Western Australia's New Stalking Legislation: Will it Fill the Gap?

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Legislation to prohibit stalking was enacted in Western Australia in 1994. Only four years later the legislation was radically overhauled. This article traces the history of the 1994 and 1998 Acts, and considers whether further reform is necessary.

IN 1994, Western Australia followed the lead of many other Australian and American jurisdictions in recognising and proscribing the repetitive, harassing conduct known as stalking.[1] However, some four years later, after several highly publicised, unsuccessful prosecutions, these original anti-stalking provisions ('the 1994 provisions') were repealed, and a new chapter on stalking substituted ('the 1998 provisions'). In this article, I consider why the 1994 provisions were unsuitable and whether the 1998 provisions are an improvement.

In Part I of the article, I identify why Western Australian law prior to 1994 left stalking conduct without effective legal sanction. Part II then considers how the 1994 provisions were intended to 'fill this gap' in the law. Part III examines how the 1998 provisions expanded the scope of the offence and evaluates the likely success of the new provisions. Finally, Part IV makes suggestions for further reform.

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1. Criminal Law Amendment Act 1994 (WA) s 9.

PART I: RECOGNISING STALKING — THE NEED FOR LEGISLATION

In 1994, Chief Justice DK Malcolm's Taskforce on Gender Bias recommended that Western Australia enact stalking legislation 'as a matter of urgency'.[2] This recommendation reflected a worldwide trend towards enacting dedicated anti-stalking laws. However, the report provided little explanation as to why such legislation was necessary in Western Australia. In this Part, I consider this question.

1. What is stalking?

Stalking is usually characterised by persistent, unwanted attention. How that attention is manifested varies considerably. Many stalkers, at least superficially, aim to establish or re-establish a romantic or domestic relationship with the victim.[3] It is not surprising, therefore, that stalking, at least initially, often mimics behaviour which would be considered socially and legally acceptable in a consensual 'dating' relationship. Unsolicited gifts (eg, chocolates and flowers) are common, as are communications such as letters, cards, e-mails, faxes and telephone messages. Such behaviour might ordinarily be considered harmless, and thus difficult to construe as 'criminal'. To the victim, however, it is not harmless. It results in a range of emotions from irritation to terror. Each 'gift' reminds the victim of the stalker's access to him or her, and thus of vulnerability to attack.

Although much stalking commences with socially accepted forms of contact, the behaviour often deteriorates rapidly. Personal contact, which may involve a physical assault, threats (overt or implied), mutilation of family pets, destruction of property, and assaults on family members or the victim's close friends, are commonly reported forms of stalking behaviour. Lying-in-wait, watching and following are other typical behaviour patterns. Some of these types of behaviour (eg, physical assault, threats and criminal damage) may be crimes in their own right.

2. Pre-1994 options for prosecuting stalkers

Where stalking involves a specific offence under the Criminal Code 1913 (WA) (eg, a threat of death or physical injury, assault, murder, or a property offence such as stealing or criminal damage), the offender can be prosecuted under the relevant statutory provision. However, much stalking behaviour is not criminal per se. Prior

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2. Chief Justice's Taskforce *Report on Gender Bias* (Perth, Jun 1994) 218.
3. However, the crime of stalking is not usually about romance or romantic love. More often it is about power, jealousy, possession, control, domination and forced submission. Stalking is as much about romance as sexual assault is about sex.

to 1994, there were some minor legislative provisions which criminalised such behaviour,[4] but these provisions were not well suited to typical stalking conduct.

Section 550 of the Criminal Code (now repealed) made it an offence to use or threaten violence, persistently follow, hide property, or watch or beset another with intent to 'compel' him or her to engage in or abstain from a lawful activity.[5] Although section 550 was originally enacted to prohibit certain practices of striking trade unionists done with intent to intimidate 'scab labour',[6] the proscribed behaviour and requisite intent were, at least in theory, broad enough to encompass some instances of stalking. However, the section was considered insufficient to capture most stalking behaviour. In 1994, the then State Attorney-General, the Hon Cheryl Edwardes MLA, stated that she considered section 550 inadequate to deal with stalking because the section was too narrow, and the penalty too lenient.[7] Other members of State Parliament agreed.[8] In fact, section 550 was never used to prosecute stalking.[9]

Section 43(1) of the Police Act 1892 (WA) gives a police officer the power to apprehend any person without warrant if there is just cause to suspect that person of having 'any evil designs'. The officer is also given a power under this section to arrest 'all persons whom [he or she] shall find or who shall have been lying or

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4. Of course, the criminal law was not (and still is not) the only recourse for victims of stalking. Civil restraining orders were and continue to be an option. Traditionally, restraining orders have been considered an ineffective deterrent to stalking: see Chief Justice's Taskforce supra n 2, 167-180. The Taskforce cited a WA inquiry into the effectiveness of restraining orders in protecting women from violence, which reported that 41% of women who had obtained a restraining order said that it did not help them at all. Many respondents considered that the process of obtaining the restraining order had actually *increased* the risk of an attack by the defendant. The report noted that 50% of women murdered by their husbands had a current restraining order against the husband at the time of the murder: Chief Justice's Taskforce supra n 2, 169, citing A Ralph 'The Effectiveness of Restraining Orders for Protecting Women from Violence' (unpublished paper, WA Office of the Family, Mar 1992). Since then, the restraining order legislation has been significantly overhauled. However, early monitoring suggests that many of the problems with effective use of restraining orders continue to exist: see Ministry of Justice *Report on the Evaluation of the First Six Months of Operation of the Restraining Orders Act 1997* (Perth, Dec 1998) 13-15.
5. Criminal Code s 550 (repealed by Act no 82 of 1994).
6. M Goode 'Stalking: Crime of the Nineties?' (1995) 19 Crim LJ 21, 22. A similar provision existed in South Australia until 1992. The provision originally derived from the Conspiracy and Protection of Property Act 1875 (UK). The legislation in South Australia was never used: ibid.
7. The offence provided for a maximum of 3 months' imprisonment or a $40 fine. Criminal Code s 550.
8. *Hansard* (LA) 30 Nov 1994, 8135, 8182.
9. *Hansard* (LA) 30 Nov 1994, 8184.

loitering in any street, yard, or other place, and not giving a satisfactory account of themselves'. Such persons are to be detained in custody 'until [they] can be brought before a Justice, to be dealt with for such offence'.[10]

Some stalking behaviour might be captured by these provisions. However, the difficulties in using them to prosecute stalkers are obvious. They require that the police must either find the stalker actually engaged in the prohibited conduct, or have sufficient alternative evidence to establish that the stalker was so engaged. The chances of the police randomly catching a stalker 'in the act' are slim. Finding sufficient alternative evidence that the stalker engaged in the prohibited behaviour prior to police arrival could also be difficult. Moreover, in most cases, it would be easy for the stalker to give a 'satisfactory account' of his or her presence. A claim that he or she was, for example, waiting for a bus or taxi, or simply walking past or in the same direction as the victim, would probably be a satisfactory account.

The 'evil designs' provision would be even more difficult to use. This offence requires that the accused engage in 'morally reprehensible conduct' for which he or she cannot give a satisfactory explanation.[11] Because following, lying-in-wait or watching is not necessarily 'morally reprehensible', the provision does not readily apply in such cases. However, it could be used where a stalker is engaged in behaviour such as sending obscene letters or making obscene comments, either face-to-face or by telephone. Such activities have been the source of prosecutions in the past.[12] The penalty, however, is trivial.[13]

3. Conclusion

Although some behaviour in which stalkers typically engage comes within the purview of these offences, much falls outside it. Moreover, the behaviour captured by these offences is subject to trivial penalties. Thus, on the whole, the law prior to 1994 was inadequate to deal with stalking behaviour. A similar gap in the law existed in other jurisdictions within Australia and overseas,[14] and this provided the impetus for enacting dedicated anti-stalking legislation in Western Australia in 1994.

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10. Police Act 1892 (WA) s 43(1).
11. WA Law Reform Commission *Police Act Offences* Project No 85 (Perth, 1992) 49, citing *Sullivan v Johnson* (unreported) WA Sup Ct 21 Jul 1986 no 307. In *Sullivan*, the defendant followed a shopper in a supermarket and looked down the front of her dress when she bent over.
12. WALRC ibid, citing 'Pen-pal Case a "Sex Fantasy"' *The West Australian* 3 Jan 1991.
13. Imprisonment for a term not exceeding 6 months or a fine of $300: Police Act 1892 (WA) s 124.
14. Goode supra n 6; JL Bradfield 'Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?' (1998) 21 Harvard Women's L Journ 229, 236-243.

PART II: WESTERN AUSTRALIA'S 1994 STALKING PROVISIONS

The 1994 provisions comprised two parts: section 338E (defining 'stalking' and 'circumstances of aggravation') and section 338D, which set out the parameters of 'unlawful stalking' (including the requisite intent for the offence and the penalties). I consider next how these provisions were intended to 'fill the gap' in the criminal law's ability to respond to stalking.

1. The conduct elements under the 1994 provisions

Section 338E of the Code defined the conduct elements of the offence of stalking. Whether this definition was wide enough to encompass all forms of stalking was the subject of significant Parliamentary debate.[15] As one member of the Legislative Assembly said: 'In my view, the Bill contains a number of loopholes and in many respects it does not go far enough in covering the sorts of incidents which can occur'.[16]

(a) Persistently following or telephoning

Section 338E(1)(a) brought within the definition of stalking 'persistently following or telephoning'. 'Persistently' was left undefined.[17] 'Telephoning' was not intended to include other forms of electronic communication which use telephone lines (eg, faxes and e-mail).[18] Nor was it intended to include more traditional forms of communication (eg, cards and letters).[19] This excluded a great deal of behaviour which could properly fall within a stalking offence. It also left to the courts the task of defining persistence, the key aspect of the subsection.

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15. *Hansard* (LA) 30 Nov 1994, 8179-8184.
16. *Hansard* (LA) 30 Nov 1994, 8180.
17. 'The term persistently will not mean a set number of times for stalking to be carried out; all that needs to be satisfied is the frequency, the relentlessness or the persistence of the act': *Hansard* (LA) 30 Nov 1994, 8137, the Hon C Edwardes (A-G) 8148.
18. Section 338E(1)(a) originally captured only 'persistently following'. During the debates in the Legislative Assembly, an amendment was put forward to create a section 338(1)(d) aimed at 'persistently communicating to harass or threaten'. The word 'communicating' was used to reflect modern forms of communication using a variety of different means, such as fax and e-mail. The Attorney-General disagreed that such an amendment was needed in light of the Code's threat provisions (s 338). However, she did agree to amend s 338E(1)(a) to read 'persistently following *or telephoning*'. She suggested that other electronic communications were a matter for the Telecommunications Act 1991 (Cth).
19. The Attorney-General opined that these would be within the definition of 'unsolicited gifts' in s 338E(3): *Hansard* (LA) 30 Nov 1994, 8179-8180.

(b) Depriving a person of the possession of property

Section 338E(1)(b) included within stalking 'depriving [a] person of possession of any property or hindering [a] person in the use of any property'. This provision was a remnant of section 550 ('hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof'). In the context of labour disputes, at which section 550 was primarily aimed, this provision captured incidents where trade unionists hid tools, uniforms, equipment or other items to impede strike-breakers. In the stalking context, it captured stalkers who took property from the victim without the intent of permanent deprivation required for a stealing conviction under section 371 of the Code. Likewise, 'hindering' captured acts such as deflating car tyres (which would temporarily prevent the victim from driving his or her car).[20]

Section 338E(1)(b) did not require an element of persistence. A single incident of depriving or hindering was captured by the offence. Thus, the subsection was probably wide enough to encompass the facts of *R v Bowman*,[21] where the defendant seized the victim's property in order to 'persuade' the victim to repay a debt.[22] The Court of Criminal Appeal held that this conduct was outside the definition of stealing under the Code. Criminalising such behaviour as 'stalking' therefore increased the scope of the criminal law substantially. Section 338E(1)(b) could also have been used to curtail political protests.[23] This, too, would seem to be a significant expansion of the traditional parameters of the criminal law.[24]

(c) Watching or besetting

Section 338E(1)(c) included within stalking 'watching or besetting' any place where the victim happened to be. One difficulty with this subsection was that it failed to define 'watching' and 'besetting'. 'Watching' presumably referred to acts of loitering and lying-in-wait. The meaning of 'besetting' is more difficult. Section 338E(3) deemed sending or leaving unsolicited gifts to be 'besetting', but otherwise the subsection did not define the term.[25]

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20. Such behaviour would be unlikely to fall within the criminal damage provisions of the Criminal Code: s 444.
21. (1980) WAR 65.
22. See N Morgan 'Criminal Law Reform 1983-1995: An Era of Unprecedented Legislative Activism' (1995) 25 UWAL Rev 283, 298.
23. Similar provisions in England have resulted in charges arising out of a protest at an abortion clinic: *DPP v Fidler* [1992] 1 WLR 91, discussed infra pp 299 and 300-301.
24. See Morgan supra n 22, 296.
25. The potential for a wide definition of these terms is demonstrated by the reported stalking prosecution of a group of young Indigenous people for loitering at a shopping centre: see Goode supra n 6, 27.

Judicial definitions of 'besetting' are rare. A protest by a 'pro-life' group outside an abortion clinic (which involved a large crowd of protesters displaying signs and engaging in verbal abuse of patients) has been held to be 'watching and besetting' within the meaning of the Conspiracy and Protection of Property Act 1875 (UK).[26] However, in that case, *DPP v Fidler*,[27] the court did not actually define 'besetting'.

'Beset' is defined in *West's Legal Thesaurus and Dictionary* as 'to attack, to set upon, to assail, to harass'.[28] These words imply that besetting ordinarily involves a physical assault or other act of violence. They suggest the possibility, however, that harassing behaviour (eg, the behaviour which took place outside the abortion clinic in *DPP v Fidler*) would also suffice. Including 'sending unsolicited gifts' within the meaning of 'beset' (as section 338E(3) did) is not entirely consistent with the ordinary meaning of beset.[29]

(d) Attendances to receive or communicate information

Section 338E(2) excluded from watching or besetting 'attendance in order merely to receive or communicate information'. This was intended to remove conduct with a legitimate purpose from the scope of stalking (eg, telephoning a spouse or former spouse to let him or her know what time to collect the children under an access order). However, an attendance 'to persuade' (such as an attendance at an abortion clinic to persuade women not to have an abortion) goes beyond 'merely receiving or communicating information'.[30]

The exclusion seems to have been too broadly drawn for its purpose. As drafted, it could have placed outside the offence of stalking a person who repeatedly attended at or telephoned the home of the victim with the sole purpose of communicating unending affection. Arguably, such an attendance would have been 'merely to communicate information' rather than to persuade the victim to do something.[31] This provision, therefore, created a ready excuse for a defendant which it would have been difficult for the prosecution to overcome.

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26. *DPP v Fidler* supra n 23, 97. The Conspiracy and Protection of Property Act 1875 (UK) was a predecessor of Criminal Code s 550, which in turn was replaced by ss 338D and E.
27. Supra n 23.
28. WP Statsky (ed) *West's Legal Thesaurus and Dictionary* (St Paul: West Publishing Co, 1986).
29. This is further supported by the Attorney-General's comment that 'gifts' within the meaning of s 338E(3) was to be interpreted widely to include 'anything physical' which is sent to the victim including letters, cards, dead animals, a bullet or a wheelchair advertisement: *Hansard* (LA) 30 Nov 1994, 8181.
30. *DPP v Fidler* supra n 23, 98.
31. One legally trained MP noted that the 1994 provisions 'set up a framework which will be a dream run for those lawyers who believe that they need to defend people in every circumstance': *Hansard* (LA) 30 Nov 1994, 8183.

2. The mental elements under the 1994 provisions

Section 338D of the Criminal Code defined the mental elements required for stalking. They included: (a) an intent to prevent or hinder the doing of an act by a person who was lawfully entitled to do that act; (b) an intent to compel the doing of an act by a person who was lawfully entitled to abstain from doing that act; or (c) an intent to cause physical or mental harm to a person or apprehension or fear in a person. These are considered below.

(a) & (b) Intent to prevent or hinder/intent to compel

The intended scope of the first two mental elements (ss 338D(1)(a) and (b)) was unclear. On a broad interpretation, these provisions might have encompassed a stalker who tried to force a former partner to return to their relationship.[32] If the former partner had, in the meantime, commenced a relationship with someone else, the provisions might have included behaviour intended to force an end to the new relationship.[33] However, without clear guidance from Parliament that it intended these provisions to be so broadly interpreted, it is unlikely that the courts would have done so. The general rule of statutory interpretation in criminal matters is that penal categories are not to be extended where the language is vague or capable of more than one meaning.[34]

This approach is supported by the decision in *DPP v Fidler*, where the court rejected the view that the acts engaged in by anti-abortion protesters (waving placards and shouting abuse at patients in an abortion clinic) involved an intent to 'compel' the women to abstain from having a lawful termination of pregnancy.[35] The court held that for the purpose of section 7 of the Conspiracy and Protection of Property Act 1875 (UK),[36] an intent to compel means more than an intent to persuade or dissuade. Nolan LJ said:

> *Physical force was neither used nor threatened.* The evident purpose of the demonstrators' behaviour was to embarrass and shock and shame those concerned into abstaining from abortion. In [our] judgment, the justices were right to find

32. This may have been within the broad meaning of 'an intent to compel the doing of an act by a person who is lawfully entitled to abstain from doing that act'.
33. This may have been within a broad interpretation of 'an intent to prevent or hinder the doing of an act by a person who is lawfully entitled to do that act'.
34. 'In a criminal statute you must be quite sure that the offence charged is within the letter of the law': *A-G v Lillem* (1864) 2 H&C 431, 515. See also *R v Adams* (1935) 53 CLR 563; *R v Bowman* supra n 21.
35. *DPP v Fidler* supra n 23.
36. This provision is nearly identical to s 550 of the Criminal Code, the predecessor to s 338D.

> that this purpose, thus implemented, was a purpose of dissuasion rather than one of compulsion.[37]

This passage suggests that the defendants might have demonstrated 'compulsion' had they physically restrained the patients or threatened physical violence. Thus, whether a stalker possesses the 'intent to compel', or 'intent to prevent or hinder', may depend on whether he or she uses or threatens physical force to achieve his or her purpose. This interpretation would significantly narrow the scope of stalking, because much stalking behaviour does not involve the use or threatened use of physical violence.

Where a stalker tries to 'woo' a former partner back into a relationship by actions such as watching, lying-in-wait, persistent following, telephoning, or sending unsolicited gifts, these actions would be unlikely to suggest an intent to 'compel' as interpreted in *Fidler*. Thus, this common, harassing form of behaviour would be unlikely to constitute stalking under either of the first two mental elements.

(c) Intent to cause harm, apprehension or fear

The third mental element, under section 338D(1)(c), was 'an intent to cause physical or mental harm to a person or apprehension or fear in a person'. In the second reading speech, the Attorney-General suggested that this aspect of the 1994 Bill would be the key to the success of the new legislation.[38] The provision was meant to expand the intent requirements in sections 338D(1)(a) and (b), bringing more behaviour within the definition of unlawful stalking. A stalker who did not intend to compel the victim to do or abstain from doing anything, but rather intended only to frighten or harm, would be captured by this subsection.

However, the Parliamentary debates on section 338D(1)(c) identified two main difficulties in focusing on the *subjective intent* of the stalker. First, intent may be immaterial to whether actual fear or apprehension is caused:

> [I]t is possible that a person can suffer enormous fear by being stalked even if the person who is doing that stalking does not have that intention.... For instance, a parent watching a child at school might say that he or she is doing it out of concern and love. A parent who is unable to have access to a child might do that and in so doing cause fear in the child and its teachers. I have seen that happen in schools in which I have worked, where teachers who have responsibility for the child's welfare become very apprehensive in these situations, although that is not the intent of the person doing the stalking.[39]

In this situation, the teacher having the legal responsibility for a child might be frightened or apprehensive that a parent without a legal right of access might try

37. *DPP v Fidler* supra n 23, Nolan LJ 97 (emphasis added).
38. *Hansard* (LA) 27 Oct 1994, 6286-6287.
39. *Hansard* (LA) 30 Nov 1994, 8137, 8183.

to abduct or harm the child. The child might also be apprehensive. However, the behaviour in this scenario would be outside the scope of unlawful stalking due to the lack of intent required by section 338D(1)(c).

Secondly, the practical difficulties faced by the prosecution in trying to establish subjective intent beyond reasonable doubt significantly limited the application of the offence:

> If I were stopped for what might be considered stalking and were asked why I was doing it, my answer would be that I was just doing it for fun and that I did not intend any of the things that are provided for in paragraphs (a), (b) and (c). [The Crown] would then have to prove intent by whatever other evidence was available, and I do not think a prosecutor would find that easy.[40]

The Attorney-General placed considerable faith in the courts to apply a commonsense approach in determining intent, and so rejected these concerns.[41] However, it was apparent that the subjective intent requirement would exclude several categories of behaviour from the scope of unlawful stalking. It would be difficult, for example, for the prosecution to prove the offence where the defendant claimed that the behaviour was engaged in, not to frighten or intimidate the victim, but rather to commence or continue a romantic relationship.[42]

Proof of intent would also be difficult where the defendant had a pathological attachment to the victim. In these cases, the stalkers honestly believe that they are in love with the victim and that their attentions are merely an innocent manifestation of that love.[43] However, such 'obsessive love' stalkers can be extremely dangerous. The initial idealised contact often deteriorates into rage upon continued rejection.[44] In the initial stages of this type of stalking, when the defendant is sending supposedly beneficial gifts, love letters and making frequent telephone calls, it would be difficult or impossible to establish a subjective intent to cause apprehension or fear.

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40. *Hansard* (LA) 30 Nov 1994, 8182.
41. '[O]ne cannot readily use an excuse of being there as a guardian angel or that one was just driving up and down the street for fun. I am not sure how many people the member for Mitchell has defended where the judge and jury have accepted that proposition': *Hansard* (LA) 30 Nov 1994, 8184.
42. Such professed motivation might be easier to overcome if the defendant engaged in behaviour well outside the boundaries of social acceptability. Whether the defendant 'intended' to cause apprehension or fear will be determined by considering all the evidence in the case, including the type of behaviour engaged in. 'The ordinary and natural meaning of the word 'intends' is to mean, to have in mind.... What is involved is the directing of the mind, having a purpose or design....[The jury] should ... be told that they are to decide whether the intention is established on the whole of the evidence': *R v Willmot (No 2)* [1985] 2 Qd R 413, Connolly J 418-419.
43. D Keenahan & A Barlow 'Stalking: A Paradoxical Crime of the Nineties' (1997) 2(4) Int'l Journ of Risk, Security and Crime Prevention 291, 293.
44. A particularly chilling, yet not uncommon, example of this type of stalking is detailed in Bradfield supra n 14.

Likewise excluded by the subjective intent requirements would be a stalker unable to formulate intent because of a delusional disorder.[45] The most common delusional disorder resulting in stalking is 'erotomania', where the stalker believes unshakably that the victim loves him or her. The stalker manifests extreme persistence in this delusional belief, and interprets all denials of love from the victim as secret affirmations of their love, or as a challenge designed to test the strength of their relationship.

In each of these scenarios, the stalking could certainly cause fear, apprehension and even mental or physical harm. It might also force the victim to curtail daily activities in response to the constant threat of attacks. All the reasons why Parliament considered it appropriate to protect the public from stalkers would be present in such cases. However, because the requisite intent is absent, the stalking would be outside the scope of the offence and the stalker free to continue the harassment.

Why did Parliament focus on the subjective intent of the accused, rather than the effect of the behaviour? Probably to exclude from the scope of the offence those who are not culpable in the traditional sense: 'innocent' but socially inept suitors who do not intend to cause harm, fear or apprehension.[46] However, in its concern, Parliament cast the net too narrowly, excluding from the offence many instances of dangerous and harassing behaviour. By relying on a test of subjective intent, Parliament left outside the offence a large range of reprehensible conduct. Other jurisdictions have avoided this problem by defining intent more broadly.[47] The options for doing this in Western Australia will be considered in Part IV.

PART III: THE 1998 AMENDMENTS

As predicted by some Parliamentarians during the 1994 debates, application of the 1994 provisions proved to be a disaster. Convictions were few, and in one widely reported incident a magistrate likened a stalker to a harmless 'puppy dog'.[48] Accordingly, Parliament was forced to take up the issue of stalking again, only four

45. The psychiatric literature is rife with examples of such behaviours. In one example from Australia, a stalker broke into the home of his victim and attempted to rape her because he was convinced that he was destined to sire a race of rulers with her. After breaking into her house he entered her bedroom naked and announced he was there to 'make babies': see P Mullen & M Pathe 'Stalking and the Pathologies of Love' (1994) 28 ANZ Journ Psychiatry 469, 473.

46. This concern probably demonstrated parliamentary misunderstanding of the nature of stalking. The motivation for stalking is usually power, jealousy, possession, control, domination and forced submission. It is rarely, if ever, about socially awkward suitors who merely annoy. Most such people (unless suffering from a personality or psychiatric disorder) would be deterred by the victim's unequivocal explanation that the attentions were not welcome.

47. Bradfield supra n 14, 254.

48. *Hansard* (LA) 8 Sept 1998, 807. This suggests that the problem may not have been merely with the legislation, but perhaps also with gender insensitivity in the magistracy.

years later. The 1998 amendments were enacted to close 'loopholes'. In the second reading speech in the Legislative Council, the Attorney-General, the Hon Peter Foss QC, acknowledged that the judicial interpretations of the 1994 provisions had excluded behaviour which Parliament anticipated would be within the scope of the 1994 legislation:

> Shortly after the enactment of the [1994] stalking provisions, a number of cases were heard in the Court of Petty Sessions which indicated that some forms of 'stalking' were not provided for in the legislation. In one case, where the accused visited the complainant's home and office over a period of seven years, the magistrate found that the accused had not intended to intimidate or frighten the complainant. Thus, the behaviour was not within the provisions of the stalking legislation. In another case, the accused had anonymously put flowers, chocolates and music tapes on the complainant's car, and on separate occasions had sent flowers to her office. The conduct occurred over a period of three months. Again, it was found that there was no direct evidence that the accused had intended to cause harm or fear to the complainant. Consequently, it has been decided that the stalking provisions need to be extended to cover those situations where there is no intent on the part of the accused but the victim nevertheless fears for his or her safety or is prevented from going about his or her normal lifestyle. Therefore, the Bill provides for a new simple offence of stalking which does not involve any intent on the part of the accused.[49]

The 1998 Bill made other significant changes as well. The new law reorganised and revised the stalking provisions, re-defining key elements and creating a new offence structure: section 338D now provides definitions for the chapter (entitled 'Chapter 33B — Stalking') and section 338E creates two new stalking offences. Section 338E(2) provides an alternative verdict to a charge brought under section 338E(1).[50]

1. The conduct elements under the 1998 provisions

The new conduct element of stalking is to 'pursue another person'. 'Pursue' is defined in section 338D(1), which incorporates some of the elements found in the former section 338E(1). The elements of pursuit are as follows.

(a) Repeated communication

Paragraph (a) of the definition of 'pursue' includes within the offence 'to repeatedly communicate with the person, whether directly or indirectly, and whether in words or otherwise'. This provision significantly expands the range of conduct which constitutes stalking. The equivalent 1994 provision included only

49. *Hansard* (LC) 11 Nov 1997, 7464-7465.
50. Criminal Code s 598AA.

'persistently following or telephoning'. The new provision is very broad, arguably including any type of communication, whether oral, in writing, by gesture or via a third party. It also seems to include symbolic communications, such as where stalkers leave some evidence of their presence in the victim's home to symbolise their access to it, thereby communicating a threat to the victim's safety.[51]

The new paragraph (a) of the definition of 'pursue' draws upon suggestions made by several Parliamentarians during the 1994 debates on the need to expand the range of conduct captured by the offence. The paragraph brings within the offence things that were previously outside it, such as electronic communications. It also makes it clear that letters, cards and other tangible forms of communication are in fact communications rather than merely 'unsolicited gifts'.

The new provision replaces 'persistently' with 'repeatedly'. Use of the term persistently was criticised by Parliamentarians in the 1994 debates because it failed to specify how often the behaviour had to occur before the criminal sanction could be invoked. The Government explained the change in wording during the 1998 Bill's second reading. It stated that use of the word 'persistently' suggested not only a particular numerical amount but also a state of mind (ie, an *intent* to persist):

> In the context of 'pursue' the [1998] Bill uses the word 'repeatedly' rather than 'persistently' to emphasise that there is no need for any mental element, on the part of the defendant, in the action itself. Quite simply, if the action is repeated then it falls within the definition of 'pursue'.[52]

This would seem to suggest that, under the 1998 provisions, any behaviour repeated more than once will suffice. However, during the debates, the Government refused to say how many times one of the proscribed forms of behaviour must be committed in order to constituted 'repeatedly': 'We are stating the principle and enabling the court to decide'.[53]

Paragraph (a) of the definition of 'pursue' closes most of the loopholes arising from the equivalent 1994 provision by expanding the number of activities falling within the definition of stalking. It could, perhaps, have been further improved by defining the number of contacts required to constitute 'repeatedly', rather than relying on the courts to perform this task. As it is, there is no guidance as to whether the stalking must occur over a lengthy period (such as weeks, months or years) or whether a much shorter period will suffice. The breadth of the provision

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51. The second reading speech stated: 'What are known as esoteric communications — communications that are recognised by the stalker and the person stalked, but possibly of little significance to others — are also intended to be caught': *Hansard* (LA) 25 Jun 1998, 4777.
52. *Hansard* (LA) 25 Jun 1998, 4777.
53. *Hansard* (LA) 8 Sep 1998, 822.

will either be expanded or curtailed through further refinement and interpretation by the courts.

(b) Repeated following

Paragraph (b) of the definition of 'pursue' brings within the offence of stalking 'to *repeatedly* follow the person'. In the equivalent 1994 provision, this conduct took the form of '*persistently* following'. This provision has undergone no substantive change other than the substitution of 'repeatedly' for 'persistently', as discussed above.

(c) Repeatedly causing the person to receive unsolicited items

Paragraph (c) includes within the definition of pursue 'to *repeatedly* cause the person to receive unsolicited items'. The former section 338E(3) included unsolicited gifts within the definition of 'besetting'. Besetting needed to occur only once to be captured by the old offence.[54] This behaviour is now subject to the same requirement of repetition as 'communicating' and 'following'. This is internally consistent, and reduces the potential for abuse of the provision.[55]

The new provision refers to unsolicited 'items' rather than 'gifts'. This amendment was made to avoid any suggestion that the item must be beneficial or of value.[56] This is significant because it clarifies for the court that the subsection includes *any* item sent or delivered to the victim, not just useful items. This reflects the fact that items which stalkers send to their victims are often of no practical value.

(d) Watching or besetting

Paragraph (d) includes within the definition of pursue 'to watch or beset the place where the person lives or works or happens to be, or the approaches to such a place'. This is, in effect, the same provision as the former section 338E(1)(c). As with that section, the conduct need only take place on one occasion to constitute stalking. This reflects Parliament's view of the danger arising from this particular

54. 'The Member also asked whether watching or besetting must be persistent, and the answer is no': *Hansard* (LA) 30 Nov 1994, 8184.
55. The potential scope of former s 338E(3) was very wide: arguably it included a creditor sending a demand letter to a debtor or a consumer sending a letter to a tradesperson demanding the completion of an unfinished job. Such behaviour is now caught by s 338E(1)(a) only if it is done repeatedly ('repeatedly communicates'), and it would be subject to the defence that it was done with 'lawful authority' under the new s 338E(3).
56. This amendment was proposed by the same Member who argued for it in the 1994 provisions. It was rejected in 1994 by the then Attorney-General as being unnecessary: *Hansard* (LA) 30 Nov 1994, 8137; 8 Sep 1998, 823.

type of conduct. However, such an expansive provision increases the possibility that it could capture behaviour not intended to be stalking.[57] The defence provided by the new section 338E(3) (ie, that the accused acted 'with lawful authority') may protect defendants from an overly broad application of this provision.[58]

The new provision still does not define 'beset'. However, this is less critical than under the 1994 provisions because beset is no longer intended to be a catch-all for behaviours not otherwise specified in the offence.[59]

(e) Breach of restraining order or bail condition

Finally, paragraph (e) includes within the definition of pursue 'whether or not repeatedly, to do any of the foregoing in breach of a restraining order or bail condition'. In both the 1994 and 1998 provisions, breach of a restraining order or bail condition was a circumstance of aggravation. The 1998 provisions bring a single breach of such an order within the purview of stalking. This appears to reflect Parliamentary concern with the high numbers of such breaches, and the likelihood of recidivism in stalking. In the case of a bail order, this protects the victim by allowing further charges to be brought if the stalker re-offends whilst on bail awaiting trial. In the case of a restraining order, it allows immediate action to be taken to protect the victim where the restraining order has failed to serve its purpose of deterring the offender. This could be a significant factor in increasing the effectiveness of restraining orders, provided that the police give prompt attention and priority in responding to such breaches.[60]

(f) Depriving a person of the possession of property

The former section 338E(1)(b) ('depriving or hindering a person in the possession or use of any property') has been omitted from the 1998 provisions. The reason is not identified in the legislative history. It was probably considered unnecessary in light of the wider ambit of the 1998 legislation. Its absence allays some concerns that the stalking offences have expanded the traditional boundaries of the criminal law inappropriately.[61] However, some forms of mischief covered by the former section 338E(1)(b) are now outside the scope of the offence (eg, deflating car tyres or unauthorised borrowings). If done repeatedly, these types of behaviour arguably belong within the offence of stalking.

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57. See eg the incident referred to in Goode supra n 6, 27 where a group of young Indigenous people were prosecuted under a similar provision for loitering at a shopping centre.
58. However, this raises the interesting question of what is 'lawful authority'. Does it include surveillance by insurance investigators or persistent celebrity photographers ('paparazzi')?
59. See above n 29 and accompanying text.
60. Hopes for this are perhaps overly optimistic: see the Ministry of Justice report supra n 4, 13-15.
61. See Morgan supra n 22, 298.

(g) Unintended communications, following, watching and besetting

Also excluded from the 1998 legislation is the former section 338E(2). This provision excepted from the definition of watching or besetting '[an] attendance in order merely to receive or communicate information'. Instead, the new section 338D(2) shifts the burden of proof to the defendant to establish the defence of 'coincidental' or 'accidental' stalking. The defendant is deemed to have engaged in stalking intentionally, unless he or she establishes the contrary on the balance of probabilities.

This provision goes only to the question of whether the defendant deliberately engaged in the proscribed conduct. Thus, the prosecution still bears the burden of establishing beyond reasonable doubt that the defendant actually pursued the victim. Moreover, under section 338E(1)(a) the prosecution also bears the burden of establishing beyond reasonable doubt that, in doing so, the accused *intended to intimidate the victim.* However, the defendant is entitled to be acquitted if he or she can establish, on the balance of probabilities, that the conduct in relation to the victim was coincidental or accidental (eg, that it was a coincidence that the street down which the defendant repeatedly drove was the street where the victim lived). This provision will clearly assist the prosecution in the difficult task of establishing the defendant's knowledge of the victim's particulars (eg, home or work address, telephone number, or schedule of activities).

It could be argued that it is unfair to place this burden on the defendant. It is unusual to shift the burden of proof in criminal matters, though it is sometimes done.[62] The burden placed on the defendant by section 338D(2) does not appear to be so high as to be unreasonable or unjust. The defendant is still entitled to have the underlying case against him or her established beyond reasonable doubt. The defendant will merely bear the burden of proof in establishing the defence of 'coincidental' or 'accidental' stalking, in circumstances where it would be very difficult for the prosecution to prove intent or knowledge.

2. The mental elements under the 1998 provisions

The 1998 provisions create two new stalking offences, each with differing mental elements. The more serious, indictable offence requires that the pursuit be

62. The most common example is the law's presumption of sanity, which must be rebutted by the defendant who seeks to rely on the defence of insanity: Criminal Code ss 26-27. However, other statutory exceptions exist to this general rule: 'One golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity *and subject also to any statutory exception*': *DPP v Woolmington* [1935] AC 462, Viscount Sankey LC 481-82 (emphasis added). See also Criminal Code ss 17, 186(2), 204, 204A(4) and 321A(7), which all contain defences shifting the burden of proof to the defendant.

'with intent to intimidate'. The simple offence requires only that the pursuit be 'reasonably expected to intimidate, and that it does in fact intimidate'.

(a) The indictable offence: section 338E(1)

Section 338E(1) makes it a crime to pursue another person 'with intent to intimidate'. The intent to intimidate may be directed at the person 'pursued' or some other person.[63] The need to recognise harassment of third parties is well documented.[64] The vague use of the words 'another person' and 'a person' in the former section 338D made it likely that those provisions were also wide enough to recognise harassment of third parties. However, the new offence puts the position beyond doubt.

'Intimidate' is defined by section 338D(1). This provision is identical in substance to that set out in the former section 338D(1) of the 1994 Act. A person intends to intimidate another if he or she intends to cause physical or mental harm to a person, or intends to cause apprehension or fear in a person. 'Intimidate' also includes compelling, preventing or hindering the doing of an act.

Because there is no substantive change to these provisions, the difficulties in achieving convictions outlined above remain. Intent to compel, prevent or hinder the doing of an act is likely to be narrowly interpreted: only acts or threats of physical restraint or compulsion may be sufficient to constitute compulsion, prevention, or hindrance.[65] Likewise, section 338E(1) still requires that the defendant *subjectively* intend to cause apprehension, fear or mental or physical harm. This intent requirement will give the offence little scope in practice.

In short, the only substantive change to the indictable offence of stalking in the 1998 legislation results from the expanded definition of 'pursue'. The offence will now capture some conduct that was outside the scope of former sections 338D and E. While this change will close many loopholes, the difficulties in establishing intent remain.

(b) The simple offence: section 338E(2)

In response to these difficulties, section 338E(2) creates a second offence: a simple offence that does not require intent to intimidate. The conduct element needed to establish the simple offence is the same as for the indictable offence: pursuit of another person. However, if the pursuit does in fact intimidate, and could reasonably have been expected to do so, that is sufficient to establish the simple offence. This offence, which carries a maximum penalty of 12 months'

63. This covers the case of stalking directed at friends or family members of the victim with a view to intimidating the victim.
64. Bradfield supra n 14, 251-252.
65. See *DPP v Fidler* supra n 23 and discussion above.

imprisonment or a $4 000 fine, is an alternative verdict to a charge under section 338E(1).[66]

Whether pursuit can 'reasonably be expected to intimidate' will be assessed on an objective basis: would a reasonable person expect that by engaging in such behaviour he or she 'could' intimidate another?[67] The definition of 'intimidate' is the same as in section 338D(1). Thus, the test is whether a reasonable person would expect that the behaviour 'could' cause the victim to experience physical or mental harm, or experience fear or apprehension, or be prevented from or hindered in the doing of any lawful activity, or be compelled to do an act. In addition to this requirement, the victim must actually be intimidated in one of these ways.

This objective test means that the simple offence is likely to produce more convictions than the indictable offence. It will bring within the scope of stalking instances where the defendant claims, falsely, that he or she is only trying to woo the victim into a 'romantic' relationship, as well as where the defendant truly does not have the requisite intent (eg, because of a psychiatric or personality disorder). In both of these cases, the risk of injury to the victim and the devastation to the victim's life as a result of the stalking are just as great as in cases of intentional stalking — and accordingly the victim deserves protection.[68]

PART IV: SUGGESTIONS FOR FURTHER REFORM

The 1998 amendments bring within the offence of stalking a great deal of conduct excluded by the 1994 provisions. The simple offence, if not the indictable offence, will deal effectively with most aspects of stalking. In this sense, the 1998 provisions have 'filled the gap' in the law's coverage of this type of behaviour. There are, however, still some areas in need of reform.

1. Erosion of the seriousness of the offence

Parliament's success in filling the gap may be only a pyrrhic victory. The indictable offence retains a significant barrier to conviction in that it requires an intent to intimidate. Thus, the breadth of the simple offence, and its availability as an alternative verdict where the indictable offence is charged, involve the risk that it will become, in practice, the *only* means of convicting stalkers in Western Australia. Such a result would significantly undermine the seriousness of the stalking offence.

The simple offence of stalking carries a maximum penalty of 12 months' imprisonment or a fine of $4 000. Few offences in the Criminal Code are potentially

66. Criminal Code s 598AA.
67. Use of the word 'could' rather than 'would' suggests that the standard is not that the behaviour necessarily *would* intimidate, but rather *might* ('could').
68. The ramifications of bringing mentally impaired defendants within the scope of stalking will be discussed below: see infra pp 312-313.

as serious as stalking, and yet warrant such a minor penalty. Common assault under section 313 (which requires no bodily harm to the victim) carries a maximum penalty of 18 months' imprisonment or a fine of $6 000. Thus, even in the most terrifying and potentially violent instances of stalking, the magistrate will be limited to a maximum penalty of 12 months' imprisonment if the prosecution is unable to establish an intent to intimidate on the part of the accused. This penalty seems inconsistent with the higher maximum sentences accorded to other, seemingly less serious, offences under the Code.[69]

Concern about the penalty does not go to the issue of deterrence. There has never been any clear evidence that incarceration is a real deterrent to crime. Rather, it goes to incapacitation and treatment — key factors in preventing recurrence. Stalking has a staggeringly high rate of recidivism.[70] This occurs because the punishment often does nothing to alter the behaviour of the offender.[71]

Where the stalking is founded in rage, revenge, desire to control, morbid jealously or obsession, psychological counselling may be of assistance in reducing recidivism rates. Likewise, where stalking results from a psychiatric condition, such as a delusional disorder, medical treatment may be needed to resolve the underlying disorder and eliminate the risk of further stalking.[72] In New York, where the stalking laws called for a similar penalty to section 338E(2), the legislation had the effect of a 'revolving door of repeated arrests, repeated psychiatric examinations, and ineffective sanctions or treatment'.[73] The current penalty in Western Australia is likely to have little deterrent or therapeutic value for the offender, and it will therefore be unlikely to resolve the underlying personality or psychiatric difficulties which sometimes cause this behaviour. The only real benefit will be, where the offender is imprisoned, to allow the victim to enjoy a brief period of respite from the stalking.

Parliament's rationale for the low maximum penalty is that, without proof of a specific intent to intimidate, the offence is rendered less serious, and thus warrants only a small penalty. There is an obvious logic in this reasoning, which is consistent with common notions of offence seriousness. The problem lies not in the low

69. Eg Criminal Code s 340 — unauthorised celebration of marriage (5 years' imprisonment and $1 000 fine); s 437 unlawfully taking fish (2 years' imprisonment or $8 000 fine); s 195 — permitting boys to resort to brothels (2 years' imprisonment); s 184 — indecent practices between males in public places (3 years' imprisonment).

70. In one study, 46% of the offenders charged with stalking had a history of prior convictions for the same offence, sometimes with the same victim: RB Harmon 'Obsessional Harassment and Erotomania in a Criminal Court Population' (1995) 40(2) Journ of Forensic Sciences 188, 194.

71. Upon release from prison, one Australian stalker went straight to the victim's home to commence the assault anew. Such behaviour is not unusual given the nature of the emotions that trigger stalking: see Mullen & Pathe supra n 45, 476.

72. PE Mullen 'The Erotomanias (de Clerembault's Syndrome)' (1994) 2(14) GP 21.

73. Harmon supra n 70, 196.

penalty for the less serious offence, but rather in this offence providing an easier route to conviction, and thus becoming the principle vehicle for convicting and sentencing stalkers in Western Australia.

How might this be avoided? One possibility would be to widen the definition of 'intimidate' in section 338D(1). There are a number of ways that this could be achieved. The easiest way would be to amend the definition of 'intimidate' to include persuasion or dissuasion together with compulsion, prevention and hindrance.[74] In the alternative, the indictable offence in section 338(E)(1) could be amended to create a rebuttable presumption. Conduct which is 'reasonably expected to intimidate, and does in fact intimidate' would establish 'intent to intimidate' *unless* the defendant proves otherwise. Alternatively, Parliament could choose from one of the many options adopted by other jurisdictions that have confronted this problem. Any of these options might help to resolve the difficulties experienced in prosecuting stalkers for the indictable offence.[75]

2. Treatment issues

Another difficulty in the 1998 provisions is that they have the potential to capture within the simple offence men or women with psychological or psychiatric disorders. Yet they fail to address the treatment of such offenders. Treatment is not only more appropriate than imprisonment or a fine for a delusional or otherwise impaired stalker, but also more likely to result in a cessation of the offending conduct. The question is how to ensure that mentally impaired stalkers get access to the treatment they need.

If a defendant is acquitted on the ground of insanity, it is within the discretion of the court either to make a custodial order or to release him or her.[76] If the defendant's insanity plea fails, he or she will probably be sentenced to a fine or a short term of imprisonment. Treatment of the underlying disorder is not necessarily

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74. Eg s 338D(1)(c) could be amended to read 'to *dissuade or* prevent the person from doing an act that the person is lawfully entitled to do, or to hinder the person in doing such an act'. Likewise, s 338D(1)(d): 'to *persuade or* compel the person to do an act that the person is lawfully entitled to abstain from doing'. Note, however, that this would significantly widen the scope of the provision and possibly be subject to abuse. A provision limiting the application to contact with no legitimate purpose would probably be necessary to rule out this possibility.

75. Responses to the issue by other jurisdictions include drafting anti-stalking provisions which require that the offender know or should have known that the actions would cause fear (eg, as in the State of Washington in the US). A few jurisdictions have created a rebuttable presumption: the stalker is deemed to have acted with the requisite intent to cause fear if he was warned that the victim did not welcome the contact (eg, as in the States of New Hampshire and Montana). Other jurisdictions simply require that the defendant intend to commit the act which causes fear. If the victim is 'reasonably frightened by the stalker's conduct', then the intent element is satisfied: see Bradfield supra n 14, 254.

76. Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) ss 20, 22.

a feature in either scenario. It is clearly unsatisfactory (and, in some cases, dangerous for the victim) to leave stalkers at liberty where they cannot control their behaviour, or they suffer from delusions. However, it is equally problematic to send such disturbed individuals to prison with no prospect of treatment for the underlying condition.

One possible solution would be to educate judges and magistrates on the close links between stalking and certain psychiatric disorders. The aim would be to assist them to recognise the warning signs of underlying psychological or psychiatric disturbance. If a stalker were acquitted on the grounds of insanity because of such a disorder, the court would be able to order treatment pursuant to section 22 of the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA). On the other hand, if the stalker were convicted, the court could order a pre-sentence report to evaluate his or her psychiatric condition. This would assist in determining whether treatment is necessary.

Other, more drastic options are also possible. For example, the stalking provisions could be amended to require a mandatory pre-sentence report on the psychiatric health of a convicted stalker to determine whether there was a psychiatric basis for the behaviour. An offender revealing such a psychiatric condition could then be classed as a mentally impaired defendant within the meaning of the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) and proceed to treatment under that Act. At present, however, it does not appear that such expensive and extreme measures are necessary. We do not know what percentage of stalkers have a psychological or psychiatric basis for their behaviour. Further study of stalking offenders would be useful.

SOME FINAL THOUGHTS

The 1998 legislation appears to provide Western Australia with significantly improved anti-stalking legislation, which now has the ability to encompass most of the conduct which falls within this field. However, convictions and sentences under the new legislation (which will almost invariably be for the simple offence in section 338E(2)) may mask the seriousness of stalking behaviour. Further, the present legal response to stalking may not be adequate to deal with the recidivistic nature of this conduct. The failure of the legislation to provide appropriately for the treatment of stalking offenders makes the likelihood of recidivism great. This article suggests some ways in which Parliament might respond to this problem and thus ensure that the new stalking provisions achieve the goal of providing adequate protection for victims.