

Queensland's Anti-Stalking Laws:When Knowledge Matters (Vol 1: Issue 3)

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This article raises a dilemma that exists for the judiciary in relation to s 359(d)(i) of the Qld Criminal Code dealing with unlawful stalking. The ambiguity was highlighted in several cases where the victims were unaware of the alleged stalker's activities until after the perpetrators were apprehended by the authorities. The unusual question then arose as to whether the victims were required to show a mental element—namely knowledge or fear—of the alleged stalking activity. Some case law suggests that the courts are reluctant to interpret the legislation in a way that requires the prosecution to show that the victim was aware of the alleged stalking. However, such an interpretation may not be completely correct given the wording of the provision.

Introduction

Is there a legal requirement in Queensland for the victim of stalking to have any prior knowledge that he or she is being stalked in order to assign criminal culpability to the alleged stalker? The ambiguity lies in the amended form of s 359B(d)(i) of the *Criminal Code* (Qld). There are occasions, when a person will stalk their victim in secrecy, and it is those types of cases on which this discussion focuses. If there is neither any knowledge nor harm stemming from a person secretly looking at or observing another, then is it fair to say that that the person has committed any offence? Why would the coercive powers of the criminal law be invoked in this instance? Is it not an unnecessary infliction of the state's power to prosecute a person for what could appear to be 'everyday' activities if there is no knowledge and therefore no physical or psychological harm that stems from the alleged stalker's activities?

These questions pose difficulties for the judiciary – how does the arbiter of law seek to discern the purpose of the *Code* in this instance when so called 'everyday'

activities can also be interpreted in rather different contexts as constituting conduct falling within the ambit of unlawful stalking? The work of Ronald Dworkin in his seminal text, 'law as integrity' posits the argument that judges decide matters of law based on 'principles', which is often a form of disguised morality. Applied in this context, a Dworkonian approach might assume that judges make decisions imbued with his or her sense of moral fairness as it relates to the victim and the alleged stalker. With that in mind, it might be a case that the decision will by and large depend on the individual judge. Perhaps if we examine the purpose of the anti-stalking legislation to gauge why anti-stalking legislation exists in the first place.

The Genesis of Anti-Stalking Legislation

The offence of stalking relates to a range of behaviours, which are perpetrated by individuals of varying personality types.^[1] Pinals cites an array of studies conducted on those who have either displayed a propensity for stalking or who have been apprehended for the offence.^[2] From this, Pinals asserts that stalking 'typology' is a factor of the individual stalker's psychological status, his or her relationship to the victim and the motivation underlying the reasons for stalking.^[3] Of interest for this discussion are those who pursue their intended victim(s) in both complete anonymity regarding the stalker's identity and also a desire to conceal from the victim any trace that the victim is being observed. Such behaviour could be the precursor for other more serious crimes involving actual physical harm to the victim and would therefore constitute predatory characteristics.^[4] This article however concentrates on a situation where the victim is totally unaware they are the target of covert surveillance by another person.

In relation to the first question as to whether the existing legislation requires the victim to be aware of the offending behaviour,^[5] this is largely a statutory interpretive exercise that seeks to determine the limits of the current posited law. Such interpretation seeks to discern whether or not the Crown need show that the victim possesses the requisite mental element, that is: (1) knowledge or awareness of the other person's actions; or (2) whether that knowledge is sufficient to cause an apprehension of fear.

The addition of stalking as an offence in Queensland was precipitated by the introduction in 1990 of anti-stalking legislation in the United States of America in the state of California where the initial motivation for creating such an offence came from situations arising from crazed fans stalking a number of celebrities.^[1] The purpose behind the legislation in the US, therefore, was to criminalize 'the intentional and

repeated following or harassment of another person and the making of credible threats with intent to place that person in reasonable fear of death or bodily harm'.^[2] Queensland was the first Australian state to enact anti-stalking laws in 1993.^[3] At the time of the introduction of the new provisions of the *Criminal Code*,^[4] it was argued by the Attorney General that the offence of stalking was,

[a] generic term ... which collectively describes a wide variety of fact situations where one person may follow, contact, put under surveillance or otherwise harass or intimidate a second person, but stops short of committing an offence against that person or his or her property.^[5]

Swanwick cites various definitions of stalking which seem to imply similar meanings in that such behaviour consists of persistent and possibly a lethal pursuit of a person(s) by another, and a 'niche of anti-social, threatening course of behaviour ... which on the surface is innocent but which taken in context, assumes a more threatening significance'.^[6] Significant here is Swanwick's reference to the notion that certain behaviours give the appearance of being innocent, while, when observed in context, imply a more sinister rationale. The implications of this represent some problems for assigning criminal liability because this may appear to be an unreasonable imposition of the criminal law on those engaged in what could only be described as innocuous and everyday behaviours.^[7] Indeed the apparent 'innocence' of the individual behaviours considered in isolation of other material facts would make it difficult to report such matters to the police.^[8]

The various definitions of stalking seem to indicate a number of generic behavioural traits that the criminal law was attempting to proscribe in the formulation of anti-stalking legislation. It is interesting to note the language of the then Attorney General with reference to the 'surveillance' of one person by another. A plain meaning of the term would indicate that surveillance connotes a 'close observation' of another person,^[9] while in a legal context, the term might indicate it involves some 'form of covert' activity which involves 'secretly observing ... the movements of persons.'^[10]

In the context of this discussion, it is this latter meaning that perhaps provides the best insight into one of the purposes or the underlying intentions of the Queensland Parliament in introducing the anti-stalking legislation. That is, in so far as the meaning of the Attorney General's language, there was always an intention that stalking would consist of behaviours that the intended victim neither knew were occurring nor is it a requirement for the victim to be aware they were being stalked.

This is significant since if stalking was intended to include these behaviours, then it is clear that there is no need to consider the knowledge, and therefore, apprehension of fear of the victim in assessing the liability of the alleged offender.

[1] Ross Swanwick, 'Stalkees Strike Back – The Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland' (1998) 19(1) *University of Queensland Law Journal* ; *ibid*26, 26-7.

[2] *Ibid* 26.

[3] Sally Kift, 'Stalking In Queensland: From the Nineties to Y2K' (1999) 11 *Bond Law Review*144, 144-5.

[4] *Criminal Code Act 1899* (Qld).

[5] Queensland, *Parliamentary Debates*, Legislative Assembly, 9 November 1993, 5473 (Hon D M Wells) in Ross Swanwick, 'Stalkees Strike Back – The Stalkers Stalked: A Review of the First Two Years of Stalking Legislation in Queensland' (1998) 19(1) *University of Queensland Law Journal* 26, 26-7.

[6] See, eg, R Evans, 'Every Step You Take' (1994) 68 *Law Institute Journal* 1021 and M Goode, 'Stalking: Crime of the Nineties?' (1995) 19 *Criminal Law Journal* 21 in Swanwick,*previously cited: remove this citation and make cross-reference*26, 26-7.

[7] Pathe, *previously cited: remove this citation and make cross-reference* 108.

[8] *Ibid*.

[9] George W Turner (ed), Oxford University Press, *The Australian Pocket Oxford Dictionary*(1988) 710.

[10] Trischa (ed) Mann, *Australian Law Dictionary* (Oxford University Press, 2010) 559.

[1] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law (3rd Ed)* (Lawbook Co, 2010) 601-3. Here the authors list five primary types of stalkers identified by psychiatrists – Intimacy Seekers, The Resentful, The Rejected, The Predatory and the Incompetents. In this discussion there is no distinction between the individuals who stalk, only those who wish to keep their actions from being discovered by the victim.

[2] Debra Pinals, *Stalking: Psychological Perspectives and Practical Approaches* (Oxford University Press, 2007) Chapter 2.

[3] *Ibid*, 30-41.

[4] Bronitt and McSheery, above n 4, 602.

[5] That is, whether there is a legal requirement that a victim of an alleged stalking needs to be aware that particular actions of another person are being directed against them, in order for the Crown to secure a successful conviction of stalking?