



Speech by

**Mr S. SANTORO**

**MEMBER FOR CLAYFIELD**

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### **CRIMINAL CODE (STALKING) AMENDMENT BILL**

**Mr SANTORO** (Clayfield—LP) (5.37 p.m.): One of the most insidious manifestations of modern society is the proliferation of the crime of stalking. Modern mass communications, urbanisation and the loss of community have all played their part in the growth of this crime. Most people would have read with concern the facts concerning the stalking of Judith Durham, the famous singer from the Seekers, as well as other well-known celebrities, such as former Triple J broadcaster Helen Razer and Liz Hayes of 60 Minutes. It is pleasing to be able to debate legislation that will further strengthen the criminal law to target this crime.

Stalking laws originated in California in 1990 following a series of infamous celebrity stalking cases. This legislation was quickly adopted by all American States and Canada, and in 1993 Queensland became the first Australian State to adopt laws dealing with this problem. Despite the hype surrounding celebrity stalking, it is unfortunately a far more prevalent crime involving ordinary people. A recent Melbourne study of 100 victims of stalking found that 29% were stalked by former partners, 34% by people whom they had met professionally or at work and 21% by a neighbour or a person they had met socially.

Many studies highlight the fact that stalking is often a by-product of the breakdown of relationships, and its prevalence is grossly underestimated. In fact, the Australian Bureau of Statistics has recently suggested that up to 10% of all Australians could have been a victim of stalking at one time or another. The one thing that is clear is the terrible consequence that stalking can have on victims. For example, Judge Pratt of the District Court made the following comments on stalking that are worth quoting. He said—

"Now, this offence of stalking can involve a severe degree of emotional and

psychological trauma to the victim of stalking whatever the state of mind of the stalker might be ... It amounts to a subtle form of violation which adversely affects and is designed to affect the personality of the victim ... The mental consequences can be severe and they can lead in that sense to physical damage. At the heart of the offence of stalking is the desire to subjugate the victim."

The current provisions in the Criminal Code dealing with stalking are very strict and have been described as possibly the most widely drawn in the world. Despite that, the current provisions are far from perfect and require reform to keep pace not just with a series of judicial decisions on their meaning but also changes in technology and the lessons learnt from the practical operation of the law over the past five or so years.

I rise today to support this legislation in principle, but I do wish to highlight some matters of concern. At the moment, in order for the Criminal Code to categorise conduct as stalking there must be four elements. First, there must be a course of conduct involving the doing of a concerning act on at least two separate occasions to another person or persons. A "concerning act" is currently defined to include: following, loitering near, watching or approaching another person; telephoning or otherwise contacting another person; loitering near, watching, approaching or entering a place where another person lives, works or visits; interfering with property in the possession of another person; leaving offensive material where it will be found by, given to or brought to the attention of, another person; giving offensive material to another person, directly or indirectly; an act of harassment, intimidation or threat against another person; or an unlawful act committed against the person or property of another person. It should be pointed out that

Judge Robertson of the District Court has said that this list seems to cover almost every known act of human behaviour.

Second, the stalker must intend that the victim or victims are aware that the conduct is directed towards him, her or them, even if this is achieved by the stalker targeting the person or property of a third person. Third, the victim must be aware that the stalker's course of conduct is directed towards him or her.

Finally, the stalker's course of conduct must be of a type that would cause a reasonable person in the victim's circumstances to believe that a concerning offensive act is likely to happen. The Criminal Code defines "concerning offensive act" to mean an unlawful act of violence by the stalker against: the victim's person or property; a third person about whose health or custody the victim would reasonably be expected to be seriously concerned, including a dependant, relative, friend, employer or associate; or the property of a person, other than the victim, about whose property the victim would reasonably be expected to be seriously concerned.

The code provides that it is a defence to a charge of stalking to prove that the course of conduct was engaged in for the purpose of a genuine industrial dispute or a political or other dispute or issue carried out in the public interest. In essence, that is the law governing stalking at the moment.

As I mentioned, Queensland was the first Australian jurisdiction to introduce a specific offence provision aimed at stalkers, but since that time all other Australian States and Territories have followed suit. The Queensland provision was heavily influenced by legislation then in force in the United States and over the past five or so years there have been a number of court decisions on both the Queensland provisions and those operating elsewhere in Australia.

In addition, as legislators we now also have the benefit of more recent reforms in other overseas jurisdictions, including the United Kingdom, as well as of a number of academic articles on this area of the law. I have also read with interest the quite critical comments on the Bill by the Scrutiny of Legislation Committee. Some of the issues that the committee raised are very important and require serious thought by the Minister. As the committee was assisted in its analysis of the Bill by Mr Robert Sibley, both a barrister and senior law lecturer at QUT, the concerns it raised must be dealt with by this House.

It is not hard to see how the law as it stands requires reform. The term "course of conduct", involving the doing of multiple acts, is less than satisfactory. Clearly an apprehension can arise even if there is a singular protracted act, rather than multiple acts. Also, according to the Explanatory Notes circulated by the Minister, the

wording of the code has been interpreted to require the repetition of the same act, whereas many and varied acts may be committed by stalkers.

Having seen the discussion on the recent Court of Appeal decision in Hubbuck's case, it is clear to me that this analysis is correct. The new requirement in proposed section 359B, that the conduct can be engaged in on any one protracted occasion or on more than one occasion, is definitely an improvement. In that regard, I appreciate that a majority of overseas jurisdictions do require conduct on more than one occasion, but in Australia, apart from Queensland, only the Northern Territory and South Australia require a particular number of occasions on which the behaviour comprising the stalking must occur.

It would appear that the Minister and his department have paid regard to the provision in force in Victoria and the decision of the Victorian Supreme Court in Pearson's case. In that case Mr Justice McDonald found that a course of conduct in the Victorian legislation "may comprise conduct which includes keeping the victim under surveillance for a single protracted period of time".

I have read the discussion paper on the offence of stalking issued by the Department of Justice, and I agree with the comments found at page 13, namely—

"It is suggested that there is no necessity for a minimum number of acts to constitute a course of conduct. The expression 'stalking' clearly encompasses either a single protracted episode or repeated conduct. The jury should be allowed to concentrate on the true nature and gravamen of the offence, the course of conduct, rather than on particular occasions."

I support the requirement that the conduct consist of one or more of the listed acts, or acts of a similar type. Although this list is an expansion of what is currently in the code, it is pleasing to see that the Minister has used the opportunity to target cyberstalking by including in the list of activities references to email and other technology. Increasingly the Internet is being used as a prime source of communication, and the number of persons using email and chat forums on the Internet to communicate is growing at a rapid rate. So too, unfortunately, is the prevalence of nuisance and hate mail. By incorporating this development in the Bill, a potentially useful tool will be given to the police in dealing with this unwelcome development.

The current law, as I pointed out, also requires an intention on the part of the stalker that the victim be aware that the course of conduct was aimed at him or her. It has been suggested that, at the moment, a stalker could argue that there was no intention for the victim to become aware that the course of conduct was

aimed at him or her. This is despite the fact that the victim did in fact become aware of this person's warped fixation and suffered as a result.

The proposal contained in this Bill removing the requirement that the stalker intend that the victim be aware of the stalking and simply providing that the stalking conduct be intentionally directed at the victim has merit. Clearly it could be suggested that if a person intends to stalk and in fact does so, it is not relevant whether the stalker has any intention that the victim become aware of the stalking. A person propounding this point of view would argue that the law should be aimed at the conduct and not the side issues.

I have some sympathy with this line of argument. However, I do point out to the Minister the comments made by the Scrutiny of Legislation Committee, which suggested that the drafting of the Bill may be unsatisfactory and that if awareness of the person stalked is to be irrelevant this should be made clear in proposed section 359C. The case made out by the committee appears convincing and I would think that it would be prudent to amend the Bill during the Committee stage to clear up this point.

It is also pointed out that, at the moment, the course of conduct of the stalker must be such as would cause a reasonable person in the victim's circumstances to believe that a concerning offensive act is "likely to happen". As the Explanatory Notes highlight, unless the victim had an actual belief that a violent act was about to happen, the offence at the moment cannot be proved. Instead the Bill, as the Minister explains, redefines the offence to require that the conduct would cause the victim apprehension or fear reasonably arising in all of the circumstances, of violence to a person or property or, alternatively, that it does cause such apprehension or fear or another detriment reasonably arising in all the circumstances to any person.

Nevertheless, when one reads proposed section 359C it is obvious that the scope of this Bill is almost without precedent. That section provides, amongst other things, that it is immaterial whether the person doing the stalking intended to cause apprehension or fear or detriment. It also provides that it is immaterial whether the apprehension or fear, or the violence, is actually caused. Finally, it makes it clear that it is immaterial that the alleged stalker even intended that the person stalked be aware of the stalking. It is important in this context to carefully consider the analysis of the Scrutiny of Legislation Committee. The committee said—

"Proposed section 359B defines unlawful stalking in such a way that it is possible for someone to commit a crime carrying 5 years imprisonment without intending harm and without causing harm and without even intending that the person stalked be aware of the conduct."

Although I do not usually quote at length, the comments of the committee deserve to be read into Hansard. The committee went on to say—

"If a stalker intentionally directs conduct at the person stalked without intending that person apprehend or fear violence or suffer any detriment and without the person stalked apprehending such fear or suffering any detriment the stalker commits an offence if it would cause apprehension reasonably arising in all the circumstances ... Thus the only 'mental element' or fault element in the proposed offence is that the stalker intended to direct the conduct at the stalked person.

Even under the existing provision, before the offence can be made, it is necessary to prove that the stalker intended that the person stalked be aware of the conduct, that the person stalked be aware that the conduct is aimed at them and the conduct is such as would cause a reasonable person to believe unlawful violence is likely.

All other Australian jurisdictions require the stalker to intend to cause fear in the person stalked as do most of the United States of America."

The committee went on to say—

"Concerns have been expressed about the overbreadth of stalking legislation. The preferred position in the Department of Justice Discussion Paper was 'redefinition to clarify that the course of conduct must cause the victim reasonably in all the circumstances to fear injury or detriment'."

The Minister knows, having authorised the release of the discussion paper on stalking, that it was not intended initially that all elements of intent and knowledge were to be deleted from the crime of stalking. When one looks separately at each of the elements of stalking in the Bill, as I have, it is easy to agree to each of the changes. Possibly the term "easy" is not quite right, but certainly it is easy to understand the motives underlining them. I stress again that it is easy to understand the motives underlining them. Yet when one sits back and contemplates the whole picture, the whole Bill and the combined provisions, and takes in the implications as exposed by the Scrutiny of Legislation Committee, one begins to wonder whether this Bill requires more finetuning with the insertion of provisions designed to prevent injustices. In relation to this, I welcome the comments made by the honourable member for Mount Ommaney as she concluded that it was important that this Bill and the provisions within this Bill be kept under regular review

I say to the Minister on this particular occasion that he needs, in conjunction with his specialist departmental legal advisers, to contemplate whether the sum total of the reforms we are now considering may well result in

unintended injustices. I am not suggesting any dilution of the protection for victims in the Bill, but rather an expansion of the range of defences or the like so that this legislation is not enforced in a harsh and unconscionable manner. As it stands, the Bill is so wide and so vague that it will criminalise, potentially, a whole range of conduct which is either innocent or harmless. It will also give enormous discretions to the investigating police and has the potential to cause genuine hardship and trauma to people who are not stalkers and who intend no harm. I strongly support effective stalking laws that target this crime comprehensively, but like every other member of this House I caution against the passage of laws which, while achieving the objects of their framers, result in a range of other undesirable consequences.

Before concluding, I wish to quickly touch on one or two other matters in the Bill. The Minister referred to the definition of "detriment" and how this will include not just apprehension or fear of violence but also serious mental, psychological or emotional harm as well as prevention or compulsion in respect of lawful rights. I mentioned at the outset the Judith Durham case, and I think that the inclusion in the concept of detriment of matters other than purely physical harm is appropriate and will make Queensland's stalking laws more relevant to the type of harassment that actually occurs.

Secondly, I note that the defences available to people accused of stalking have been expanded 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 the law, administration of an Act or for a purpose authorised by an Act. I draw to the Minister's attention the suggestion by the Scrutiny of Legislation Committee that this proposed section be extended to provide a general exemption in the case of reasonableness. Having regard to the width of other provisions, I think that the committee's suggestion has merit and could be usefully included in the Committee stage. An amendment along these lines would in no way dilute the protections the Bill provides to the victims of stalking but would go some way towards preventing the prosecution of some people whose conduct would not constitute stalking at the moment and which most reasonable people would not agree should be criminalised.

Finally, I support the introduction of an injunctive power to prevent stalking even if the stalker is not convicted or the charge is not proceeded with. It is unfortunate that the Bill does not go further and allow for an interim injunctive order along the lines of the Victorian legislation. I think that prevention is better than cure, and this is one area which requires further reform. It is preferable that, if a deranged individual is causing hardship, the legislation contains a short, sharp mechanism to stop the stalking at an early stage rather than going through with an arrest and prosecution which may take some time. I respectfully ask the Minister to give this matter further thought.

In conclusion, I support the Bill, with some reservations. Although it goes too far in some respects, it certainly will provide extra protections to those who have suffered or who may suffer from stalkers.

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