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Sally Kift

*Queensland University of Technology*

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# Stalking in Queensland: From the Nineties to Y2K

## **Abstract**

Queensland was the first Australian state to enact anti-stalking legislation when it did so in 1993. That first attempt was criticised as unnecessarily complex, though it was nevertheless extensively utilised. Following an exhaustive consultation process, the original s 359A QCC has now been completely recast and a new Chapter 33A 'Unlawful Stalking' has been inserted into the Criminal Code (Qld). This article will examine the elements of this most recent legislative response to the anti-social behaviour known as stalking. The new model is a diligent and genuine effort to address past deficiencies in the law, to satisfy the concerns of victims and to take this crime of the nineties into the next century.

## **Keywords**

stalking, section 359A Criminal Code Qld, chapter 33A Criminal Code Qld

## NOTE

### STALKING IN QUEENSLAND: FROM THE NINETIES TO Y2K

By SALLY KIFT LLB (Hons) (UQ), LL.M (QUT), Lecturer in Law, Faculty of Law, Queensland University of Technology.\*

*Queensland was the first Australian state to enact anti-stalking legislation when it did so in 1993. That first attempt was criticised as unnecessarily complex, though it was nevertheless extensively utilised. Following an exhaustive consultation process, the original s 359A QCC has now been completely recast and a new Chapter 33A 'Unlawful Stalking' has been inserted into the Criminal Code (Qld). This article will examine the elements of this most recent legislative response to the anti-social behaviour known as stalking. The new model is a diligent and genuine effort to address past deficiencies in the law, to satisfy the concerns of victims and to take this crime of the nineties into the next century.*

#### Background

On 30 June 1998, one of the new Queensland Labor Attorney General's first acts was to release a *Discussion Paper on the Offence of Stalking*. The Discussion Paper mooted that the existing s 359A *Criminal Code* (Qld) 'Unlawful Stalking' be completely replaced by a draft new section. While it was unanimously accepted by key stakeholders and other interested parties that the current s 359A was in desperate need of reform, the June 1998 proposal was seriously flawed. Submissions received on it led to the preparation in August 1998 of the *Criminal Code (Stalking) Amendment Bill*, which proposed a further new anti-stalking section, addressing some of the deficiencies of the June proposal. Further extensive consultation on that exposure draft led to the *Criminal Code (Stalking) Amendment Bill* 1999 which was subsequently passed. The *Criminal Code (Stalking) Amendment Act* 1999 (No 18 of 1999) was assented to on 30 April 1999. It repeals s 359A *Criminal Code* (Qld) and inserts a new Chapter 33A (Unlawful Stalking), containing ss 359A-359F.

All Australian jurisdictions now have anti-stalking legislation sanctioning behaviour calculated to harass, threaten or intimidate.<sup>1</sup> Stalking may occur in a variety of contexts: the notorious celebrity stalking cases (Jodie Foster, Madonna, Steven Spielberg and, recently in Australia, Triple J host Helen

\* This article is based on a paper presented at the Australasian Law Teachers Association Conference in Wellington, NZ in July 1999.

1 See *Criminal Code* (Qld) s 359A; *Criminal Code* 1913 (WA) ss 338D and 338E; *Crimes Act* 1900 (NSW) ss 562A and 562AB; *Crimes Act* 1958 (Vic) s 21A; *Criminal Law Consolidation Act* 1935 (SA) s 19AA; *Criminal Code Amendment (Stalking) Act* No 65 of 1995 (Tas); *Criminal Code* 1983 (NT) s 189 and see *Albrecht v Price* (Unrpt NT Sup Ct per Kearney J, 2 April 1996). See also *Protection From Harassment Act* 1997 (Eng).

Razer), in domestic violence situations, arising out of workplace relationships or at random, stranger stalking. Although the offence originated in the United States as a mechanism to deal with celebrity related stalking, in Australia, stalking is most commonly an extension of domestic violence.<sup>2</sup> Because the element of threat is often no more than merely underlying or implicit, the individual instances of behaviour themselves may not amount to the commission of any offence (not even an attempt); particularly the acts may not constitute criminal assault as currently defined.<sup>3</sup> Common examples of stalking behaviour include: telephoning the victim; following the victim; visiting, driving past or sitting outside the victim's home; and sending gifts, letters or notes.<sup>4</sup>

There can be little doubt that there is a niche of anti-social, threatening behaviour which, it can be argued, is not properly or adequately covered by the current criminal law. In general terms, that gap occurs where one person causes another a degree of fear or trepidation by behaviour which is on the surface innocent but which, taken in context, assumes an importance beyond its immediate significance.<sup>5</sup>

However, as Duggan J warned in relation to the South Australian stalking provision,<sup>6</sup> this is not to say that the unlawful stalking offence is meant to be a 'repository for a collection of sundry offences against other provisions of the criminal law'. In *Police v Leon Peter Flynn*, Duggan J considered it 'inappropriate' that charges for a series of substantive offences<sup>7</sup> were abandoned when the appellant pleaded guilty to stalking, in order that those incidents be included as particulars in the stalking offence. His Honour agreed with Goode's observation that:

Many stalkers would, in all probability, commit other offences, perhaps serious offences in the course of conduct. The stalking offence should be used to fill a gap in the law and not simply to load up the indictment with another offence, perhaps to be used as a bargaining chip in pleas negotiations.<sup>8</sup>

Stalking laws have proved difficult to draft. All jurisdictions have adopted different approaches and have kept them under review. For example, just as Queensland has completely redrafted its provisions this year, so too, in 1998, did Western Australia completely recast *Criminal Code 1913 (WA)* Chapter

2 See, for example, Mullen P and Pathe P, 'Stalking and the Pathologies of Love' (1994) 28 *Australian and New Zealand Journal of Psychiatry* 469; Burgess A et al, 'Stalking Behaviours within Domestic Violence' (1997) 12 *Journal of Family Violence* 389.

3 s 245 *QCC* which, in particular, requires a 'bodily act or gesture' to accompany any threatened or attempted application of force and see *R v Cook* (Unrpt Qld Ct of Appeal 23 March 1995) illustrating how stalking offence enlarges ambit of criminal law re abusive and threatening phone calls. See generally J Bradfield, 'Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?' (1998) 21 *Harvard Women's Law Journal* 229.

4 For more extreme examples see R A Swanwick, 'Stalkees Strike Back - The Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland' (1996) 19 *UQLJ* 26 at 34.

5 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 5: Non Fatal Offences Against the Person Discussion Paper*, August 1996 (MCCOC) at 39.

6 See *Police v Leon Peter Flynn* (Unrpt Sup Ct of SA, Duggan J, 9 May 1997) at para 11 re *Criminal Law Consolidation Act 1935 (SA)* s 19AA.

7 For common assault, threatening life, larceny and failing to comply with a restraining order.

8 Goode M, 'Stalking: A Crime of the Nineties' (1995) 19 *Crim LJ* 21 at 26.

XXXIIIB – Intimidation and replaced it with a new Chapter entitled ‘Stalking’.<sup>9</sup> In Australia, the variety of stalking offences are most usually criticised on the bases that they are, firstly, overly broad (as evidenced by problems in defining the offences’ ‘acceptable range’<sup>10</sup>) and, secondly, that they do not address the intent requirement appropriately. Additionally, of course, specific provisions have encountered specific difficulties in interpretation.

### The Old s 359A Criminal Code (Qld)

Queensland was the first Australian state to enact stalking legislation, doing so in 1993.<sup>11</sup> The resultant s 359A *Criminal Code* (Qld) was quite complex, as a brief examination of the major elements of the old crime shows:<sup>12</sup>

- the ‘first person’ (the offender) engaged in a ‘course of conduct’ (not defined) comprised of at least two or more separate ‘concerning acts’ (very broadly defined in s 359A(7) and covering almost ‘every known act of human behaviour’<sup>13</sup>);
- the offender must *intend* that the ‘second person’ (the potential victim) ‘be aware that the course of conduct is directed at’ him/her
- the victim must be aware that the course of conduct is directed at them;
- the course of conduct must cause a reasonable person in the ‘victim’s circumstances’ (defined s 359A(3) as circumstances known or foreseen or reasonably foreseeable by the offender) to believe that a ‘concerning offensive act’ (defined s 359A(7) to mean an unlawful act of violence against the person or property of either the victim or someone about whom the victim would reasonably be expected to be concerned) is ‘likely to happen’.

Section 359A *Criminal Code* (Qld) had been extensively utilised. In a detailed review of the first two years of s 359A’s operation, Swanwick recorded that 175 cases of stalking went before the various Queensland Magistrates Courts; 73 of which were heard summarily and 74 of which were committed to the District Court.<sup>14</sup> In the 18 months to January 1997, there were 1104 stalking complaints lodged with police: this was more than 4 times the 240 stalking complaints received in the previous 18 month period.<sup>15</sup>

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9 See *Criminal Law Amendment Act (No 1) 1998* (WA) which received royal assent on 25 September 1998. These new provisions are examined in Whitney K, ‘Western Australia’s New Stalking Legislation: Will it Fill the Gap?’ (1999) 28(2) *UWA Law Review* 293.

10 MCCOC, above n 5, at 43 and see also Goode, above n 8, at 26-28.

11 *Criminal Law Amendment Act 1993* s 3 (Act No 65 of 1993).

12 Set out in ss 359A(2)(a)-(d).

13 Swanwick, above n 4, at 31 citing *The Queen v Clarke* (Unrpt Dis Ct Ipswich, Robertson DCJ, 27 February 1995) transcript at 10; see also Swanwick at 33-34.

14 Swanwick, above n 4, at 31; see also ‘Stalking: Three Months in Review’ (1994) 14 *Proctor* 8: 40 persons charged in that period.

15 Police statistics published in K Lawrence, ‘Terror Hides behind Law’, *Sunday Mail* 3 May 1998 60.

### Difficulties Identified with Old s 359A: Concerning Acts and a Course of Conduct

While almost every conceivable type of behaviour was covered under the definition of ‘concerning act’ in old s 359A(7), specific problems arose with the requirement in s 359A for proof that an ‘unlawful act of violence’ (to the person or property of either the victim or someone about whom the victim cares<sup>16</sup>) was *likely* to occur. Unless the conduct caused a reasonable person in the victim’s circumstances to believe that a violent act was likely to happen, the offence could not be proved. Further, in some cases it may just not have been possible to prove a likelihood of violence (for example, where the offender had broken into the victim’s home and washed the dishes) though the behaviour was nevertheless obsessive and frightening.<sup>17</sup> This last example illustrates a further limitation of the old s 359A which required that a concerning act must have occurred on ‘at least 2 *separate* occasions’ before the offence was committed:<sup>18</sup> one only instance, or even a prolonged episode of, harassing behaviour clearly did not suffice.

Even then, the two separate concerning acts must have constituted a ‘course of conduct’. This latter phrase was not defined in s 359A and difficulties were encountered in determining what exactly was contemplated by ‘a course of conduct’. While the section did not require that the conduct occur over any set period of time, it was suggested that the phrase implied ‘some degree of *continuity* and not one or two *isolated* incidents’.<sup>19</sup> This aspect was further complicated when, in *R v Hubbuck*,<sup>20</sup> it was held that the jury must all agree on the same two concerning acts having occurred.<sup>21</sup> Pincus J said that (the old) s 359A ‘seems to make the offence *consist in* the doing of a concerning act on at least two separate occasions’. By way of comparison, Duggan J, speaking of the South Australian offence, said that the actus reus of s 19AA *Criminal Law Consolidation Act 1935 (SA)* ‘...contemplates continuing conduct involving harassment or offensive behaviour towards a particular person.’<sup>22</sup>

### Difficulties Identified with Old s 359A: the Intent Requirement

In terms of intent, uniquely amongst the Australian provisions, all that the former s 359A required was that the offender intended that the victim ‘be aware that the course of conduct is directed at’ him/her: a purely subjective test. Section 359A did not require (as elsewhere) that the stalker should intend to cause physical or mental harm or even an apprehension of fear in the victim. Thus the section moved the focus away from the offender’s intent and, rather,

16 S 359A(7).

17 See example in K Lawrence, ‘Terror Hides behind Law’, *Sunday Mail* 3 May 1998 60 at 60.

18 See also Swanwick, above n 4, at 41.

19 *Id* at 29.

20 Unrpt Qld Ct of App, CA No 358 of 1997, 17 February 1998; [1998] QCA 11.

21 Referring to the recent High Court decision in *KBT v R* (1997) 72 ALJR 116 re s 229B(1) *QCC* which confirmed the approach taken in *R v Kemp* [1997] 1 Qd R 383, *R v Kemp (No 2)* (Unrpt Qld Ct of App 13 December 1996) and *Thompson* (1996) 90 A Crim R 416.

22 *Police v Leon Peter Flynn* (Unrpt Sup Ct of SA, Duggan J, 9 May 1997) at para 8.

looked to the effect of their conduct on the victim introducing a subjective/objective test that caused further difficulty in its application.<sup>23</sup> Therefore in *Kyriakou*,<sup>24</sup> where the applicant danced around in front of his victim, talking nonsense, the Queensland Court of Appeal found that his activities were ‘...so bizarre that whatever may have been his intent, a reasonable person in the claimant’s position could believe that an ‘act involving violence’ was likely to happen.’<sup>25</sup>

## New Chapter 33A - Unlawful Stalking

Accepting the need for reform, the new Chapter 33A has completely recast the anti-stalking offence and sought to address many of the problems of its predecessor. A determined effort has been made in the drafting to enhance readability of the legislation (by removing references to ‘first person’ and ‘second person’) and to reduce the essential operating parts of the offence to discrete sections (hence the introduction of a new Chapter, rather than a single section). Essentially, the new Chapter captures intentionally directed conduct that occurs on one (if protracted), or (otherwise) on more than one, occasion that, reasonably in the circumstances, would cause apprehension or fear or causes detriment.

The new s 359A provides definitions for the key words and phrases used in Chapter 33A: ‘circumstances’, ‘detriment’, ‘property’, ‘stalked person’, ‘unlawful stalking’ and ‘violence’ are all defined. Usefully, the definition of ‘violence’ includes ‘an act of depriving a person of liberty’. The newly coined term ‘detriment’ has been given an inclusive definition and is cast in terms of the consequences of the stalking behaviour:

- ‘**detriment**’ includes the following -
- (a) apprehension of fear of violence to, or against property of, the stalked person or another person;
  - (b) serious mental, psychological or emotional harm;
  - (c) prevention or hindrance from doing an act a person is lawfully entitled to do;
  - (d) compulsion to do an act a person is lawfully entitled to abstain from doing.

An improvement on earlier drafts is that the limb of detriment in (b) is now limited by the qualification that the degree of this type ‘mental, psychological or emotional harm’ must be ‘serious’,<sup>26</sup> though there are no further definitions of any of these terms provided. Despite the fact that the proposal clearly goes beyond the extension to ‘serious psychological harm’, suggested by the Attorney General in his June Press Release,<sup>27</sup> the inclusion of the notion of causing mental

23 As required by s 359A(2)(d). See *Discussion Paper* at 8 and Swanwick, above n 4, at 29-31.

24 (1994) 75 A Crim R 1.

25 (1994) 75 A Crim R 1 at 6.

26 Adopting the South Australian position that (there) the ‘injury’ is required to be ‘serious’. MCCOC, above n 5, endorsed a variant of the SA position.

27 Attorney-General and Minister for Justice and the Arts, The Hon. Matthew Foley MLA, Ministerial Media Statement, ‘New Stalking Laws Will Protect Victims’, 30 June 1998, at 1 (re the June *Discussion Paper*).

harm is nevertheless to be commended. What is not clear is what any of these variants of ‘mental, psychological or emotional’ harm mean and, further, how it is that any one of them is different from the others. Is mental harm some severe impairment of the victim’s mental or psychological functioning? Will some undefined period of anxiety or stress be enough for psychological harm? Where do arousal of apprehension or fear fit? Do emotions such as fear, panic or distress come within ‘emotional harm’?<sup>28</sup> It would seem that the intention of the redraft is that *all* of these states of mind are sufficient to constitute ‘detriment’ and that the reach of the legislation is thereby extended, hopefully occasioning no great practical difficulty.

It should be mentioned that it is sufficient under the new Chapter that the stalking conduct causes this type of detriment ‘reasonably...in all the circumstances’.<sup>29</sup> If emotional harm does include fear, panic, stress or anxiety, for such detriment to ‘reasonably aris[e] in all the circumstances’ may not be much of a threshold to satisfy in proving the offence.

Limbs (c) and (d) of the detriment definition seem directed at identifying how instances of mental, psychological or emotional harm might evidence themselves.<sup>30</sup> The particular examples are given in the legislation (for example, re para (c) that ‘A person significantly changes the route or form of transport the person would ordinarily use to travel to work or other places’; re para (d) that ‘A person sells a property the person would not otherwise sell’). Further examples of para (c) might include a victim not turning on their lights at home, leaving the phone off the hook or not going out.

### S 359B - Unlawful Stalking

Section 359B sets out the elements of the offence of ‘unlawful stalking’. The following s 359C then makes provision for ‘What is immaterial for unlawful stalking’ and identifies five matters which are immaterial to determining the offender’s guilt. To understand completely the breadth of the conduct that has now been proscribed, it is useful, at this early stage, to incorporate the several matters identified in s 359C into the statement of the offence created by s 359B:

**359B ‘Unlawful stalking’** is conduct –

- (a) intentionally directed at a person (the ‘**stalked person**’) [but it is immaterial whether offender intends the *victim* to be aware that the conduct is so directed **and** also immaterial that the offender is

28 Cf comments of D Wiener, ‘Stalking: Criminal Responsibility and the Infliction of Harm’ (1995) 69 *LJ* 30 at 31. See discussion in *R v Ireland, R v Burstow* [1997] 3 WLR 534, a case of repeated silent telephone calls and consequent psychological damage suffered by the victims. Perhaps it is in this context that a real question arises as to whether the causing of this sort harm might be better dealt with under a lesser harassment offence: see *Discussion Paper* at 10-11.

29 S 359B(d)(ii).

30 S 359A limbs (c) and (d) draw on the old s 338D(1)(a) and (b) *Criminal Code* 1913 (WA) which were repealed by *Criminal Law Amendment Act (No 1)* 1998 (WA), though there framed as part of intent requirement. See discussion in Whitney, above n 9, at Part IIB1; and see also *DPP v Fidler* [1992] 1 WLR 91 re ‘compel’.

- mistaken about the identity of the victim (eg, offender intends to stalk A and in fact stalks B): see s 359C(1)] ;and
- (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion [it is immaterial whether the conduct consists of the same or different acts: s 359C(3)]; and
  - (c) consisting of 1 or more acts of the following, or a similar, type -
    - (i) following, loitering near, watching or approaching a person;
    - (ii) contacting a person in any way, including, for example, by telephone, mail, fax, e-mail or through the use of any technology;
    - (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
    - (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
    - (v) giving offensive material to a person, directly or indirectly;
    - (vi) an intimidating, harassing or threatening act against a person whether or nor involving violence or a threat of violence;
    - (vii) an act of violence, or threat of violence, against, or against property<sup>31</sup> of, anyone, including the defendant; and
  - (d) that-
    - (i) would cause [but immaterial whether the conduct actually causes or not: s 359C(5)] the stalked person apprehension or fear, reasonably arising in all the circumstances,<sup>32</sup> of violence to, or against property<sup>33</sup> of, the stalked person or another person; or
    - (ii) causes detriment,<sup>34</sup> reasonably arising in all the circumstances, to the stalked person or another person.

[It is immaterial whether the offender intended to cause the ‘apprehension or fear ...of violence’ to person or property *or* the ‘detriment’ referred to in s 359B(d): s 359C(4)]

Sub-section 359C(2) also makes it clear, as was previously the case, that it is immaterial that conduct directed at the victim is actually carried out in relation to another person or another’s property (for example, persons such as the victim’s relatives, friends, work colleagues).

Section 359E designates unlawful stalking a crime and sets the maximum penalty at five years imprisonment, rising to seven years with a circumstance of aggravation (which, in large part mirror the aggravating circumstances under the old s 359A(6)).<sup>35</sup>

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31 Defined s 359A.

32 Defined s 359A.

33 Defined s 359A.

34 Defined s 359A.

35 But note additional requirement that any threat to use violence or to contravene an injunction or order under s 359(3)(a) and (c) must be ‘intentionally’ made.

## Discussion - No 'course of conduct' now required

Clearly, on its face, s 359B, the central section, is not nearly so complex as the previous s 359A: much has been done in an attempt to simplify the section but nevertheless retain (and then broaden) the very wide net cast by the old s 359A. For example, the elaborate notions of 'course of conduct', 'concerning act' and 'concerning offensive act' have all been done away with in the redraft, while the section still captures the breadth of potential stalking behaviour.<sup>36</sup> An additional type of conduct that has been usefully included in s 359B(c)(ii) is the Victorian notion of 'sending electronic messages'<sup>37</sup> with a view to addressing the e-mail and Internet problems of 'cyber stalking' that have arisen in the United States and are starting to arise here.<sup>38</sup>

The gravamen of the offence is now that conduct on one protracted occasion is sufficient. The rationale for this simplification is to be found in the reality of the experience of stalking victims and the simple fact that the commission of the offence (and the punishment for this type of anti-social behaviour) should not depend on a 'technical count of the number of acts done'.<sup>39</sup> As the June *Discussion Paper* suggested:

...there is no necessity for a minimum number of acts to constitute a course of conduct. The expression 'stalking' should encompass either a single protracted episode or repeated conduct and that the jury should be allowed to concentrate on the true nature and gravamen of the offence, the course of conduct, rather than on the particular occasions.<sup>40</sup>

By drafting s 359B in the way that has been done, the difficult requirement for a 'course of' conduct has been removed and all that is required is that 'conduct' be 'engaged in on any one occasion if the conduct is protracted or on more than one occasion'.<sup>41</sup> The provenance of this phrase is presumably the interpretation given to 'course of conduct' under s 21A *Crimes Act* 1958 (Vic) by McDonald J in *Gunes v Pearson and Tunc v Pearson*.<sup>42</sup>

In my view, in order for conduct which is engaged in to be a 'course of conduct', the relevant conduct must be conduct which is protracted or conduct which is engaged in on more than one *separate* occasion...For example, a 'course of conduct' which includes keeping the victim under surveillance, may comprise conduct which includes keeping the victim under surveillance for a single protracted period of time or on repeated separate occasions.<sup>43</sup> (My emphasis)

36 The previous definition had not been found wanting: see Swanwick, above n 4, at 33-34.

37 *Crimes Act* 1958 (Vic) s 21A(2).

38 See, for example, G Barton, Taking a Byte out of Crime: E-mail Harassment and the Inefficacy of Existing Law' (1995) 70(2) *Washington Law Review* 465; J Lancaster, 'Cyber-Stalkers', in *Behind IT* at 16, *The Weekend Australian*, June 20-21, 1998. Consider also harassment by facsimile machine.

39 *Criminal Code (Stalking) Amendment Bill* 1999, Explanatory Notes at 1.

40 *Discussion Paper* at 7.

41 S 359B(1)(c), remembering that s 359C(3) makes it immaterial whether the conduct consists of the same or different acts.

42 (1996) 89 A Crim R 297 and see commentary in (1997) 21 *Crim L J* 238.

43 *Gunes v Pearson* and *Tunc v Pearson* (1996) 89 A Crim R 297 at 306.

However, while the ambit of the new section now catches the ‘single protracted instance’, a specific criticism made of the old s 359A appears not to have been dealt with: that, absent a prolonged episode, one only (and not repeated) instance of conduct will not suffice. Sub-section 359C(3) states that, for the purposes of s 359B(b), it is immaterial whether the conduct consists of the same or different acts. The Explanatory Notes<sup>44</sup> refer to s 359C(3) and say that:

One of the problems identified under the old section was that the same act would need to be repeated to constitute stalking. This was not the experience of victims.

It would seem that the words in s 359B(1)(b) ‘on *more than* one occasion [if not protracted conduct]’ retain the requirement that more than one instance of conduct is necessary (if conduct cannot be classified as protracted) though s 359C has clarified that it may be the same act type again. Despite the indication to the contrary in the Explanatory Notes, it appears to remain the position under the redraft ‘that the same act would need to be repeated to constitute stalking’. While it is consistent with the philosophy behind targeting this conduct as enacted elsewhere, it is doubtful that this was intended by the redraft, particularly given the Attorney’s Press Release claim that the June proposal ‘...[removed] the current requirements for two or more instances of stalking and require instead proof of a ‘course of conduct’ to constitute the offence...’<sup>45</sup>

## **Intent and Immateriality**

The deceptive simplicity of s 359B is however stripped away, when the additional matters of immateriality, most of which go to the offender’s intent, are included by virtue of s 359C. This is not so much a criticism of the new Chapter as perhaps an acceptance that any anti-stalking legislation, given the gamut of behaviour it seeks to regulate, will be complex, despite best drafting intentions.

The mental element required of an offender under s 359B is simply that s/he intends to direct the conduct at the stalked person (s 359B(a)). It is immaterial that the stalker did not intend that the victim be aware of the conduct or that the stalker mistakenly stalked the wrong person: s 359C(1). Further, the offender’s intention as to the consequences of his/her (intentionally) directed conduct is rendered immaterial under s 359C(4): it is irrelevant whether the offender intended to cause the ‘apprehension or fear...of violence’ to person or property or the ‘detriment’ referred to in s 359B(d).<sup>46</sup> With this formulation of the mental element, the new Chapter 33A has rejected the recommendation of the Model Criminal Code Officers Committee (MCCOC) in its review of stalking legislation conducted in August 1996.<sup>47</sup> MCCOC endorsed a variant of the South

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44 Explanatory Notes at 5.

45 Attorney-General and Minister for Justice and the Arts, The Hon. Matthew Foley MLA, Ministerial Media Statement, ‘New Stalking Laws Will Protect Victims’, 30 June 1998, at 1.

46 See Explanatory Notes at 5 reinforcing that ‘this does not, however, remove the requirement of intentional direction in s 359B(a) that the unlawful stalking be conduct intentionally directed at the stalked person.

47 MCCOC, above n 5, at 43.

Australian stalking model and recommended requiring proof of an intention to cause serious physical or mental harm, or serious fear or apprehension. MCCOC recognised that this formulation would not catch the ‘erotomaniac’<sup>48</sup> who ‘loves’ the victim but desires that they not be harmed’,<sup>49</sup> but considered that this type of stalker should be dealt with by apprehended violence or restraining orders or via the mental system.<sup>50</sup> In relation ‘erotomaniacs’, the Explanatory Notes state that those offenders should not be ‘able to say that they did not intend the victim to find out about the stalking behaviour. This...needs to be understood in light of the safeguard of reasonableness set out in s 359B(d).’<sup>51</sup> The erotomaniac is caught by the new Queensland legislation.

The focus on the victim that was commanded under the old s 359A has been abandoned under the new Chapter. Section 359(d)(i) makes it sufficient that the conduct ‘would cause’ the stalked person apprehension or fear of violence to person or property, reasonably in the circumstances. Subsection 359C(5) makes it immaterial whether apprehension or fear is *actually* caused. This latter is in line with the MCCOC recommendation that it should not be necessary to prove that the victim actually fears harm.<sup>52</sup> As pointed out in the Explanatory Notes,<sup>53</sup> the element in s 359B(d)(i) ensures that the behaviour of the stalker is still punishable even though the ‘constitution of the victim is more robust than that of most people in such circumstances’. The previous difficulties associated with proving a victim’s belief that an unlawful act of violence was likely to occur (under old s 359A) have been removed.

The question whether the victim even needs to be aware of the conduct under the new s 359B is an interesting one. It would not seem to be necessary, so long as the stalker’s conduct is such that it ‘*would* cause the stalked person’ (it being immaterial whether it actually *does* cause) apprehension or fear of violence to any person or property. This conclusion is supported by s 359C(1)’s declaration of immateriality as to the stalker’s intention that the victim be aware of the conduct, and by the further statement in s 359C(2) that, as was previously the case, it is immaterial that conduct directed at the victim is actually carried out in relation to another person or another person’s property (for example, persons such as the victim’s relatives, friends, work colleagues). It is conceivable therefore that the s 359B offence can be committed before a victim is aware of it.

Before leaving the issue of intent, it is interesting to examine briefly the approach that has been taken in the complete redraft of the West Australian provisions in 1998. In the new, substituted Chapter XXXIII B – Stalking, two separate offences have been created: one simple offence and one indictable. The

48 See Goode, above n 8, at 30: researchers suggest a basic typology of four kinds of stalkers: ‘simple obsessional’, ‘love obsessional’, ‘erotomania’, ‘false victimisation syndrome’.

49 MCCOC, above n 5, at 41.

50 *Id* at 43.

51 Explanatory Notes at 5, in relation to s 359C(1).

52 MCCOC, above n 5, at 40. MCCOC suggested that liability for this type of behaviour should not depend on the strength of mind of the victim selected.

53 Explanatory Notes at 4.

main point of difference between the two offences is the mental element required to be established. New s 338E(1) creates the crime of stalking where a person ‘pursues’<sup>54</sup> another ‘with intent to intimidate that person or a third person’: a crime of specific intent that may be difficult to prove. Section 338E(2) then creates the simple offence where the accused pursues another in a manner ‘that could reasonably be expected to intimidate, and does *in fact intimidate*’ (my emphasis). The lesser offence in s 338E(2) is an alternative verdict to s 338E(1).<sup>55</sup> For the purposes of both subsections, ‘intimidate’ is defined in s 338D(1). The rationale for the lesser offence is obvious: it is hoped that the simple offence will indeed capture the cases where the prosecution has difficulty in proving the more onerous requirement of the accused’s specific intent in s 338E(1). The simple offence of stalking carries a maximum penalty of 12 months imprisonment or a fine of \$4000. However, the new simple offence may be criticised on two bases. First, as argued by Whitney, the seriousness of the offence has been eroded by both the inappropriate, lower range punishment provided and because:

Given the seriousness of the stalking behaviour, and the danger it poses to stalking victims, the likelihood that most stalking convictions will be achieved through the simple rather than the indictable offence is a less than satisfactory result’.<sup>56</sup>

The second basis on which s 338E(2) might be criticised is that, by coupling the objective intent with the requirement that the manner of the accused’s pursuit ‘does *in fact intimidate*’, casts a focus on the robustness of the victim and the ease with which they may or may not be intimidated that is inappropriate. As mentioned above, this focus on the particular victim’s fortitude has been abandoned under the new Queensland Chapter which is in line with the MCCOC recommendation that it should not be necessary to prove that the victim actually fears harm or, in WA, is intimidated.

### **S 359D: Defences**

Section 359D sets out conduct that will not constitute unlawful stalking. The previous s 359A defences in relation to carrying on a genuine industrial dispute or a political or other dispute in the public interest have been retained<sup>57</sup> and new exculpatory matters have been added.<sup>58</sup> New excuses include acts done in the execution of a law or for the administration or purposes of an Act and reasonable conduct engaged in for a person’s lawful trade, occupation or business or to obtain or give information that the person has a legitimate interest in obtaining or giving. The reversal of onus for the defences in the old section has not been repeated.

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54 Defined s338D(1) *Criminal Code* 1913 (WA) and note s 338D(2).

55 See new *Criminal Code Act* 1913 (WA) s 598AA.

56 Whitney, above n 9, Part IV.

57 S 359D(b) and (c).

58 The general defences provided for elsewhere in the Code are not affected: see Explanatory Notes at 5.

New s 359D is certainly an improvement on the old s 359A(4) (which was undesirably retained under an earlier proposal). The old defences (now s 359D(b) and (c)) had been legitimately criticised as vague<sup>59</sup> and of uncertain application: 'It is hardly desirable that the scope of operation of a serious criminal offence should be limited only by such a vague exception'.<sup>60</sup> While the 'vague exceptions' still remain (what does in the 'public interest' mean), at least the matters are now exculpatory (with no reversal of onus). The expansion of excuses, coupled with the requirement for reasonableness in s 359B(d) also go some way to ameliorating the harshness of the liability imposed. Precedents exist for alternate legislative formulations of a defence<sup>61</sup> one of the best of which appears in the recent *Protection From Harassment Act 1997* (Eng) 1997.<sup>62</sup>

### Section 359F: Court may restrain unlawful stalking

A most welcome initiative is the inclusion in Chapter 33A of s 359F which empowers the Court, when it considers it 'desirable' on the hearing of a charge of unlawful stalking, to consider making a restraining order against the person charged 'whether the person is found guilty or not guilty or the prosecution ends in another way'. Should the Court start a 'restraining order proceeding' under s 359F(2), the proceeding is not a criminal one<sup>63</sup> and any question of fact must be decided on the balance of probabilities,<sup>64</sup> having regard to the evidence given at the hearing of the stalking charge, any application made<sup>65</sup> and 'any further evidence the court may admit'.<sup>66</sup> Restraining order proceedings commenced in the Supreme or District Courts may be remitted to the Magistrates Court.<sup>67</sup> A 'knowing contravention' of a restraining order constitutes an offence, punishable by 40 penalty units or 1 year's imprisonment.<sup>68</sup>

This power to make a restraining order, regardless of whether the offender is convicted or not, for the purpose of prohibiting particular conduct including, for example, contact with *any* person (the victim or another) or any property,<sup>69</sup> is extremely valuable. In the absence of domestic violence laws that extend to cover non-spousal violence and apart from the limited protection provided by the *Peace and Good Behaviour Act* (1982) (Qld), this is the only effective

59 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 5: Non Fatal Offences Against the Person Discussion Paper*, August 1996 at 41.

60 Goode, above n 8, at 27: what is in the 'public interest' - investigative journalists, heritage protesters, anti-abortion protesters, summons' servers, private investigators? See also MCCOC, above n 5, at 41.

61 For example, *Crimes Act 1958* (Vic) s 21A(4) and see comment Wiener D, 'Stalking: Criminal Responsibility and the Infliction of Harm' (1995) 69 LJ 30 at 32-33 suggesting that the use of 'without lawful excuse' is a more appropriate defence; old *Criminal Code* 1913 (WA) s 338E(2) - lawful authority or with a reasonable excuse has now been replaced with s 338E (3) 'defence to a charge' if accused 'acted with lawful authority'.

62 See s 1(3) and also s 4(3): defences on the basis that the course of conduct was pursued for the purpose of preventing or detecting crime, pursued under any enactment or rule or because 'in the particular circumstances, the pursuit of the course of conduct was reasonable'.

63 S 359F(10).

64 S 359F(11).

65 Pursuant to s 359F(3): by the Crown or an interested person or on the Court's own initiative.

66 S 359F(6), including, presumably, evidence on affidavit.

67 S 359F(4).

68 S 359F(8).

69 See s 359F(6) and definition of 'restraining order' in s 359F(12).

mechanism available to the victims of this type of frightening behaviour to protect themselves against continued unwelcome contact. Prior to the actual hearing, a further issue arises as to the desirability of providing for an interim restraining or protection order to be made. The new s 359F could easily be extended to provide, as does the state's domestic violence legislation, that if the court is satisfied (on the balance of probabilities) that the defendant has stalked another person and is likely to continue to do so or do so again, an interim protection/restraining order may be made.<sup>70</sup>

### **Cross-Jurisdictional Stalking**

Finally, MCCOC also raised the question of stalking behaviour where the course of conduct spans more than one jurisdiction,<sup>71</sup> and proposed that specific legislative provision be made to cover this situation. This has not addressed in the new Queensland Chapter and it may be useful to consider whether the MCCOC model might be adopted on this issue. The MCCOC Report suggested requiring that at least one instance of conduct occur within the jurisdiction and that, where the proscribed conduct consists of a person telephoning or sending offensive material to another person, that the offence occurs in the jurisdiction where the call is made or the material is sent to or from.

### **Conclusion**

The new *Code* Chapter 33A is a considerable advance in the formulation of this complex modern-day offence. The necessity for anti-stalking legislation has been well documented. It is often resorted to in bizarre and frightening situations to target conduct otherwise beyond the reach of the criminal law. Further, the value of these offences as part of a strategy to contain domestic violence and like behaviours has become widely accepted. The new Queensland provisions are a diligent and genuine effort to address past deficiencies in the law, to satisfy the concerns of victims and to take the law into the next century. As in 1993 when the Queensland law was first of its kind in Australia, we shall have to wait to see how effective a response the changes will be.

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70 See, for example, *Crimes Act* 1958 (Vic) s 21A(5). In Qld the *Domestic Violence (Family Protection) Act* 1989 (Qld) could be invoked re 'spouses'. See discussion in Swanwick, above n 4, at 41. Cf *Crimes Act* 1900 (NSW) s 562B(1) re making an apprehended violence order in the case of stalking.

71 MCCOC, above n 5, at 38.