

LEGAL GUIDE TO VIOLENCE RESTRAINING ORDERS IN WESTERN AUSTRALIA

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 Violence Restraining Orders

This guide looks at how people can obtain protection orders from the court to protect them from technology-facilitated stalking and abuse. In Western Australia these protection orders are called **Violence Restraining Orders (VROs)**.

For information on other areas of law see:

Legal Guide to Surveillance Legislation in Western Australia

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 Relevant Criminal Offences in Western Australia

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

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'.

Simple offence

Less serious offences (such as common assault), are known as simple offences. When an offence is not stated in legislation to be an indictable offence (see below), it is a simple offence (see the *Interpretation Act 1984* (WA)).

Indictable offence

More serious offences (such as murder, manslaughter, sexual assault) are known as indictable offences.

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.

VIOLENCE RESTRAINING ORDERS

The *Restraining Orders Act 1997* (WA) (**'the Act'**) is the piece of legislation (law) in Western Australia that allows the courts to make orders protecting people from abuse.

A person who is experiencing domestic violence (**'person seeking to be protected'**) may apply to the Magistrates Court of Western Australia for a violence restraining order (**'VRO'**). Applications are made through the police who can also make temporary orders that last until the matter goes to court (interim order). A VRO can protect a person by ordering the person against whom the VRO is made (**'respondent'**) not to commit further acts of domestic violence against the person seeking to be protected.

It's important to note that a VRO is a *civil* order, meaning it is not a criminal charge. However, an application for a VRO may be accompanied by related criminal charges and criminal penalties may apply if a VRO is breached.

1. When can a VRO be made?

A violence restraining order is made when an *act of abuse* has been, or is feared will be committed.

An *act of abuse* includes family and domestic violence or an act of personal violence. For example:

- Assaulting or causing injury to a person or threatening to do so
- Kidnapping or depriving a person of their liberty or threatening to do so
- Pursuing a person (or third person) to intimidate them, or threatening to do so
- Behaving in a ongoing manner that is intimidating, offensive or emotionally abusive where the parties are in a family and domestic relationship
- Damaging property where the parties are in a family and domestic relationship

It also includes getting another person to do any of the above acts on that person's behalf.

If the parties are not in a family and domestic relationship and the respondent is behaving in an intimidating or offensive manner or has damaged the person's property, the person can apply for a misconduct restraining order (see s 34)

Where can I find this information in the Act?

Please see sections 11A & 11B of the *Act*.

2. Can technology-facilitated stalking and abuse be a form of family and domestic violence?

The short answer is **yes**; technology-facilitated stalking and abuse may be a form of domestic violence.

For example threats made over the phone, email or social media would be captured by the above definition of an *act of abuse*.

Behaviours such as the use of surveillance devices, sharing intimate photos of the person without consent or technology-facilitated stalking (e.g. tracking a person through GPS on their phone) may be considered domestic violence if the behaviour is ongoing and intimidating, offensive or emotionally abusive.

To amount to family and domestic violence, there must be a *family and domestic relationship*. This is defined broadly in the *Act* to include:

- Current or previous de factos or spouses
- Relatives (e.g. brother, aunt, cousin, father, step-brother, etc.)
- A child who resides, regularly stays with or is under guardianship of a person
- Those who have been in an intimate or personal relationship (this does not necessarily mean a sexual relationship)
- Relatives through the current or previous de facto or spouse (e.g. in laws such as a brother-in-law, one party's child or parent)
- Those who could be considered relatives according to the person's cultural, social or religious background

Where can I find this information in the Act?

Please see sections 4 & 6 of the *Act*.

3. Who can apply for a VRO?

An application for a VRO may be made by:

- The police
- A person seeking protection or their representative or guardian
- A parent or guardian where the person seeking protection is a child

Applying for an VRO

If the police have not made an application, a person can apply for a VRO at their local Magistrates Court, filling out the application and affidavit in support of the application (linked at the end of this guide).

When the application is lodged, the applicant can ask for the first hearing to go ahead without the respondent being present. The Magistrate may grant an interim order if satisfied that the respondent committed an act of abuse against the person seeking to be protected or there are reasonable fears the respondent will commit an act of abuse. This is a temporary order that comes into effect when the police serve it on the respondent. It usually lasts until a decision about a final order is made, however, if the respondent does not lodge a consent or objection within 21 days of being served, the order will automatically become a final VRO.

Seek legal advice from a community legal centre (e.g. Women's Law Centre), Legal Aid or a private lawyer on applying for a VRO. Court support and assistance can also be sought from the Family Violence Service.

Where can I find this information in the Act?

See section 25 of the *Act*.

4. How can a VRO protect a person from technology-facilitated stalking or abuse?

The conditions in a VRO depend on the particular circumstances of the matter.

The court can impose whatever restraints it considers appropriate to prevent the respondent committing an *act of abuse* or from behaving in a manner that would make the person who is protected fear an *act of abuse*.

The *Act* sets out examples of conditions the applicant can apply for which may assist in prohibiting technology-facilitated domestic violence. These include, orders prohibiting the respondent from:

- Being on or near certain premises, e.g. where the person lives, works or is likely to be
- Communicating or attempting to communicate with the other person by whatever means
- Limiting a person's use of certain property, even if the person owns that property (for example, preventing them from accessing a shared computer)
- Causing or allowing another person to engage in any of the above conduct

The applicant for the VRO can also ask the court to include conditions that are specific to their situation and which will make them feel safe. For example:

Suggested wording to cover 'revenge porn' situations

The person bound must not directly or indirectly publish, share or threaten to publish or share images or videos of the person protected that are of an intimate nature

Suggested wording to cover 'tracking/surveillance device' situations

The person bound must not attempt to locate, ask someone else to locate, follow or keep the person protected under surveillance.

A person bound **must** follow the conditions of a VRO. If the person bound breaks any of the VRO conditions (called contravening or breaching the VRO), it is an offence and the police can lay charges.

Where can I find this information in the Act?

See section 13 of the *Act*.

5. What if a person is in urgent need of protection?

Where for example, a matter is **urgent** or it is late at night or the person is in a rural location, an application for a **violence restraining order** may be made by either:

- The police as a **police order** or;
- As a **telephone application**

A police order may be made where the officer believes a person has committed an act of *family and domestic violence* or fears they will and the order is necessary to ensure the person's safety. It comes into effect as soon as it is served on the respondent, and lasts for 72 hours or less. It provides temporary protection until an application for a violence restraining order can be made.

Another option, for example, where the police are not involved, is to make a telephone application. Once an application is made, a hearing can occur, for example, by telephone, fax, radio, videoconference or email. The Magistrate may decide to make a **telephone order** (which lasts for 72 hours or less), an **interim order** or decide to adjourn or dismiss the matter.

Where can I find this information in the Act?

See sections 17 – 24 & 30A of the *Act*.

6. How long does a VRO last?

A final VRO usually lasts for the period specified in it, or if not specified, then 2 years.

Where can I find this information in the Act?

See section 16 of the *Act*.

7. What if a person breaks the conditions of a VRO by engaging in technology-facilitated stalking or abuse?

When a person does not obey the conditions of a VRO, this is called a **breach** or **contravention** of the VRO. It is an offence to breach a VRO.

Maximum penalty: \$6 000 or imprisonment for 2 years, or both. If a person has repeatedly breached the VRO, a prison sentence may be considered.

All contraventions should be reported to the police so they can investigate (see 1.9 below for evidence gathering tips).

If the person, who is protected aids, abets, counsels, or procures the respondent to engage in behaviour that contravenes the VRO, the person seeking to be protected **will not** have committed an offence. However, it may lead to a variation or cancellation of the order

- For example, there is an order prohibiting the person bound from contacting the person protected in any way. If the person protected sends the person bound a text message and he replies, he has breached the order and she cannot be charged with an offence. However, the order may be modified at court.

Where can I find this information in the Act?

See sections 61 & 61A of the Act.

8. Gathering evidence to prove a technology-facilitated stalking or abuse

Sometimes it can be difficult to prove technology-facilitated stalking or abuse. Some tips for gathering evidence to show a DVO is necessary or a DVO has been contravened include:

- Do not delete text messages, voicemail messages, photos
- Try and save any evidence to a computer/USB flash drive
- Use screenshots and save the image as the date & time it was taken. If taking screenshots of websites, always include the URL in the screenshot
- Keep a diary or voice notes of incidents including dates and times
- Consider giving police written permission to access your phone, computer, Facebook, email account etc. if a matter is being investigated

9. Further help and information

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.

*Note: certain conduct in relation to technology-facilitated stalking or abuse may constitute a criminal offence. Please see the **Legal Guide on Relevant Criminal Offences** and **Legal Guide to Surveillance Legislation** for further information.*