

Criminal Code (Stalking) Amendment Bill 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

This Bill will reform the offence of stalking in s. 359A of the *Criminal Code*.

Reasons for the objectives and how they will be achieved

Queensland was the first Australian State to enact a stalking section. Variations have been developed in all Australian jurisdictions. In the course of time a number of difficulties were identified in the interpretation of the section in Queensland.

The accused had to engage in a ‘course of conduct’ involving the doing of a defined ‘concerning act’. There have been difficulties in determining what constitutes a course of conduct. Proof of the offence should not depend on a technical count of the number of acts done. Also, the language of the old section lent itself to the interpretation that the same act must be repeated whereas the experience of victims is that many and varied acts may be committed to stalk them over the course of time.

The accused had to intend that the victim be aware that the course of conduct was directed at him or her. Therefore some true stalkers could say that they did not so intend even though the victim suffered a detriment after becoming aware.

The victim had to be aware that the course of conduct was directed at him or her. If the person at whom the stalking conduct was directed was not aware of the conduct but the conduct caused detriment to another person it was not considered to be stalking.

The course of conduct had to be such that it would cause ‘a reasonable person in the victim’s circumstances’ (described as those known or

foreseen by the accused and those reasonably foreseeable by the accused) ‘to believe that a concerning offensive act’ (which is defined as an act of violence against a person or property) ‘is likely to happen’. Therefore, unless the victim had an actual belief that a violent act was likely to happen, the offence could not be proved.

The courts also lacked power, at the time of the trial, to impose restraining or non-contact orders on the offenders.

The objectives will be achieved in a re-write of the stalking provisions in a new chapter in the *Criminal Code*, described below, by taking into account the majority and unanimous views of all people and groups who made submissions.

Administrative cost to Government of implementation

There will be little administrative cost to government.

The definition of “detriment” is inclusive. Police officers will continue to gather evidence of stalking in the usual way. As “serious mental, psychological or emotional harm” is only one of the limbs of “detriment”, it will not be necessary in every case to have evidence of that specific type of detriment. Also, the number of cases relying on that limb will be limited by the qualification that the degree of harm must be “serious”.

Where the evidence is required, there will be instances where the victim has already been examined by doctors or psychologists and the necessary evidence may be readily available. In a few cases, it may be necessary to see if the victim is willing to be examined and assessed by State or private experts.

The question will need to be examined on a case-by-case basis. It is not possible at this time to accurately forecast the number of cases which will impact on State resources except to say the number is likely to be small. Experience shows that the vast majority of stalking cases would fall within the other limbs of “detriment”.

Fundamental legislative principles

All fundamental legislative principles are observed. The reversal of the onus of proof for the defences in the old section has been removed.

Consultation

On 30 June 1998 the Attorney-General and Minister for Justice and Minister for The Arts released a discussion paper offering a number of options for reform. On 31 August 1998, Cabinet gave approval for the *Criminal Code (Stalking) Amendment Bill* to be prepared as an exposure draft.

The discussion paper and consultation draft Bill were distributed for public consultation to over 450 interested parties. An advertisement appeared in all major regional centres inviting comment. Both documents were made available on the Department of Justice Web site. Numerous submissions were received and considered. Workshops were held with key stakeholders from several government departments, the Women's Legal Service and the Gold Coast Domestic Violence Service. The consultation period ended on 9 November 1998. This Bill represents the result of all consultations.

All respondents agreed it was necessary to redraft or to amend the anti-stalking laws. There were divergent views about what needed change and how to achieve it. The Bill represents a considered view of all of the submissions received. The amendments proposed have substantial support among key stakeholders.

NOTES ON PROVISIONS

Short Title Criminal Code (Stalking) Amendment Bill 1999

Clause 1 sets out the Act's short title

Clause 2 provides that this Act amends the *Criminal Code*.

Clause 3 repeals the current stalking provision in section 359A at the end of Chapter 33 of the *Criminal Code*, and inserts a new Chapter 33A (Unlawful Stalking). The new sections will be sections 359A to 359F.

Section 359A (Definitions for ch 33A) sets out the definitions for key words and phrases used in the new chapter. Of particular importance is the definition of 'detriment' which includes, but is not limited to, apprehension or fear of violence, serious mental, serious psychological

or serious emotional harm, or prevention or compulsion in respect of lawful rights.

Section 359B (What is unlawful stalking) states the elements of the offence of unlawful stalking. They are:

- (a) that conduct is directed at the stalked person; and
- (b) that the conduct be engaged in on any 1 protracted occasion or on more than 1 occasion; and
- (c) that the conduct consist of one or more of the listed acts, or acts of a similar type; and
- (d) that the conduct either
 - (i) would cause to the stalked person apprehension or fear, reasonably arising in the circumstances, of violence to anyone or anything; or
 - (ii) does cause a detriment, reasonably arising in all the circumstances, to anyone.

The element in (d)(i) above ensures that the behaviour of a stalker is still punishable even though the constitution of the victim is more robust than that of most people in such circumstances.

Section 359C (What is immaterial for unlawful stalking) states five matters which are immaterial to determining guilt.

Subsection (1) states that it is immaterial whether the offender intends that the victim be aware that his or her conduct is directed at the victim. This will ensure that offenders, including those who exhibit ‘erotomania’, are not able to say that they did not intend the victim to find out about the stalking behaviour. This subsection needs to be understood in light of the safeguard of reasonableness set out in section 359B(d). The subsection also provides that it is immaterial that the stalker has a mistaken belief about the identity of the person at whom the conduct is intentionally directed. It is no excuse to say that the stalker believed that he or she was stalking person A when the person stalked in fact turns out to be person B.

Subsection (2) states that it is immaterial that conduct directed at the victim is actually carried out in relation to another person or

the property of another person. This covers the situation, for example, of a stalker who targets a victim through the victim's family, friends or acquaintances.

Subsection (3) states that it is immaterial whether protracted or other conduct consists of the same or different acts. 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.

Subsection (4) states that it is immaterial whether the offender intended to cause the apprehension or fear, or the detriment mentioned in section 359B(d). This does not, however, remove the requirement of intentional direction in section 359B(a) that the unlawful stalking be conduct intentionally directed at a person (the stalked person).

Subsection (5) states that for section 359B(d)(i) (ie where the stalking conduct 'would cause' apprehension or fear, reasonably arising in the circumstances, of violence) it is immaterial whether the conduct actually causes any apprehension or fear, or violence.

Section 359D (Particular conduct that is not unlawful stalking) lists specific defences available to the offence of stalking. The general defences provided for elsewhere in the *Criminal Code* are not affected. The defences in the old section in relation to carrying on genuine industrial and political disputes are retained. Also, new defences are added to protect those who legitimately and reasonably conduct themselves in the course of undertaking a lawful trade occupation or business, or in obtaining or giving information in which the person has a legitimate interest, or in the execution of a law, administration of an Act or for a purpose authorised by an Act.

Section 359E (Punishment of unlawful stalking) sets the maximum penalties for the crime of unlawful stalking (5 years imprisonment) and of unlawful stalking with a circumstance of aggravation (7 years imprisonment).

Section 359F (Court may restrain unlawful stalking) provides that the court hearing a charge against a person of unlawful stalking may, under certain circumstances, make a restraining order against the person. The restraining order may be made whether or not the

defendant is convicted of the offence charged.

Clause 4 inserts new chapter and part headings after the penultimate section in the *Criminal Code*. It creates a new chapter 72 for transitional provisions. The first part heading (Transitional provision for the *Courts Reform Amendment Act 1997*) relates to the final section in the current *Criminal Code*, section 708, itself a transitional provision for another Act.

Clause 5 inserts a second part heading (Transitional provision for the *Criminal Code (Stalking) Amendment Act 1999*) and a new section 709. The new section will declare that evidence of acts as described in the old stalking section, which were done before the commencement of the new stalking section, are admissible in evidence to prove whether acts done after the commencement of the new section constitute unlawful stalking.

Clause 6 states that the following schedule amends the Acts it mentions.

SCHEDULE

MINOR CONSEQUENTIAL AMENDMENTS

The Schedule amends the *Transport Operations (Passenger Transport) Act 1994* and the *Transport Operations (Road Use Management) Act 1995* by inserting the offence of unlawful stalking into the list of disqualifying offences for the purpose of each Act respectively, in schedule 1, part 1 of each Act.