

LEGAL GUIDE TO RELEVANT CRIMINAL OFFENCES IN THE AUSTRALIAN CAPITAL TERRITORY

Introduction

Technology-facilitated stalking and abuse is the use of technology (such as the internet, social media, mobile phones, computers, and surveillance devices) to stalk and perpetrate abuse on a person.

Such behaviour includes:

- Making numerous and unwanted calls to a person's mobile phone
- Sending threatening and/or abusive messages (text messaging, Whatsapp, Snapchat, Facebook messaging, Twitter)
- Hacking into a person's email or social media account to discover information about them
- Hacking into a person's email or social media account to impersonate them and send abusive messages to family/friends of that person
- Using surveillance devices to spy on a person
- Using tracking devices to follow a person
- Sharing, or threatening to share, intimate pictures of a person

This legal guide is one of a set of three guides that looks at areas of law relevant to people experiencing technology-facilitated stalking and abuse.

Legal Guide to Relevant Criminal Offences in the ACT

This guide looks at the various criminal offences that may apply to a person who is perpetrating technology-facilitated stalking and abuse.

For information on other areas of law see:

Legal Guide to Surveillance Legislation in the ACT

This guide looks at what the law says about surveillance devices – when it is an offence to use them and what the restrictions are on sharing information/videos/pictures obtained through the use of surveillance devices.

Legal Guide to Domestic Violence Orders

This guide looks at how people can obtain protection orders from the court to protect them from technology-facilitated stalking and abuse. In the ACT these protection orders are called Domestic Violence Orders (DVOs).

DISCLAIMER: The use of technology-facilitated violence is a developing area of the law. The legal information, examples and scenarios contained in the guide are intended to explain the law in general terms only and are not legal advice. They cannot be relied upon or applied by readers in their own cases. Each set of circumstances needs to be looked at individually. You should seek legal advice about your own particular circumstances.

Terminology

Language of 'Victim' vs 'Survivor'

Some women who are experiencing, or who have experienced, domestic violence use the term 'victim' of domestic violence to describe themselves. Others believe the term 'survivor' of domestic violence more accurately reflects their experience.

Whilst acknowledging that each woman's experience is unique and individual to her circumstances, for consistency, these guides will refer to women who are experiencing, or who have experienced, domestic violence as 'victims' of domestic violence.

Gender and Language

While domestic violence can happen in many circumstances (including in non-heterosexual relationships), in the vast majority of reported domestic violence cases men are the perpetrators and women the victims.

For this reason these guides use 'he' to refer to perpetrators and 'she' to refer to victims. This is not intended to exclude other situations.

Criminal Offence (or offence)

A criminal offence is an offence against the State. It is commonly referred to as 'breaking the law'.

Summary offence

Less serious offences (such as minor theft), are known as summary offences. Summary offences normally have a maximum penalty of no more than 2 years imprisonment or are not punishable but imprisonment at all.

Indictable (serious) offence

More serious offences (such as murder, manslaughter, sexual assault) are known as indictable offences. Indictable offences are punishable by imprisonment exceeding 2 years.

Charge

When a person is charged with an offence, it means that the police have formally accused that person of committing an offence.

Conviction

When a person is convicted of an offence, it means that person has either pleaded guilty to committing the offence, or a court has found that person guilty of committing the offence.

Penalty unit

A penalty unit describes the amount payable for a fine.

Penalty units are used instead of dollar amounts because the rate for penalty units is indexed for inflation and may therefore change from time to time.

The dollar amount for one penalty unit is set out in section 133 of the Legislation Act 2001 (ACT) and increases with inflation. As of 2015: one penalty unit = \$150 (for individuals).

Therefore, an offence with a maximum penalty of a fine of 50 penalty units will have a maximum fine of \$7,500.

RELEVANT CRIMINAL OFFENCES

Some forms of technology-facilitated stalking and abuse are against the law. If it is unlawful, then the person responsible can be charged with a criminal offence.

This guide will look at some of the offences under ACT and Commonwealth laws that are relevant to technology-facilitated stalking and abuse.

Note: The Listening Devices Act 1992 (ACT) and Domestic Violence and Protection Orders Act 2008 (ACT) also contain relevant offences – these offences are covered in the Legal Guide to Surveillance Legislation and the Legal Guide to Domestic Violence Orders.

This guide covers the following legislation:

Criminal Code 2002 (ACT)

1. Blackmail (s 342)
2. Threat to cause property damage – fear of death or serious harm (s 406)
3. Threat to cause property damage (s 407)
4. Unauthorised access, modification or impairment with intent to commit serious offence (s 415)
5. Unauthorised modification of data to cause impairment (s 416)
6. Unauthorised impairment of electronic communication (s 417)
7. Unauthorised access to or modification of restricted data held in computer (s 420)

Crimes Act 1900 (ACT)

8. Threat to kill (s 30)
9. Threat to inflict grievous bodily harm (s 31)
10. Demands accompanied by threats (s 32)
11. Stalking (s 35)
12. Intimate observations or capturing visual data etc (s 61B)

Criminal Code 1995 (Cth)

13. Dealing in identification information (s 372.1)
14. Interception devices (s 474.4)
15. Offences using a carriage service
 - To make a threat (s 474.15)
 - To menace, harass or cause offence (s 474.17)

Telecommunications (Interception and Access) Act 1979 (Cth)

16. Telecommunication not to be intercepted (s 7)
17. No dealing in intercepted information or interception warrant information (s 63)
18. Civil remedies unlawful interception or communication (s 107A)

LEGAL ADVICE – At any stage, it is important for a person to obtain legal advice about their situation and the options available to them. Please see the legal services directory on the support page of www.smartsafe.org.au for referrals to the nearest legal service

Criminal Code 2002 (ACT)

1. Blackmail (section 342)

It is an offence for a person to make an unwarranted demand with a menace of someone else with the intention of obtaining gain or causing loss. The demand does not need to be for money or other property.

Menace includes making an express or implied threat to of action that is detrimental or unpleasant to someone else. For the behaviour to be menacing it must be a threat that would be likely to cause a person of normal stability and courage to act unwillingly, or it would be likely to cause the individual to act unwillingly because of their particular vulnerability, known to the person making the threat.

Gain can be of property (whether temporary or permanent) or the supply of services and can also include keeping what one already has. A loss can mean a loss of property (whether temporary or permanent) (see s 300).

Maximum penalty: 1,400 penalty units, imprisonment for 14 years or both.

- **For example,** a person demands money from his ex-partner and if she does not comply, he will post a sex tape of the victim on the Internet.

2. Threat to cause property damages – fear of death or serious harm (section 406)

It is an offence for a person to threaten to damage property where they are reckless about causing that person to fear that if the threat were carried out, it would kill or cause serious harm to that person or another person. It is not necessary to prove that the threatened party actually feared the threat would be carried out.

Maximum penalty: 700 penalty units, imprisonment for 7 years or both.

- **For example,** a person sends his ex-partner a text message saying that he will burn the woman's house down while she is sleeping.

3. Threat to cause property damages (section 407)

It is an offence for a person to threaten to damage property that belongs to another person where they intend for that person to fear the threat will be carried out. It is not necessary to prove that the threatened party actually feared the threat would be carried out.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- **For example,** a person sends his ex-partner a text message saying that he will cut up all her clothes and burn her diary.

4. Unauthorised access, modification or impairment with intent to commit serious offence (section 415)

It is an offence if a person causes unauthorised access or modification of data in a computer, or to cause unauthorised impairment of electronic communication to or from a computer, where that person knows it was unauthorised and they intend to commit or enable a serious offence (e.g., an offence punishable by imprisonment for 5 years or longer). It does not matter whether it was possible for the serious offence to be carried out.

Maximum penalty: the maximum penalty applicable if the person had committed, or enabled the commission of, the serious offence in the ACT.

- **For example,** a woman flees a domestic violence situation and is in hiding. The perpetrator infects her computer with spyware so can he can find out her new address and posts that address online on a forum asking other men to go to the address and sexually assault her.

5. Unauthorised modification of data to cause impairment (section 416)

It is an offence if a person causes unauthorised modification of data held in a computer knowing the modification is unauthorised. The person must intend by the modification to impair access, reliability, security or the operation of data held in the computer, or be reckless about any such impairment. It does not matter whether there was any actual impairment caused.

Maximum penalty: 1,000 penalty units, imprisonment for 10 years or both.

- **For example,** a man infects his ex-partner's computer with a virus so she can no longer access her computer files.

6. Unauthorised impairment of electronic communication (section 417)

It is an offence if a person causes unauthorised impairment of electronic communication to or from a computer, knowing the impairment is unauthorised. The person must intend to impair electronic communication to or from the computer, or be reckless about any such impairment. The impairment must be more than mere interception of the communication.

Maximum penalty: 1,000 penalty units, imprisonment for 10 years or both.

- **For example,** a man infects his ex-partner's computer with a virus so she can no longer send emails from her computer

7. Unauthorised access to or modification of restricted data held in computer (section 420)

It is an offence for a person to cause unauthorised access to or modification of restricted data held in a computer knowing it is unauthorised and intending to cause the access or modification.

Restricted data includes data restricted by an access control system, for example, where you need a password to log in to the computer.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- **For example,** a person hacks in to his ex-partner's computer and accesses or deletes her files. It is not clear whether the data would be considered restricted if, for example, she had shared her password with him.

Crimes Act 1900 (ACT)

8. Threat to kill (section 30)

It is an offence to make a threat to another person to kill them or any third party, intending them to fear the threat will be carried out or being reckless to their fear. The threat must be in circumstances where a reasonable person would fear it would be carried out.

Maximum penalty: imprisonment for 10 years.

- **For example,** a person sends his ex-partner a text message saying that he will kill her or her child and because of the history of domestic violence she feared it would be carried out.

9. Threat to inflict grievous bodily harm (section 31)

It is an offence to make a threat to another person to inflict grievous bodily harm on them or any third party, intending them to fear the threat will be carried out or being reckless to their fear. The threat must be in circumstances where a reasonable person would fear it would be carried out.

Maximum penalty: imprisonment for 5 years.

- **For example,** a person sends his ex-partner a private message on social media stating in detail how he will injure her in a very serious or permanent way

10. Demands accompanied by threats (section 32)

Demands with threats to kill or cause grievous bodily harm

It is an offence for a person to make demands of another person with a threat to kill or inflict grievous bodily harm on a person.

Maximum penalty: imprisonment for 20 years.

- **For example,** a person calls his ex-partner and says if she doesn't allow him to see the children, he will kill her

Demands with threats to endanger

It is an offence for a person to make demands of another person with a threat to endanger the health, safety or physical wellbeing of a person.

A threat to endanger a person's health, safety or physical wellbeing does not include threats to publish compromising photos of a person (R v Butler [2012] CTSC 124, 35).

Maximum penalty: imprisonment for 10 years.

- **For example,** a person calls his ex-partner and says if she doesn't get back together with him, he will send someone to her house to beat her up

11. Stalking (section 35)

It is an offence for a person to stalk someone with intent to harm them, harass them or to cause apprehension or fear of harm. Harm includes temporary or permanent physical or mental harm.

Stalking is where on at least two separate occasions a person does one or more of the following:

- Keeps the other person under surveillance
- Interferes with the property in possession of the stalked person
- Gives or sends offensive material to the other person, or leaves offensive material where it will be found by, given to or brought to the attention of the other person
- Telephones, sends electronic messages to or otherwise contacts the stalked person;
- Sends electronic messages about the stalked person to anybody else
- Makes electronic messages about the stalked person available to anybody else
- Acts covertly in a way that could reasonably be expected to arouse apprehension or fear in the stalked person
- Engages in conduct amounting to intimidation, harassment or molestation of the stalked person

Note: This section covers a broad range of conduct that can be considered stalking, above is only those most relevant to technology-facilitated stalking and abuse.

Maximum penalty: imprisonment for 2 years. If the offence involved a contravention of an injunction or other court order or if the offender was in possession of an offensive weapon, then imprisonment for 5 years.

- **For example,** in Scott William Longfield v Amanda Louise Glover [2005] ACTSC 25 the court held that Longfield had been stalking and harassing his ex-partner Glover by ringing her at work, home and on her mobile, saying at one point "I control your life".

12. Intimate observations or capturing visual data (section 61B)

Observing or capturing visual data where indecent or an invasion of privacy (s 61B(1))

It is an offence to observe another person with the aid of a device or to capture visual data of them where a reasonable person would find it to be indecent or an invasion of privacy in the circumstances.

It is a defence to this offence if the person can prove:

- They believed on reasonable grounds that the other person consented; or
- They did not know and could not reasonably be expected to have known, that it was without the other person's consent

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- **For example,** setting up a surveillance camera in a woman's bedroom or car to observe her without her knowledge

Observing or capturing visual of private region (s 61B(5))

It is an offence to observe another person with the aid of a device or to capture visual data of:

- Their genital or anal region; or
- For a female or a transgender or intersex person who identifies as a female—the breasts; and

Where a reasonable person would find it to be an invasion of privacy in the circumstances.

It is a defence to this offence if the person can prove:

- They believed on reasonable grounds that the other person consented; or
- They did not know and could not reasonably be expected to have known, that it was without the other person's consent

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

- **For example,** setting up a surveillance camera in a woman's bathroom to observe her in a state of undress without her knowledge

Criminal Code 1995 (Cth)

13. Dealing in identification information (section 372.1)

It is an offence to make, supply or use the identification information of another person to pretend to be, or to pass oneself off as another person for the purpose of committing or facilitating a Commonwealth indictable offence (meaning, a crime under a Commonwealth Act that is punishable by imprisonment for more than 12 months).

Maximum penalty: Imprisonment for 5 years.

- **For example,** a person makes a social media account in his ex-partner's name, pretending to be her. He posts her personal details and tries to add her friends so they see the account, If this is done for the purpose of harassing the ex-partner, for example, he starts posting offensive comments while pretending to be her (see s 474.17)
- This is commonly referred to as 'identity fraud'

14. Interceptions devices (section 474.4)

It is an offence to manufacture, advertise, sell, or possess an interception device.

Interception device includes an apparatus or device that is capable of intercepting a communication passing over a telecommunication system that could reasonably be regarded as having been designed for that purpose (see s 473.1).

Maximum penalty: Imprisonment for 5 years.

- **For example,** it is an offence for a person to have in their possession an audio bug device used to intercept phone calls covertly

15. Offences relating to the use of a carriage service (sections 474.15 and 474.17)

A 'carriage service' means a service for carrying communications by means of guided and/or unguided electromagnetic energy (s 7 Telecommunications Act 1997 (Cth)). Examples include:

- Telephone services
- Internet access services
- Voice over Internet Protocol (VoIP) services (eg, Skype)

Using a carriage service to make a threat to kill (s 474.15)

It is an offence for a person to use a carriage service to make a threat to a person that they will kill them or a third person, intending them to fear the threat will be carried out. It is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.

Maximum penalty: Imprisonment for 10 years.

- **For example,** sending a person a text message, email or instant message or a telephone or videoconference call where they threaten to kill their ex-partner or her child

Using a carriage service to make a threat to cause serious harm (s 474.15)

It is also an offence for a person to use a carriage service to make a threat to a person that they will cause them or a third person serious harm, intending them to fear the threat will be carried out. It is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.

Maximum penalty: Imprisonment for 7 years.

- **For example,** sending a person a text message, email or instant message or a telephone or videoconference call where they threaten to break the limbs of their ex-partner or her child

Using a carriage service to menace, harass or cause offence (s 474.17)

It is an offence for a person to use a carriage service in a way that reasonable persons would regard as being menacing, harassing or offensive.

Maximum penalty: Imprisonment for 3 years.

- **For example,** sending a person a large volume of offensive text messages, emails or instant messages or a telephone or videoconference calls

Telecommunications (Interception and Access) Act 1979 (Cth)

16. Interception of telecommunications (section 7)

It is an offence for a person to intercept or do any act or thing that will enable that person or another person to intercept a communication passing over a telecommunications system.

Interception of a communication passing over a telecommunications system means listening or recording the communication without the knowledge of the person making the communication.

There are limited exceptions, for example, where there was a warrant issued.

Maximum penalty: Imprisonment for 2 years (see s 105).

- **For example** someone pays a person to set up a phone bug on their ex-partners phone without their knowledge, to listen in on their calls
- Due to the definition of passing over (s 5F) it would not be an offence to read a person's inbox of emails or SMS messages without their consent because the messages have already been received and are not in transit

17. Dealing with intercepted information (section 63)

A person must not communicate to another person, make use of, or make a record of, or give evidence in a proceeding any information that has been intercepted (subject to the other provisions of Part 2-6).

Maximum penalty: Imprisonment for 2 years (see section 105).

18. Civil remedies relating to unlawful interception and communication (section 107A)

The legislation provides for civil remedies for the unlawful interception of a communication passing over a telecommunications system, and the unlawful communication of such information.

Some orders the court can make are:

- An order declaring the interception or communication was unlawful
- An order that the defendant pay to the protected person damages
- An injunction