

## The Purpose of Unlawful Stalking Laws and the Rationale for State Coercion (Vol 1: Issue 3)

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Stalking usually occurs as part of a concerted effort by the perpetrator either explicitly or implicitly to make their victim(s) aware of the presence of the stalker.<sup>[1]</sup> Most of the stalking related cases that have arisen in Queensland since the enactment of anti-stalking legislation have occurred where the victim was aware of such actions by the perpetrator. As such the question whether the victim is required to know they are in fact being stalked, has not arisen in many of these prosecutions. To illustrate the types of conduct that might typify acts of stalking, one needs look no further than the case of *R v Ali* which involved one party who perpetrated a range of acts over a period of 18 months that culminated in a conviction of stalking and a sentence of three years jail, pursuant to s 359B(d).<sup>[2]</sup>

The case of *Ali* initially started out as a dispute between residential neighbours concerning a common fence. Although the relationship was initially 'satisfactory', the victim later claimed that relations between the two quickly deteriorated after a dispute about a fence and the appellant then launched a concerted campaign that consisted of acts causing loud noises by banging on the fence, using power tools close to the boundary line, running lawn mowers close to the boundary and deliberately lighting fires in order that the ensuing smoke would drift onto the property of the appellant.<sup>[3]</sup>

The Alis later installed video cameras directed at the victim's house and this was coupled with abusive language, 'wolf-whistling', offensive gestures, loud music, rubbish thrown into the victim's yard, and the complainant's plants mysteriously dying.<sup>[4]</sup> To compound matters, the Alis then erected three white crosses on the fence for the purpose of keeping the 'devil' away.<sup>[5]</sup> The victim claimed that as a result of the conduct of the accused, she was forced to take sleeping pills in order to combat emotional stress. The case of *Ali* illustrates the type of acts that anti-stalking legislation is perhaps most suited to be applied against and it is not difficult to see how the criminal law could legitimately be applied in circumstances where the acts of the perpetrator are as overt and offensive as those outlined in this case. Such acts

can therefore be considered as part of the rationale for the justification of offences relating to anti-stalking.

### ***Rationale for State Coercion***

At what point is state coercion an acceptable imposition on an individual's freedom for acts which are in the first instance bereft of illegality and appear, at least on a *prima facie* level, innocuous in nature?[6] This notion is raised by H L A Hart when he asks why are certain actions forbidden by law and others are not.[7] Hart asserts that it is for the legislature to deem certain behaviour unlawful and in doing so it 'announces to society that these particular actions are not to be done and to secure that fewer of them are done.'[8] It would seem that Hart made this rational assumption on the basis of having *overtly* wrongful acts in mind, such as murder where it is easy to discern wrongful acts.[9]

However, the problem arises with stalking since many acts of the stalker may not necessarily appear overtly wrong. Giving flowers or making contact in some benign way does not automatically relegate an individual into the realms of criminality. Hart is correct to say that one aim of the criminal law is to deem certain conduct criminal, and it comes down to posited rules which set 'standards of behaviour to encourage certain types of conduct and discourage others ... '[10] In a true positivist sense, therefore, Hart argues that it is the law posited by the legislature that will determine whether such actions are in fact unlawful.[11]

One problem posed by this assertion, is the ever present danger that certain actions which appear *prima facie* benign could in fact attract criminal sanction in the context of stalking. This is because there exists a duality between innocent acts and those that are implicitly criminal due to the intent of the performer of those acts, the latter of which might appear quite normal and part of everyday activities but for the *mens rea* of the perpetrator. The line dividing these two categories is not clearly discernible in the language used in the statute itself and it is therefore for the Courts to resolve this ambiguity by determining which acts fall into the unlawful variety and therefore warrant punishment by the criminal law. The challenge facing the courts however is to articulate a theoretical framework in which such distinctions can be justified in a fair and reasoned manner.

One problem relates to when ordinary acts become transformed into criminal acts and therefore require the restriction of an individual's freedom? Put another way,

what are the limits of criminal sanction that should be imposed in relation to those acts? Joel Feinberg lists four types of acts or purposes for which he calls 'commonly proposed liberty-limiting principles' that the law may legitimately coerce an individual and thereby restrict their liberty.<sup>[12]</sup>

The restriction of one's liberty through the use of anti-stalking criminal laws, can be framed as a jurisprudential question that is part of a much larger tapestry of political and philosophical discourse concerning social control, on the one hand, and the expression of human agency, on the other.<sup>[13]</sup> The essence of whether the victim is required to know that he or she is being stalked goes to this very notion of 'liberty', and to the extent that it should or ought to be limited by the state. For by imposing a legal burden on the prosecution to prove that the victim knew or apprehended fear of violence, this goes towards affirming the accused's personal autonomy, and that it can only be revoked when some more *tangible* form of harm is suffered by the complainant. One could assert that there should be no requirement under criminal law, that the prosecution need to prove actual presence of a mental element in relation to the victim in order for the offence to be made out. Surely the purpose of the criminal law is not to unduly place the burden of proof on the Crown to prove beyond all reasonable doubt that the victim knew or apprehended fear or violence stemming from the actions of the accused?

<sup>[1]</sup> Reid J Meloy, Lorraine Sheridan and Jens Hoffmann, *Stalking, Threatening and Attacked Public Figures: A Psychological and Behavioural Analysis* (Oxford University Press, 2008) 42-3.

<sup>[2]</sup> *R v Ali* (2003) 2 Qd R 389 ('Ali').

<sup>[3]</sup> *Ibid* [2]-[3].

<sup>[4]</sup> *Ibid* [4]-[5].

<sup>[5]</sup> *Ibid* [3].

<sup>[6]</sup> Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws* (Oxford University Press 2004) 171-6.

<sup>[7]</sup> H L A Hart, *Punishment and Responsibility* (Clarendon Press, 1968) 6-8.

<sup>[8]</sup> *Ibid* 6.

<sup>[9]</sup> *Ibid* 7.

<sup>[10]</sup> *Ibid* 6.

<sup>[11]</sup> *Ibid*.

<sup>[12]</sup> Denise Meyerson, *Jurisprudence* (Oxford University Press, 2011) 271-2.

<sup>[13]</sup> Joel Feinberg, *Harm to Others* (Oxford University Press, 1984) 3.

<sup>[14]</sup> *Ibid* 31.

[15] Ibid 51-3.

[16] Ibid 11.

[17] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 4<sup>th</sup> ed, 2010) 27.

[18] Queensland, *Parliamentary Debates*, Legislative Assembly, 27 April 1999, 1394 (Liz Cunningham, Honourable Member for Gladstone).

[19] Ibid.

[20] Queensland, *Parliamentary Debates*, Legislative Assembly, 27 April 1999, 1394 (Liz Cunningham, Honourable Member for Gladstone).

[21] Ibid.