New Zealand Law Society
Te Kāhui Ture o Aotearoa

Crimes (Stalking and Harassment) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

13 February 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Crimes (Stalking and Harassment) Amendment Bill (**Bill**).

1.2 This submission has been prepared by the Law Society's Criminal Law Committee.[1]

1.3 The Law Society **wishes to be heard** on this submission.

2 General comments

2.1 The Bill proposes to amend the Crimes Act 1961 to establish a new criminal offence of stalking and harassment. The explanatory note outlines that the current criminal justice settings do not adequately respond to stalking behaviour. The Bill therefore aims to improve public confidence in the criminal law's response to stalking by providing appropriate and proportionate responses to the harm caused. Information in the Regulatory Impact Statement (**RIS**) also sets out that amending the criminal law to adequately respond to stalking means the criminal justice system will better respond to victims' needs and safety in these cases.[2]

2.2 The Law Society supports the Bill's intention to address the potentially serious harm that can be inflicted in cases of stalking. However, as currently drafted, we consider the Bill contains some workability and drafting issues which should be addressed before the Bill is progressed.

2.3 This submission sets out these issues and, where possible, recommends changes to address them. The submission comments on:

(a) Process concerns;

(b) The issue of an effective criminal offence of stalking;

(c) The subjective issue of fear or distress and its interpretation; and

(d) The public interest defence.

3 Process Concerns

3.1 The RIS notes that the policy work done to develop the Bill was:[2]

(a) constrained in scope by pre-existing ministerial direction;

(b) developed at pace; and

(c) undertaken with only limited consultation.

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1 More information about the Law Society's law reform sections and committees is available on the Law Society's website: NZLS | Branches, sections and groups.

2 Ministry of Justice "Regulatory Impact Statement: Establishing an offence of stalking" (26 September 2024) (**RIS**) at 14.

3.2 The Law Society continues to emphasise that a full and considered policy development process is a necessary feature of high-quality legislative design.[3] These processes help to ensure that resulting legislative proposals are evidence-based and effective, and have been through full public consultation processes involving all affected parties.[4] Failure to adhere to proper processes for legislative development can result in the drafting of provisions that do not work in practice or overreach in their criminalisation and, ultimately, legislation that does not address the harm to which it is responding.

3.3 We are concerned that changes to the criminal justice system are again being made without the benefit of this policy work. For example, it appears that a full comparative assessment of other jurisdictions' experience with stalking offences has either not been done or is at least not reflected in the RIS (and Bill).

4 Effective enforcement

4.1 It follows from the above that there is a limited assessment of the likely efficacy of the Bill. Literature and media related to the implementation of stalking offences make it clear that an offence provision is only effective where recognition and appropriate escalation of cases occurs. Recent history tells us that the level of recognition of stalking behaviours and appropriate escalation of cases by New Zealand Police is poor.[5]

4.2 For example, the Independent Police Conduct Authority (**IPCA**) last year found that the Police response to Farzana Yaqubi's online reports that a man was threatening, stalking and harassing her (prior to her murder by her stalker) was inadequate. The IPCA's key findings included:[6]

(a) The initial assessment matrix Police use to assess allegations of stalking to determine whether there will be further investigation is not fit-for-purpose as it does not adequately take into account all lines of enquiry, and, critically, the risk posed to victims such as Ms Yaqubi;

(b) Police did not adequately take into account cultural and religious factors which influenced how Ms Yaqubi engaged with Police, nor did they provide her with appropriate support;

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3 For example, see the Law Society's submissions on the Oranga Tamariki (Responding to Serious Youth Offending) Amendment Bill and Sexual Violence (Strengthening Legal Protections) Legislation Bill – AP 215 and 216.

4 See Legislation Design and Advisory Committee Legislation Guidelines (2021), chapter 1.

5 Louise Ternouth "Stalking law: Victim warns new bill could protect stalkers, harm victims" (7 February 2025) < https://www.rnz.co.nz/news/national/541248/stalking-law-victim-warns-new-bill-could-protect-stalkers-harm-victims > where the victim notes that she reported her stalker to Police 'a dozen times' talking to 'multiple officers at various levels of authority failing to escalate my case or take me seriously'. Further, at 5 below, Farzana Yaqubi is the most infamous case of reported stalking in New Zealand that was not responded to appropriately due to a lack of appropriate escalation and prioritisation despite multiple efforts to engage with Police about her fears.

6 See the Independent Police Conduct Authority report on the Police response to Farzana Yaqubi's online report about her stalker prior to her murder which highlights the need for improved Police training and recognition of stalking and harassment: https://www.ipca.govt.nz/Site/publications-and-media/2024-media-releases/2024-apr-18-investigation-response-farzana-yaqubi-online-report-.aspx

(c) Police failed to ensure significant matters raised in Ms Yaqubi's formal statement were immediately addressed; and

(d) Police failed to link Ms Yaqubi's file and the file of another young girl also being threatened by the same man, thereby missing an opportunity to gain a fuller picture of the extent of his actions.

4.3 While establishing a criminal offence is a positive step, its effectiveness in curbing harmful behaviour by stalkers is reliant on proper training, implementation, and operationalisation of the law.[7] This ensures that justice officials and law enforcement can effectively identify and recognise the behaviours the law is intended to address. It is important to recognise that stalking behaviours are inherently deceptive and often hidden. This may make it challenging to identify repeated actions (in this case the specified acts in new section 216P) that are likely to cause fear and distress. In part, some of this difficulty may lie in the subjective assessment of fear and distress made by the officer receiving the report from the person being stalked.

4.4 The RIS is clear that additional costs arising from the Bill will relate to training, educating, and providing guidance for agencies.[8] The Law Society considers this training (and by extension, its resourcing) is crucial to avoid repeating the mistakes made by other jurisdictions, where similar offences were created without effectively operationalising the intended policies, resulting in little beneficial impact for victims of stalking.

5 'Fear or distress'

5.1 Proposed new section 216O(2) provides that a person 'stalks and harasses' person B, if they:

(a) Engage in a 'pattern of behaviour' directed at person B, by doing any specified act to them on at least 3 separate occasions within a period of 12 months; and

(b) Does so knowing that the pattern of behaviour is 'likely to cause fear or distress' to person B.

5.2 While the RIS does not consider the drafting (and performance) of comparative provisions in other jurisdictions, the Bill appears to be at least partly influenced by the Protection from Harassment Act 1997 (England and Wales). As can be seen in the comparison of overseas provisions in **Appendix One**, the Bill proposes a definition that almost amalgamates the summary and indictable offences in England and Wales (a 'course of conduct,' defining harassment by reference to the term 'distress', alongside a specified number of occasions). However, the maximum penalty in England and Wales for the summary offence is much lower than proposed in the Bill (a term of

7 RIS at 10; Leana Bouffard, Jeff Bouffard, Matt Nobles, LaQuana Askew "Still in the Shadows: The unresponsiveness of stalking prosecution rates to increased legislative attention" (2021) 73 Journal of Criminal Justice 101794; Christy Somos "Canada needs to overhaul how it handles stalking, harassment cases: experts" (December 9, 2022) < https://www.ctvnews.ca/canada/article/canada-needs-to-overhaul-how-it-handles-stalking-harassment-cases-experts/ >

8 RIS at 20 – 21.

imprisonment not exceeding 51 weeks). That offence requires a course of conduct comprised of specified acts associated with stalking, which cause alarm or distress to the subject individual.[9] The indictable offence, carrying a more significant penalty of up to 10 years imprisonment, requires fear of violence on at least two occasions, or '*serious* alarm or distress' which has a 'substantial adverse effect' on the subject person's day-to-day activities.[10]

5.3 We note this as the Bill proposes to simultaneously lower the mens rea standard of the offence and increase the maximum penalty. While the 'knowledge' component of the mens rea provides some protection against overreach, use of the term 'distress' coupled with the increased penalty may raise the risk of the offence being applied more broadly than intended or resulting in disproportionate punishment. In particular, the term 'distress' may set too low a threshold in light of the specified penalty. We note that 'distress' is currently the threshold for issuance of a restraining order under section 16 of the Harassment Act 1997, contravention of which on two or more occasions over a period of three years carries a penalty of a maximum two years imprisonment.[11] Further consideration of the use of the term 'distress', and comparison with comparable overseas provisions, may be beneficial.

5.4 Notwithstanding the need to ensure the proposed penalty proportionately responds to the level of harm captured by the offence, we also note that further consideration of the mens rea requirement of the offence may be necessary.

5.5 There are four mens rea requirements commonly used in criminal offence provisions in New Zealand, and which are seen across the comparable offences in other jurisdictions. These are:

(a) 'Intending': the conduct or outcome (in this case prescribed to be 'fear or distress') was desired or wanted by the defendant. A 'firm intent or a firm purpose to effect an act.'[12]

(b) 'Knowing': this requires actual knowledge or a deliberate shutting of one's mind to the possibility. In this case, the reason for doing the act is relevant only to the penalty.

(c) 'Recklessness': the defendant was aware of the risk and chose nonetheless to act. In this case, it would require a conscious realisation that one's conduct will or is likely to cause fear or distress, and continuing to act anyway, where an ordinary person would consider the risk too great to be justified (i.e. it was unreasonable to take the risk).

(d) Negligence, or the 'ought to have known' test: doing acts which the defendant may not know will or may cause fear/distress, but where an ordinary person would realise that risk and not run it.

9 Section 2A, 'harassment' is defined in section 7(2).
10 Sections 4A.
11 Section 25, Harassment Act 1997.
12 *R v Waaka* CA260/01, 24 October 2001 at [20].

5.6 The level of intent prescribed in the Bill will inform how a judge or jury is likely to interpret the question of liability and is a critical element to ensuring an effective offence provision. The Bill currently requires that an offender did something "knowing" of the likelihood of fear or distress, and this would require proof beyond reasonable doubt of what the suspect actually "knew" of their alleged victim's likelihood of suffering fear or distress. Noting the comparative offences outlined in **Appendix One**, we suggest that further adjustment may be necessary to achieve the balance between an appropriately defined offence and proportionate penalty. For example:

(a) The level of knowledge, i.e. the mens rea (guilty intent) required should be clarified:

(i) One option is to include recklessness where the Bill currently proposes to require knowledge proven. All charges will otherwise be vulnerable to a claim by the defendant that they did not actually know their conduct would likely cause fear or distress. For example, proposed section 216O(1)(b) would be amended to read: "… engages in that pattern of behaviour knowing, ***or being reckless as to whether***, that it is likely to cause fear or distress to person B."

(ii) The approach taken in Queensland's Criminal Code provides another option.[13] In Queensland, the requirement is not that the defendant knew or intended any adverse outcome, but that adversity (fear or detriment) was "reasonably arising in all the circumstances." This shifts the focus to the alleged victim and all of the circumstances of the conduct, thus mitigating risks of victim blaming and/or a defendant asserting that they personally were not aware of a likelihood of negative effects from their conduct. The mens rea/intent is simply that the defendant did the act(s) complained of intentionally.

(b) Requiring – before consideration of whether the defendant was aware the *pattern* of conduct was likely to cause fear or distress – that it be established on *each occasion* of conduct that the mental elements were satisfied. As above, this could be knowledge or recklessness about whether the conduct was likely to cause fear or distress, or it could be an approach focussing on what the reasonable outcomes of each incident might be. Given the breadth of proposed section 216P (in particular subsections (1)(a)(iii), (v) and (vi)), this could also limit the risk of prosecution for three occasions of conduct which, but for section 216P, would not reasonably be considered to form a "pattern." The proposed notice provisions would likely operate to ensure that this does not raise the burden of proof to such a level that successful prosecution in appropriate cases is jeopardised.

(c) Reconsidering the maximum penalty in light of the variance across other jurisdictions. This could look like considering a separate aggravated offence with a higher penalty to ensure the more severe forms continue to be captured whilst

13 See Appendix 1.

setting the maximum penalty for non-aggravated offending more in line with penalties for similar offending (for example, breach of a protection order).

5.7 Related to fear or distress is the general provision in proposed section 216P(1)(vi) for "any" act to be prohibited if done in a way "that would cause fear or distress to a reasonable person." The "reasonable person" test, stated in this way, may mean that subsequent occasions of stalking or harassment do not meet the test for having caused or been likely to cause fear or distress to a reasonable person. That is, if, via prior negative conduct, the defendant has lowered the alleged victim's tolerance for fear or distress, the fear or distress that they experience as a result of subsequent occasions of conduct may not meet the 'reasonable person' standard, unless the 'reasonable person' is taken to mean 'the reasonable person who has been subjected to X prior occasions of prohibited conduct by the defendant'. "Reasonable" may well be found by the courts to include subjective considerations in this way. However, if the intent is to have reasonableness informed by the alleged victim's circumstances, this could be explicitly provided for. The current proposed (vi) could, for example, be amended to "acting in any way that would cause fear or distress to a reasonable person ***in the same circumstances as person B***".

5.8 Finally, we note that should any amendments be made to reduce either the specified number of occasions in proposed section 216O(1)[14] or to lower the requirement of 'knowledge' that the pattern of behaviour was likely to cause fear or distress (for example introducing recklessness or 'ought to have known,' the maximum penalty should be reviewed to ensure it is set at an appropriate level).

6 The public interest defence

6.1 Proposed section 216Q(2)(c) provides it is a defence to a charge of stalking and harassment if the defendant proves they engaged in their behaviour 'in the public interest.' An obvious example may be that of a protest. There is a public interest in individuals being able to conduct legitimate protest, and this is recognised by protection of the right to freedom of expression in the New Zealand Bill of Rights Act 1990. This is not beyond the realm of possibility, at times there has been concern in overseas jurisdictions that stalking offences were being used where the conduct was in fact legitimate protest action.[15] This is not considered in Crown Law's advice to the Attorney-General under the New Zealand Bill of Rights Act 1990 and we recommend the Select Committee consider seeking further advice to inform its report.

6.2 Further, it is important to consider the potential for overreach and – given the subjective nature of the offence as drafted – the risk of prosecution of individuals for public interest activities. This is particularly concerning given the charge would then need to proceed to

14 As discussed in some media coverage of the Bill: https://www.rnz.co.nz/news/national/541248/stalking-law-victim-warns-new-bill-could-protect-stalkers-harm-victims

15 For example, see concerns raised during the 2012 review of the Protection from Harassment Act (England and Wales), where it was noted that the provisions had also been used in disputes between neighbours. *Review of the Protection from Harassment Act 1997: Improving Protection for Victims of Stalking* (Home Office, 2012). https://assets.publishing.service.gov.uk/media/5a7aa97ee5274a319e779d8e/stalking-responses.pdf, accessed 9 February 2025.

trial, and the significant consequences that can arise from the fact of being charged with an offence in the first place, regardless of the outcome. Having a criminal charge against you can be resource intensive, impact on employment and personal relationships, and it is not unheard of for individuals to be facing charges for years while subject to bail conditions. Being found not guilty does not eliminate the costs that come from being charged in the first place.

6.3 Overall, the Law Society suggests that further consideration should be given to how the drafting of the Bill can ensure it is appropriately targeted. One option could be to structure the public interest defence similarly to self-defence. That is, by applying an evidential burden on the defendant when raising the defence, with the prosecution then having the burden of proving beyond reasonable doubt that the behaviour in question was not conducted in the public interest. Although this would be unusual for a public interest defence, it may have the benefit of reducing the risk of overreach. It would also mean that a defendant could apply to have the charge dismissed, per section 147 of the Criminal Procedure Act 2011, providing a further filtering of public interest cases.

7 Other issues

Ancillary orders

7.1 The Law Society suggests that the court be given the power to make a restraining order or a Harmful Digital Communications Act order even in a case where a defendant is discharged without conviction. We understand that a similar change is being progressed for protection orders and consider that such an amendment would improve the effectiveness of the regime in responding to stalking.

7.2 Currently, a section 106 discharge without conviction only enables the court to make any order that is *required* on conviction. Given that the proposals will *allow* for the making of the relevant orders, but not require them, this means that the orders will not be able to be made in the situation where a section 106 discharge without conviction is granted.

Nāku noa, nā

David Campbell
Vice President

Appendix 1: Comparison of mens rea for stalking provisions in Australia and England & Wales

Jurisdiction	**Provision + Mens rea**	**Imprisonment**	**Aggravated offence(s)**
Protection from Harassment Act 1997 (England and Wales)	Section 1 prohibits a person from pursuing a court of conduct which amounts to the harassment of another, and which he *knows or ought to know* amounts to harassment of the other. Section 1(3) provides that a person 'ought to know that the course of conduct amounts to harassment' if '*a reasonable person in possession of the same information would think the course of conduct amounted to harassment.*' There is an offence of both 'harassment' (section 2) and 'stalking' (section 2A). The offence of harassment applies where an individual pursues a court of conduct in breach of section 1 (or 1A). The offence of stalking applies where a person pursues a course of conduct that amounts to harassment, in breach of section 1(1) (the prohibition of harassment). A course of conduct amounts to stalking if: • It amounts to harassment; • The acts or omissions that comprise the court of conduct are those associated with stalking (examples are specified at section 2A(3)); and • The person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.	Six months imprisonment (harassment) 51 weeks imprisonment (stalking)	Section 4 provides for an aggravated offence where the course of conduct 'causes another to fear on at least two occasions, that violence will be used against him' and the accused 'knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.' Section 4(2) provides a comparable provision to section 1(3). Conviction on indictment carries a maximum term of imprisonment of 10 years, summary conviction is six months. Section 4A creates an offence of stalking involving violence or serious alarm or distress. This applies where the course of conduct amounts to stalking and either:

	For the purposes of both offences, section 7(2) defines 'harassment' as including alarming someone or causing distress.		• Causes the complainant to fear, on at least two occasions, that violence will be used against them; or • Causes serious alarm or distress which has a substantial adverse effect on the complainant's usual day to day activities. Section 4A similarly uses the test of 'knows or ought to know.' Upon summary conviction, the offender is liable to imprisonment of a term not exceeding the magistrates limit for imprisonment. Conviction on indictment carries a maximum term of 10 years imprisonment.
Criminal Code Act Compilation Act 1913 (Western Australia)	Section 338E(1) provides that a person is guilty of a crime where they 'pursue another person *with intent to intimidate*.'	Section 338E(1) – 3 years imprisonment	Section 338E(1) can be aggravated (where the offender is armed or pretends to be so armed, or the conduct constituted a breach of a bail

	Section 338E(2) provides for a simple offence, where the person 'pursues in a manner that *could reasonably be expected to intimidate'* and which does intimidate. 'intimidate' is defined in section 338D(1) as including: • Physical or mental harm. • Apprehension or fear. • Preventing a person from doing an act that the person is lawfully entitled to do, or to hinder the person in doing such an act. • Compelling a person to do an act that the person is lawfully entitled to abstain from doing.	Section 338E(2) – 12 months imprisonment	condition) – 8 years imprisonment.
Crimes Act 1900 (ACT)	Section 35 provides that a person must not 'stalk someone with intent': • To cause apprehension, or fear of harm; • To cause harm; • To harass the person stalked. Section 35(4) provides that a person is taken to have the required intent *if they know, or are reckless about whether*, stalking the other person would be likely to: • Cause apprehension or fear of harm; or • Harass the person stalked.	2 years imprisonment (5 years if in possession of an offensive weapon or in contravention of court order)	Aggravated offence (the offence involved contravention of an injunction or other court order, or the offender was in possession of an offensive weapon – 7 years)(any other aggravated offence, typically family harm – 3 years).

Crimes (Domestic and Personal Violence) Act 2007 (NSW)	Section 13 provides that 'A person who stalks or intimidates another person *with the intention of causing the other person to fear physical or mental harm* is guilty of an offence.' Section 13(3) specifies that 'a person intends to cause fear of physical or mental harm *if he or she knows that the conduct is likely to cause fear* in the other person.' 'Intimidation' and 'stalking' are defined terms in sections 7 and 8, respectively. One specified example of 'intimidation' includes intentionality, being 'outing' or threatening to 'out' an individual via disclosure of specified personal information.	5 years imprisonment	
Criminal Code 1899 (Queensland)	Sections 359A, s359B, 359D and 359E provides that unlawful stalking, intimidation, harassment or abuse is listed conduct deliberately directed at a person that *would cause apprehension or fear, reasonably arising in all the circumstances, of violence to or against the stalked person or another person, or causes detriment, reasonably arising in all the circumstances, to the stalked person or another person* (per the primary "stalking" definition at s359B). The fear or detriment must be "reasonably arising in all the circumstances." So – the conduct is deliberate and targeted, but it may not have been intended to cause apprehension of fear or violence. Rather, the latter is on the basis of the reasonable view.	5 years imprisonment.	An aggravated offence is one that involves actual or threatened violence, use or presence of a weapon. Section 52B also provides that stalking is a prescribed offence for which the circumstances of aggravation in that section apply. Those circumstances involve offending that was wholly or partly motivated by hatred or serious contempt for a person or group of persons based on their race, sexuality, sex characteristics, or gender identity (presumed or real).

			The penalty is uplifted to 7 years imprisonment for simple aggravation. The penalty is also uplifted to 7 years imprisonment if a domestic relationship exists between the offender and the stalked person. The penalty is further lifted to a maximum of 10 years imprisonment if any of the acts are done because or when the stalked person is a law enforcement officer investigating the activities of a criminal organisation.
Crimes Act 1958 (Vic)	Section 21A provides that a person must not stalk another person and requires *intention to cause physical or mental harm or arousal of apprehension or fear for their or another's safety*. Intention means: (a) the offender knows that engaging in a course of conduct of that kind would be *likely* to cause such harm or arouse such apprehension or fear; or (b) the offender in all the particular circumstances ought to have understood that engaging in a course of conduct of that	10 years imprisonment.	No aggravated offence.

	kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.		
Criminal Code Act 1983 (NT)	Section 189 requires repeated instances of conduct with the *intention of causing physical or mental harm, or apprehension or fear for safety*, and the *conduct actually had that effect*. Intention includes if the offender knows, *in the particular circumstances*, that a reasonable person would have been aware that engaging in such conduct would be likely to cause such apprehension or fear.	2 years imprisonment.	An aggravated offence requires that the conduct contravened a condition of bail, or an injunction or order imposed by a court (either under a Commonwealth law, the Territory, a State or another Territory of the Commonwealth) or the offender was in possession of an offensive weapon. Penalty is increased to 5 years imprisonment.
Criminal Law Consolidation Act 1935 (SA)	Section 19AA requires any of the listed conduct on at least 2 separate occasions, *intending to cause serious physical or mental harm or serious apprehension or fear*. Additionally provides that a person charged with stalking is to be taken as having been charged in the alternative with offensive behaviour so that if the court is not satisfied that the charge of stalking has been established but is satisfied that the charge of offensive behaviour is established then the court may convict the person of that instead. Note: The South Australian government has very recently passed an Act to insert 'or ought reasonably to have known that'	3 years imprisonment.	Section 5AA sets out the circumstances for an aggravated offence. This includes: • Deliberately and systematically inflicting severe pain on the victim; • Use of or threatening to use an offensive weapon; • The offending was against a police officer,

	into section 19AA, thereby broadening the scope of the mens rea.		prison officer or other law enforcement officer acting in the course of their official duty or in retribution against the officer. • And many more circumstances. Penalty is increased to 5 years imprisonment.