

2000

**THE LEGISLATIVE ASSEMBLY OF THE AUSTRALIAN CAPITAL
TERRITORY**

CRIMES AMENDMENT BILL 2000 (No 2)

EXPLANATORY MEMORANDUM

Circulated by authority of the
Attorney-General
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Outline

This Bill replaces section 34A of the *Crimes Act 1900*, which creates the offence of stalking, with a new section.

The amendments, which have been designed in consultation with major stakeholders, will enhance the effectiveness of the section, which has to date been hampered by the restrictive intent requirement and the requirement for the harm to be "serious".

Currently, to be found guilty of stalking, a defendant must have the intention of causing either apprehension or fear of serious harm, or serious harm, to the victim or a third person. The Bill ensures that this intention is also established where the defendant knows that, or is reckless as to whether, his or her actions would be likely to cause apprehension or fear in the victim or a third person, regardless of whether the defendant actually intended that result.

In addition, the Bill inserts a new ground of harassment, so that it is an offence to stalk someone with intent to harass that person, as well as to cause apprehension or fear of harm. It also replaces references to "serious harm" with references to "harm" and exempts reasonable and lawful conduct engaged in by a person in the course of their employment.

The definition of stalking in the current provision is retained, as are the definitions of harm, harm to mental health and physical harm.

The amendments will reflect the fact that stalking behaviour is to be taken seriously notwithstanding that the offender may not actually intend to cause his or her victim fear, and will facilitate the prosecution of such offenders. Together with the civil regime of protection and restraining orders, the proposed new section 34A will provide victims with an appropriate level of protection from stalking behaviour.

The Bill also clarifies the definition of "offensive weapon". It is an aggravating factor in terms of the penalty for stalking if the offender was in possession of an offensive weapon.

Financial Implications

The proposed amendments may lead to an increased number of investigations and prosecutions under section 34A. These costs will be absorbed within existing budgetary allocations of the Australian Federal Police and the Office of the Director of Public Prosecutions.

Notes on Clauses

Clause 1 Name of Act

This Bill, once enacted, will be known as the *Crimes Amendment Act 2000 (No 2)*

Clause 2 Commencement

The proposed Act will commence on the day it is notified in the Gazette.

Clause 3 Act amended

The proposed Act amends the *Crimes Act 1900*.

Clause 4

Replaces the current definition of "offensive weapon" in section 4(1) of the *Crimes Act 1900* to make it clear what constitutes an "offensive weapon". The current definition only provides that an "offensive weapon" includes a replica or imitation of an offensive weapon, but does not define the actual term.

The definition is relevant to this Bill as it is an aggravating factor in terms of the penalty for stalking if the offender is in possession of an offensive weapon (see subsection 34A(1)).

Clause 5 Replacing s 34A

Substitutes the current section 34A with the following provisions:

Proposed subsection 34A(1)

This subsection establishes the offence of stalking. The offence consists of the physical element of "stalking", which is explained in subsection (2), and the mental element of "intent", which is dealt with in this subsection and in new subsection (4).

This provision differs from the existing subsection 34A(1) in two respects.

Firstly, the references to "serious harm" have been replaced by references to "harm". The current requirement of "serious harm" is unique to the ACT and South Australia. It is an unnecessary impediment to prosecutions under the section and is not defined.

Police and prosecutorial discretion may be relied upon (as they are in relation to the operation of the criminal law generally) to exclude innocent or random acts, or vexatious attempts to use the provision. Therefore, all references to "serious" have been removed.

Secondly, a new ground of harassment has been introduced in response to concern that proving psychological harm may sometimes require evidence from expert witnesses, that is, psychologists or psychiatrists. It is not intended that the concept of "psychological harm" be limited to the sort of harm which requires such evidence to be given in court. Inserting a ground of harassment will obviate the need to prove harm of the kind recognised by psychologists or psychiatrists.

The ground of harassment is confined to the victim, and does not extend to intention to harass a third person. This is because harassment is a lesser ground than the causing of apprehension or fear of harm, or the causing of harm.

The term "to harass" is not defined in the Bill and will therefore be accorded its common meaning by the courts.

The maximum penalty for stalking is 2 years imprisonment, or 5 years imprisonment if the offence involved a contravention of a court order or injunction, or if the offender was in possession of an offensive weapon.

Proposed subsection 34A(2)

This provision is substantively identical to the existing subsection 34A(2), but has been amended to conform to current drafting style. It provides that a person is taken to stalk someone else if that person acts in a particular manner (including following or contacting the victim, keeping the victim under surveillance or interfering with the victim's property) on at least two occasions. This continuity requirement is what gives the behaviours described in this subsection their criminal nature.

Proposed subsection 34A(3)

This is a new provision that ensures that reasonable conduct engaged in by a person in the course of their employment will not be criminalised by subsection 34A(1), as long as it is a function of the person's employment to engage in the conduct and the conduct is not otherwise unlawful.

The exemption is necessary given the proposed changes to the intent requirement in subsection 34A(4). It excuses people such as bailiffs and sheriffs whose lawful actions, by their very nature, may come under the definition of 'stalking' and may be likely to cause apprehension or fear in others. Insurance investigators, police officers and other law enforcement personnel are among other groups that require a general exemption.

However, the conduct engaged in must be reasonable *and* not otherwise unlawful. This is to ensure that the public is protected from people who may be tempted to abuse the exemption. For instance, a private investigator who has been employed to investigate someone but who oversteps the boundaries of his employment when he becomes obsessed with his subject, could still be prosecuted for stalking under the proposed amendments.

Proposed subsection 34A(4)

This new subsection ensures that the offence of stalking can be established in relation to persons who either know that their actions would be likely to harass the other person, or cause apprehension or fear of harm, or who have considered the likelihood of that occurring but who have proceeded regardless.

These mental elements of knowing or being reckless as to the likely effects of conduct are in addition to the mental element of actual intention to harass, harm or cause apprehension or fear of harm, which is set out in subsection (1).

The current intent requirement excludes anyone who does not specifically intend to cause the victim fear. Proving actual intent in stalking cases can be very difficult. Ex partners, for example, often argue that they 'love' the victim and did not intend to cause him or her fear. The requirement of actual intent has, therefore, operated to hinder and/or preclude prosecutions under section 34A in circumstances that would commonly be considered 'stalking'.

Cases in which the alleged stalker has not even considered the possible consequences of his or her actions will not be covered. Such cases will continue to be dealt with in the first instance by the civil regime (that is, by way of protection or restraining orders).

It is a criminal offence to breach a protection or restraining order. In addition, knowledge that such an order has been made or applied for, will leave an alleged stalker open to a stalking charge if his or her behaviour continues. This is because the alleged stalker will be unable to argue ignorance of the probable effects of his or her actions on the victim, and will consequently be caught by the proposed recklessness provision.

Alternatively, if an alleged stalker is asked to cease the offending behaviour, whether by police or someone else, that person will be considered to have been duly warned and, again, could be prosecuted for stalking if the behaviour continues.

Proposed subsection 34A(5)

This subsection replicates the existing subsection 34A(3), but includes a reference to harassment as a result of amendments to subsection 34A(1).

The subsection ensures that it is not necessary to prove that the stalking behaviour actually had its intended or likely effect on the victim, or a third person, as the case may be. This is because the offence is established if the defendant behaved in a manner that was intended to harass or cause apprehension or fear, or that was likely to do so, regardless of whether the conduct actually had that effect.

Proposed subsection 34A(6)

This subsection replicates the existing subsection 34A(4). It defines "harm", "harm to mental health" and "physical harm".