

*Stalking: Crime of the '90s?*¹

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There has been a new and growing recognition of the importance of the distinct anti-social behaviour known generally as 'stalking'. The essence of this behaviour is intentionally harassing, threatening, and/or intimidating a person by following them about, sending them articles, telephoning them, waiting outside a house and the like. In general terms, an awakening of concern about this kind of behaviour in Australia has been caused by its prevalence in domestic violence cases. The creation of a criminal offence dealing with this behaviour is usually presented, and argued for, as an adjunct to the arsenal of legal weapons arrayed against domestic violence.

As is usual, it appears that scandal provokes and promotes change, especially legal change (Taylor, Walton & Young 1975; Sallman 1981; Ingber 1981). The most immediate catalyst was the murder in New South Wales of Ms Andrea Patrick by an ex-lover, who harassed her violently in violation of a protection order before killing her and committing suicide. To make matters worse, he had been in custody and had been admitted to bail two days previously.

It appears from the growing and extensive American literature on the subject that scandal following notorious individual cases also drove the legislation of stalking offences in that country. It is rare to read an American article on the subject which does not commence with a horrified account of some horrendous case. An account of the murder of actress Rebecca Schaeffer appears to be the de rigeur first paragraph (Sohn 1994; Faulkner & Hsiao 1994). While the stories of personal intimidation, fear and exposure to bizarre intimidation fuel righteous indignation, they do nothing to indicate the extent of the real problem, how the

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law should deal with it, and the extent to which it is possible or desirable to extend the criminal sanction.

The idea for this kind of legislation in modern times originates in the United States (Strikis 1993; Guy 1993; Lingg 1993; Fahnestock 1993; McAnaney 1993; Comment 1993a; Comment 1993b; Sohn 1994; Faulkner & Hsiao 1994; Boychuk 1994). Beginning with California in 1990, at last count 49 American jurisdictions had brought some version of a stalking offence into law. The offences vary from State to State, not only in content, but also in form and penalty. Moreover, it is clear that, while some concerns have been prompted by domestic violence, the original California initiative was probably due to the ‘stalking’ of celebrities by crazed fans. Perhaps the most notorious of these (and there are quite a number) was John Hinckley, who was obsessed by the actress Jodie Foster, and shot Ronald Reagan in order to get her attention. Some 35 per cent of the work of the relevant unit in Los Angeles Police Department is reported to be celebrity related (Note 1993).

Other Legal Controls

Interestingly enough, South Australia—and, probably, most other Australian jurisdictions at one time or another—had an offence in the criminal law for many years which criminalised stalking kinds of behaviour. Until 1992, the Criminal Law Consolidation Act contained an offence which criminalised, among other things, persistently following another and ‘watching and besetting’ places where another works or lives with a view to compelling that other to do or not do something.

This offence derives originally from the English Conspiracy and Protection of Property Act 1875 (38&39 Vict, c. 86, s. 7). That legislation was adopted in South Australia in 1878 (*Conspiracy and Protection of Property Act*, No 109 of 1878, s. 7) in order ‘to put the law on the same footing as in the old country’. It was directly aimed at what were thought to be the practices of striking or locked out unionists to intimidate strike breaking labour. It comes from a time in which the criminal law was the principal method used by the State to regulate labour relations, although, ironically, in general the legislation was reforming in nature and designed to replace the extremely harsh regime of the Combination Acts (*Combination Act 1797*, 37 Geo 3, c. 123). The offence had not been used in living memory in South Australia, and was repealed without replacement in 1992 (*Statutes Amendment and Repeal (Public Offences) Act*, No 35 of 1992). It is clear that the section would require substantial redrafting to target the kind of stalking behaviour with which the law and public policy is currently concerned.

There was a recent attempt to convert that old anti-union offence to modern problems in England. In *Fidler* [1992] 1 WLR 91, the accused, who were opposed to abortion, stood outside an abortion clinic intending to dissuade women attending the clinic from having an abortion. They were charged with ‘watching and besetting’. The question was whether they had acted ‘with a view to compel’ women from abortions. They were acquitted. The court held that, while the accused intended to stop abortions being carried out by verbal abuse,

reproach and shocking reminders of the physical implications of abortion, their purpose was one of dissuasion and not of compulsion.

In South Australia, there is recent authority to the effect that stalking behaviour can be prosecuted as 'offensive behaviour' contrary to s. 7 of the *Summary Offences Act*. In *Stone v. Ford* (1992) 65 A Crim R 459, the accused was convicted of offensive behaviour on the basis of evidence that he followed a woman about a shopping precinct in a marked manner and lurked outside shops when she went inside. It is notable that, the court held that there must be proof of an intention to behave in an offensive manner, but had no difficulty in inferring the intention (at 464-5):

The defendant offered no explanation for his conduct. He knew what he was doing. In the absence of explanation I think the facts here spoke for themselves. They bespoke an intention to be offensive, to threaten. . . . In my opinion, the irresistible inference is that the appellant intended to be offensive, to threaten.

There is also some law on the use of civil remedies against a stalker. A recent example is *Khorasandijan v. Bush* [1993] 3 All ER 669. The plaintiff, an eighteen-year-old girl, was harassed by a twenty-three-year-old man. The man assaulted her, threatened violence, followed her around shouting abuse, and pestered her by telephone calls. He was arrested for threatening and abusive behaviour and was given a conditional discharge. Later, he was arrested for threatening to kill and served a short term of imprisonment. This did not deter him, so the plaintiff sought an injunction restraining the defendant from threats, violence, and, significantly, from harassing, pestering or communicating with the defendant in any way. The basis was the tort of nuisance. The plaintiff was forced into the civil court proceedings because, it appears, in England restraining orders are limited to those who are or had been in a domestic relationship, and this was not such a case.

The court held that the conduct of the defendant constituted a private nuisance and gave the plaintiff her injunction. A recent commentator has argued that the decision is 'startling' because it gives a plaintiff without an interest in land the right to sue in nuisance and because it granted an order which restrains actions which have nothing to do with the enjoyment of land (Cooke 1994).

It has long been thought that, for a number of reasons, a statutory scheme of summary injunctions is preferable to compelling the victims of harassment, intimidation or violence to resort to the civil jurisdiction. Statutory summary schemes for obtaining injunctions against alleged harassers are now common to all Australian jurisdictions. There are differences in details ranging from the name, to the grounds on which a person is entitled to apply.

In South Australia, these are known as 'restraining orders', and have been in legislative existence since 1982 (*Justices Act Amendment Act*, No 46 of 1982). Restraining orders grew out of very old provisions dealing with bonds or sureties to keep the peace (*Justices Procedure Amendment Act*, 1883-1884). A detailed review of the provisions is beyond the scope of this paper, but it should be reported that the South Australian scheme underwent a complete rewriting in 1994 in order to make separate provision for cases of domestic violence and so that the content of both domestic violence and other restraining orders would

harmonise with the stalking legislation (*Summary Procedure (Restraining Orders) Amendment Act*, No 20 of 1994; *Domestic Violence Act*, No 22 of 1994). Although separate provision has been made in this jurisdiction for restraining orders in cases of domestic violence, the summary statutory injunction remains accessible to individuals who seek relief from the courts in a non-domestic violence case.

Framing Stalking Legislation

The legal situation appeared to be that some stalking behaviour (but not all) could be prosecuted as ‘offensive behaviour’. That was clearly not a sufficient coverage of the general area. The offence carries a maximum penalty of six months imprisonment, and, while that may be satisfactory for minor instances of the behaviour, it was clearly inadequate to deal with the seriousness of a course of behaviour which amounted to major intimidation and harassment. Existing criminal offences covered assaults and threats with appropriately high applicable maxima.

There can be little doubt that there is a niche of a course of anti-social, threatening behaviour which 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. Where a person does not explicitly threaten another, but silently follows them around, or sits outside their dwelling, it may be difficult to find the appropriate criminal sanction. This kind of behaviour can be controlled by restraining orders, but the restraining order may be inadequate to the specific task.

The restraining order regime could not fill that gap for a number of reasons. First, the innocuous behaviour might not be sufficient to attract the making of an order. Second, while in some cases the identity of the stalker is known, in other cases it is not—and if the behaviour is innocuous, no criminal offence would be involved and therefore there would be no grounds for a police investigation. Third, while little research has been done on the effectiveness of restraining orders, the anecdotal consensus appears to be that a restraining order will have little effect on the kind of serious obsessive behaviour exhibited by stalkers (ACT CLRC 1993).

American statutes differ, but in general they criminalise intentionally and repeatedly following or harassing another person and making a credible threat with intent to place that person in reasonable fear of death or great bodily injury. Some of them also contain an ‘aggravated stalking’ offence in which the basic offence attracts a higher penalty if, for example, the use of a weapon is involved, or there is violation of a restraining order, or a previous conviction.

Some of the available American legislation was drafted in the most extraordinary nineteenth—or even eighteenth—century manner. For example, the Massachusetts statute contains a s. 43(b) which in turn contains a paragraph consisting of one sentence 12 lines long. Illinois statute contains 10 pages of fine detail. But there was a clear pattern. Since California enacted the first statute it

seemed likely to have served as a model. The elements of the Californian offence were:

- A person wilfully, maliciously, and repeatedly followed or harassed another person; and
- The harasser made a credible threat; and
- The harasser had an intention to place that other person in reasonable fear of death or great bodily injury (California Penal Code s. 646.9).

Those three elements are punishable by a maximum of one year's imprisonment or a fine of US\$1000 or both. There was an aggravated offence where the harasser was in violation of an injunction or a temporary restraining order, or if there was a second or subsequent conviction within seven years.

Some of the terms were amplified by further definition as follows:

'Harasses' means 'a knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.'

'Course of conduct' means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct'.

'Credible threat' means 'a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause great bodily injury to . . . [the person or his or her immediate family]'

There were some legal cultural oddities here, notably the gaol specification, the (by Australian standards) low maximum penalties specified and the plethora of cumulative words meaning fault, but leaving those aside, some points of interest remained. According to a recent commentator, American stalking legislation after California can be sorted into three rough groups: those which, like California, require acts, a threat and an intent; those which require either acts or threat, plus intent; and those which require just acts and intent (Boychuk 1994).

In contemplating legislation on stalking for South Australia, five propositions seemed reasonably clear and obvious:

- the conduct elements of any offence of stalking would need to be as widely described as possible because the ways in which a stalker can intimidate or harass are as boundless as the obsessive human imagination;

- stalking is in essence a pattern of conduct, and not just a single incident, or, put another way, a single incident of intimidation or harassment would be misdescribed as ‘stalking’;
- given the existence of a summary offence and a scheme of restraining orders, the main point of the legislation would be to aim a serious offence at serious stalkers and that, therefore, this would need to be an indictable offence punishable by a maximum greater than the general summary level of two years, with the summary offence being a possible lesser alternative verdict;
- it would generally make sense to say that a stalker who was stalking in breach of an injunction or restraining order or who was armed with an offensive weapon should be treated more harshly than one who was not;
- 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 plea negotiations.

The major points of interest in a survey of the American legislation and the growing literature are: the threat requirement; an overbreadth problem; and the intent requirement.

Credible threats

Arcane American constitutional arguments aside, there did not appear to be a sound substantive policy reason for the requirement that the harasser make a threat, credible or not. In all Australian jurisdictions, a person who makes a threat to kill or cause grievous bodily harm is guilty of a serious offence. What about the stalker whose threat lies in mere omnipresence? Menacing behaviour need not include any credible threat, but be menacing for all that. The ‘threat’—and the fear—may be all the worse for being unstated and left to the imagination.

Overbreadth

The Californian legislature seemed to have recognised the difficulties in limiting such a broadly defined offence to the target group. The statute required that the conduct have no ‘legitimate purpose’ and, in addition, took the precaution of specifying that the section would not apply to ‘conduct which occurs during labour picketing’. These generalised exceptions seemed unlikely to cater for all the possible variations. For example, if not labour pickets, why not also other pickets such as those attempting to prevent the demolition of an historic building? Is that ‘legitimate’?

A number of American statutes, including California, exempted ‘constitutionally protected activity’, but that was of no aid to an Australian legislator. Tennessee exempted ‘lawful business activity’ for some reason—perhaps door-to-door sales representatives were at risk.

What about investigative journalists? What about a group of heritage protesters trying to stop the demolition of a building which the owner has every right to demolish? Or peace protesters at an American base? Anti-logging protesters? Summons servers? Workers' compensation fraud investigators? Or anti-abortion protesters at a clinic? Or any number of persistent visitors and callers who, at worst, are a pest, perhaps even a criminal pest, but should not be called stalkers and made subject to heavy criminal penalties.

How did others deal with this problem? The first Australian legislation on stalking was enacted in Queensland (*Criminal Law Amendment Act 1993*). The new sections added to the Criminal Code listed a great variety of harassing behaviour, with a basic penalty of three years, a summary option with a maximum of 18 months, and a serious version, maximum 5 years, where the stalking was aggravated by threats of violence, possession of a weapon, or in breach of any court order. The extreme difficulty faced with keeping the scope of stalking offences within bounds is shown by the inclusion of the following subsection:

It is a defence to a charge under this section to prove that the course of conduct was engaged in for the purposes of a genuine -

(a) industrial dispute; or

(b) political or other public dispute or issue carried on in the public interest. [Criminal Code, s. 359A(4)]

It is hardly desirable that the scope of operation of a serious criminal offence should be limited only by such a vague exception. The futility of trying to confine the broad sweep of the general offence by this sort of general 'public policy' exception has recently been demonstrated by the prosecution of a group of Aboriginal youths under this offence for loitering in a shopping centre.

The New South Wales version (*Crimes (Domestic Violence) Amendment Act, No 101 of 1993*), which is an intimidation offence punishable by a maximum of two years imprisonment, solved the problem of scope by limiting its offence to those in a 'domestic relationship'. That is defined as follows:

. . . a person has a domestic relationship with another person if the person:

(a) is or has been the spouse or de-facto partner of the other person; or

(b) is living with or has lived ordinarily in the same household as the other person (otherwise than merely as a tenant or boarder); or

(c) is or has been a relative . . . of the other person; or

(d) has or has had an intimate personal relationship with the other person. [NSW Crimes Act 1900, s. 545BA(6)]

But that is hardly satisfactory either, as *Khorasandijan v. Bush* demonstrates. While this paper is not concerned with the contentious question whether

‘domestic violence’ should be treated differently or more severely than ordinary violence, it is plain that serious stalking may arise from a workplace relationship, being a celebrity—or just at random. Why should a criminal prosecution for intimidation turn on whether, for example, the accused was a tenant or not, or whether the accused and the victim had had a previous sexual relationship or not?

In sum, the Americans had devised a number of strategies to avoid unconstitutional overbreadth. The requirement of a threat was one, specific exemptions another. In Australia, Queensland had tried to frame a general exemption, but it did not seem satisfactory. There seemed no good reason, as in New South Wales, to confine the offence to ‘domestic relationships’. But many American commentators took the view that the primary way in which unconstitutional overbreadth would be avoided was by the requirement of intent. The New South Wales offence also required an intention to cause the victim to fear personal injury. An intent requirement may solve the problem.

Intent

Most American versions seemed to require that the harasser perform various types of conduct with intent that the victim be intimidated or terrorised. There was a deal of debate about the need for and specification of this requirement in the American literature, but it fitted well with Australian common law tradition that, in the most general of terms, a serious offence ought to require proof of criminal intent (*He Kaw Teh* (1985) 157 CLR 523). It also had the advantage of limiting the scope of the crime to the malicious. What matter that the harasser is engaged in a labour dispute, a fraud investigation, investigative journalism and the like? If he or she harasses the victim with an intent to cause serious harm or intimidation, that should surely be criminal.

The best way to limit the scope of the offence to the targeted group appeared to be a requirement of proof of an intention to cause serious fear, harm or apprehension. But that, too, had its problems. They are best put in the following passage:

This requirement may mean that anti-stalking statutes will not reach people who, because they are delusional or otherwise, are not capable of forming the intent. The delusional offender may be acting out of ‘love’ for the victim, or out of a belief that [he or] she is, or is meant to be, bonded to the victim (McAnaney 1993).

That will be true assuming that a court can be convinced that the accused was wholly convinced of the delusion and that there was in the (usually) quite bizarre behaviour, no intention to cause harm. But even if that is so, such an accused is highly likely to be sufficiently mentally ill to warrant the application of civil or criminal powers over the mentally ill who cause harm to others. It may also be remarked that even if the law did apply to such a person, the notion that they would be deterred by it is, at best, fanciful.

The South Australian Legislation

South Australia's stalking legislation was enacted by the *Criminal Law Consolidation (Stalking) Amendment Act*, No 7 of 1994 which came into effect on 1 June 1994. It was passed with the warm support of all parties. The legislation enacts an offence of stalking punishable by a maximum period of imprisonment for three years and specifies circumstances of aggravation which take the applicable maximum to five years. That means that both offences are minor indictable offences which may be tried summarily unless the accused elects trial by jury.

Conduct requirements

The Act requires that, on at least two separate occasions, the person follows the other person, or loiters outside the place of residence of the other person or some other place frequented by the other person, or enters or interferes with property in the possession of the other person or gives offensive material to the other person or leaves offensive material where it will be found by, given to or brought to the attention of the other person or keeps the other person under surveillance, or acts in any other way that could reasonably be expected to arouse the other person's apprehension or fear.

Fault requirements

The Act requires that the person intend to cause serious physical or mental harm to the other person or a third person or intends to cause serious apprehension or fear.

Circumstances of aggravation

The offence will be regarded as aggravated and hence attract the higher applicable maximum penalty if, either the offender was in breach of any injunction or other court order or was, on any occasion to which the charge relates, in possession of an offensive weapon.

Other provisions

The Act makes it clear that the summary offence of offensive behaviour may be used as an alternative verdict if the court is satisfied that such an offence has been committed. It also contains two subsections designed to ensure that a stalking offence is not just used to load up an indictment where the offender has also committed other crimes in the course of the stalking conduct.

The legislation was welcomed by most. The exceptions were some police, prosecutors and feminists who wanted the intent requirement dropped, primarily because they argued that it would be impossible to prove. When challenged, however, none of these groups could solve the overbreadth problem in any other principled way. Most could not accept that there is no defensible case at all for making loitering (for example), with no harmful intent, a serious offence punishable by imprisonment for at least three years.

Implementation

Too often, lawyers, politicians, policy makers and pressure groups think or feel that passing a law solves the problem. Generally it does not. In the case of stalking, it certainly does not. The serious obsessive stalker is unlikely to know or believe that his or her conduct is against the law and is likely, even if he or she does know, to disregard that law. If an anti-stalking law is to achieve more than symbolic importance and be useful against the serious stalker, implementation is a key.

It was therefore of considerable interest to South Australia to learn of the existence of a Threat Management Unit within the Los Angeles Police Department. The Unit was created in 1989, and has the task of assessing the threat posed by individual stalkers, taking what steps might be possible to stop the stalking before it escalates into more serious violence. Intervention by the Unit is designed to ensure at the very least that the stalker is aware of police awareness of and concern about the behaviour. This is an instance of exactly the kind of preventive policing which is needed to implement laws on stalking and to try to get to the problem before it escalates to a more serious level.

The Unit also aims to help the victim decide what action he or she can take about the threat. They advise about security, help with getting a restraining order and encourage the victim of stalking to 'manage the threat'.

There does not appear to be much published research on obsessive harassers. The standard psychiatric typology accepts erotomania as a delusional disorder, but, of course, by no means are all stalkers erotomanics. In a study conducted with the help of the LAPD Threat Management Unit (Zona 1993), researchers examined the case files of the Unit and suggested a basic typology of four kinds of stalkers. They are:

- *Simple obsessional*: stalker, usually male, knows victim as an ex-spouse, ex-lover or former boss and begins a campaign of harassment;
- *Love obsessional*: stalker is a stranger to the victim but is obsessed and mounts a campaign of harassment to make the victim aware of the stalker's existence;
- *Erotomania*: stalker, usually female, falsely believes that the victim, usually someone famous or rich, is in love with them;
- *False victimisation syndrome*; the conscious or unconscious desire to be placed in the role of a victim.

The strength of beginning a typology along these lines is, of course, that police and victim manage the threat posed by a stalker differently according to the type identified.

A researcher into stalking has also warned about stereotyping based on outdated prejudices and committing too quickly to tentative typology classifications:

Simply put, assassins and other public figure attackers and stalkers are not a type unto themselves with necessarily common features. Efforts to categorise them as loners, frustrated about their lack of impact on the world, striving for greatness by destroying greatness, may be wrong as often as right. There certainly are commonalities, but there are just as many differences, and defining the 'typical' assassin is no more practical than defining the 'typical' murderer. They are as complex and as various as people in general. They can be motivated by jealousy, fear, anger, revenge, frustration, just as any other person (DeBecker 1994).

Clearly there is much work to be done. But there must be a cooperative effort between police and researchers into human behaviour, so that the style of preventive policing begun by LAPD in relation to stalkers can be refined, made more accurate—and deliver the goods. Serious stalkers are very likely to be mentally ill—that term includes personality disorders—and preventive policing is all the more urgent in such cases where the normal deterrent effect of the criminal law is unlikely to work. The enactment of legislation can be used as one part of a strategy to attempt to deal with a form of behaviour which is simply unacceptable in a decent society.

POSTSCRIPT

Since the paper was written, events have moved swiftly. In New South Wales, the restriction of the offence to domestic violence was removed: *Crimes (Threats and Stalking) Amendment Act 1994*. Victoria has enacted the *Crimes (Amendment) Act*, No 95 of 1994. In common with the previous Australian legislation, it lists the kinds of behaviour which may constitute stalking, and then requires both an intention of causing physical or mental harm or arousing apprehension or fear, and that the course of conduct actually did have that result. The succeeding sub-section then states that the requirement of intention will be satisfied if the 'offender knows, or in all the particular circumstances that offender ought to have understood' that the course of conduct 'would be likely to cause such harm'. This is recklessness. The next sub-section states:

'This section does not apply to conduct engaged in by a person performing official duties for the purpose of -

- (a) the enforcement of the criminal law; or
- (b) the administration of any Act; or
- (c) the enforcement of a law imposing a pecuniary penalty; or
- (d) the execution of a warrant; or
- (e) the protection of the public revenue . . . '.

While this section provides extensive protection for official actions, the extension of the offence to people who know, or ought to know, (but did not), that what they were doing was likely to cause harm gives cause for apprehension that the ambit of the offence stretches well beyond the stalking mischief which prompted this kind of offence.

Western Australia enacted a stalking statute in 1994 (*Criminal Law Amendment Act 1994*). The definition of the crimes is very similar to that in other jurisdictions. Significantly, like the South Australian offence, it is limited to those who commit the behaviour with intent.

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