences – the more serious offence requires the accused to have behaved “with intent to intimidate”; the lesser offence only that accused’s behaviour be “reasonably expected to intimidate”: *Criminal Code Compliance Act 1913* (WA) s 338E(1) and s 338E(2).
26. For this reason, the Queensland legislation explicitly provides that it is immaterial whether the victim was aware of being stalked, or whether the accused intended to cause the fear or apprehension: *Criminal Code Act 1899* (Qld) s 359C.
27. See I Dussuyer, “Is Stalking Legislation Effective in Protecting Victims?”, paper presented at the conference *Stalking: Criminal Justice Responses* (Department of Justice, Victoria, 2000) at para 7.1.

13.17 The mental state of the accused is also significant.<sup>28</sup> Some stalkers suffer from psychiatric disabilities or mental illnesses, which may result in delusional episodes and reduce their legal culpability.<sup>29</sup> Where the accused has a mental illness, criminal prosecution may be inappropriate. It is less clear cut where the accused has a personality disorder, or emotional or behavioural problems. Indeed, many stalkers act irrationally, and demonstrate little understanding of the effect of their behaviour. It is worth noting, however, that most offenders are not psychotic or delusional.<sup>30</sup>

### Defences and exclusions

13.18 Other jurisdictions exclude certain conduct from the scope of their legislation. For example, in Queensland, stalking does not include acts done for a lawful purpose, acts done for the purpose of an industrial, political or other public dispute, reasonable conduct engaged in for the person's trade, business or occupation, or reasonable conduct to obtain or give information that the person has a legitimate interest in obtaining or giving.<sup>31</sup> In Tasmania and Victoria, it is not an offence if the person is performing his or her official duties,<sup>32</sup> while in Western Australia, it is a defence that the accused acted with lawful authority or reasonable excuse.<sup>33</sup> This ensures that legitimate activity is not inadvertently brought

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28. See I Frecklington, "Stalker Sentencing and Protection of the Public" (2001) 8 *Journal of Law and Medicine* 233 at 234-236.

29. See *Bhattacharya v Hamilton* [2000] NSWSC 102 (1 March 2000) at para 34 (Dunford J).

30. In 2001, there were 838 charges of stalking or intimidation brought before the local courts. Of these, only 7 charges were dismissed on grounds of the mental health of the accused: information supplied by the Bureau of Crime Statistics and Research (3 September 2002). See also United States of America, *Stalking and Domestic Violence: the Third Annual Report to Congress under the Violence Against Women Act* (US Department of Justice, 1998) at 14.

31. *Criminal Code Act 1899* (Qld) s 359D.

32. *Criminal Code Act 1924* (Tas) s 192(3) and *Crimes Act 1958* (Vic) s 21A(4).

33. *Criminal Code Compilation Act 1913* (WA) s 338E(3).

within the scope of the offence. There are no statutory defences or exclusions in NSW.

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**Issue 26**

**How effective are the stalking and intimidation provisions in Part 15A in protecting people against acts or threats of violence?**

**Is the requisite intent, that the behaviour in question be “likely to cause fear of physical or mental harm”, appropriate?**

**Should the legislation include any defences or exclusions?**

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## **HARASSMENT CAUSING DISTRESS OR DETRIMENT**

13.19 The requirement that the offender cause “fear of physical or mental harm” creates an important threshold, ensuring that behaviour which is merely irritating or annoying remains outside the scope of the offence.

13.20 However, persistent unwanted attention may have a significant impact on a person’s life, although no fear of harm is caused. A recent Australian study reported that “a majority of victims (63%) modified their lifestyle in response to the stalking behaviours”,<sup>34</sup> concluding that “most victims report significant disruption to their daily functioning irrespective of exposure to associated violence”.<sup>35</sup> Victims took measures such as increasing

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34. R Purcell, M Pathé and P Mullen, “The prevalence and nature of stalking in the Australian community” (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114 at 117.

35. R Purcell, M Pathé and P Mullen, “The prevalence and nature of stalking in the Australian community” (2002) 36 *Australian and New Zealand Journal of Psychiatry* 114 at 114. See also I Dussuyer, “Is Stalking Legislation Effective in Protecting Victims?”, paper

their home security, changing their telephone number or screening their calls or, in more serious cases, moving house or changing jobs. The unwanted attention also restricted their social activity and led to increased work absenteeism. Arguably the statutory focus on causing “fear of physical or mental harm” does not recognise the effect that stalking and intimidation have on the victim’s enjoyment of life.

13.21 For this reason, some jurisdictions include behaviour causing detriment or distress, as well as behaviour causing fear. For example, under the Queensland model, unlawful stalking includes conduct that “causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.”<sup>36</sup> “Detriment” includes prevention or hindrance from doing an act a person is lawfully entitled to do, for example where a person changes the route or form of transport he or she would ordinarily use to travel to work. It also includes compulsion to do an act a person is lawfully entitled to abstain from doing, for example where a person feels compelled to sell a property he or she would otherwise not sell.<sup>37</sup>

13.22 However, it is important that the threshold is not too low, otherwise behaviour which is merely irritating may be criminalised inadvertently. Indeed, legislation in some jurisdictions has been criticised for being too broad or too uncertain. The Victorian legislation is reportedly being used to deal with neighbourhood disputes, noise complaints, road rage and disputes between school children, prompting concern that “the definition of stalking is increasingly being widened through dealing with situations that originally may have been outside the scope of the current legislation”.<sup>38</sup> The United Kingdom model has also been criticised for its breadth and uncertainty. Although it was enacted to address

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presented at the conference *Stalking: Criminal Justice Responses* (Department of Justice, Victoria, 2000) at table 26.

36. *Criminal Code Act 1899* (Qld) s 359B(d)(ii).

37. *Criminal Code Act 1899* (Qld) s 359A.

38. See I Dussuyer, “Is Stalking Legislation Effective in Protecting Victims?”, paper presented at the conference *Stalking: Criminal Justice Responses* (Department of Justice, Victoria, 2000) at para 7.1.

stalking-type behaviour, it prohibits any “course of conduct which amounts to harassment of another”.<sup>39</sup> The summary offence of harassment includes causing alarm or distress, and does not require the victim to have been put in fear.<sup>40</sup> This captures a much wider range of behaviour than the Australian legislation, and is reportedly being used far more widely than was intended, for a variety of behaviour including low level harassment and neighbourhood disputes relating to property or money.<sup>41</sup>

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**Issue 27**

**Should the offence of stalking or intimidation cover behaviour causing detriment or distress, or should it remain limited to behaviour causing fear?**

**Does the legislation draw an appropriate line between nuisance behaviour, which is annoying but lawful, and criminal conduct?**

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39. *Protection from Harassment Act 1997* (UK) s 1(1).

40. The *Protection from Harassment Act 1997* (UK) creates two separate offences. Section 2 creates a summary offence which deals with conduct amounting to harassment. Section 4 creates a more serious offence of harassment causing fear of violence.

41. J Harris, *An evaluation of the use and effectiveness of the Protection from Harassment Act 1997* (Home Office, London, 2000) at vi, 5 and 51. For a criticism of the breadth of the New Zealand legislation, see J Mountfort, “The Civil Provisions of the *Harassment Act 1997*: A Worrying Area of Legislation?” (2001) 32 *Victoria University of Wellington Law Review* 999.