

LEGAL GUIDE TO RELEVANT CRIMINAL OFFENCES 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 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.

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 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)**.

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.

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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 **Western Australian** and **Commonwealth** laws that are relevant to technology-facilitated stalking and abuse.

*Note: The Surveillance Devices Act 1998 (WA) and the Restraining Orders Act 1997 (WA) also contain relevant offences – these offences are covered in the **Legal Guide to Surveillance Legislation** and the **Legal Guide to Violence Restraining Orders**.*

This guide covers the following legislation:

Criminal Code Act 1913 (WA)

1. Threat with intent to gain etc (s 338A)
2. Threats (s 338B)
3. Statement or act creating false apprehension as to existence of threat or danger (s 338C)
4. Stalking (s 338E)
5. Criminal defamation (s 345)
6. Demanding property with threats with intent to extort or gain (s 397)
7. Threats etc. with intent to extort etc. (s 398)
8. Unlawful use of computer (s 440A)
9. Making, using or supplying identification material with intent to commit indictable offence (s 490)

Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)

1. Leaving publications in certain places (s 65E)
2. Unclassified, RC and X 18+ films, sale of (s 73)
3. Leaving films in certain places (s 80)
4. Possession or copying of certain films (s 81)

Criminal Code 1995 (Cth)

1. Dealing in identification information (s 372.1)
2. Interception devices (s 474.4)
3. 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)

1. Telecommunication not to be intercepted (s 7)
2. No dealing in intercepted information or interception warrant information (s 63)
3. 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 Act 1913 (WA)

4. Threats (sections 338A-338C)

Threats include those to kill, injure or endanger a person, or to destroy, endanger or harm property or to take control of a building by force or violence or to cause a detriment of any kind to a person (see s 338).

Threats with intent to gain (section 338A)

It is an offence for a person to make a **threat** with **intent to**:

- Gain a benefit (does not have to be monetary); or
- Cause a detriment (does not have to be monetary); or
- Prevent or hinder someone doing an act they are lawfully entitled to do; or
- Compel someone to do an act where they are lawfully entitled to not do that act

Maximum penalty: imprisonment for 7 years, however, if it involved a threat to kill, then imprisonment for 10 years.

- For example, a person threatens his ex-partner that he will upload a sex tape of her online if she does not pay him money

Threats (section 338B)

It is an offence to threaten to:

- Kill, injure or endanger a person; or
- To destroy, endanger or harm property; or
- To take control of a building by force or violence; or
- To cause a detriment of any kind to a person

Maximum penalty: imprisonment for 3 – 14 years, depending on the circumstances.

- For example, in a 2015 unreported case, a man was found guilty of this offence where he sent text messages to a woman he had been in a brief relationship with, asking her to upload a sex tape they had made onto a porn sharing website. When she refused, he sent messages to the victim demanding nude photos. He was fined \$2,000 with no criminal conviction recorded

Statement or act creating false apprehension as to existence of threat or danger (s 338C)

It is an offence to make a statement or to convey information knowing it is false, which indicates that a **threat** has been made or there is an intention, proposal or plan to:

- Kill, injure or endanger a person; or
- To destroy, endanger or harm property; or
- To take control of a building by force or violence; or
- To cause a detriment of any kind to a person

Maximum penalty: imprisonment for 3 – 10 years, depending on the circumstances.

- For example, a person makes up a lie, telling his ex-partner that his brother was using his computer when he found naked photos of her, and his brother now plans to post them online

5. Stalking (section 338E)

Intimidate includes:

- Causing physical or mental harm; or
- Causing apprehension or fear; or
- Preventing or hindering someone doing an act they are lawfully entitled to do; or
- Compelling someone to do an act where they are lawfully entitled to not do that act

Pursue includes:

- Repeated intentional communication; or
- Repeatedly intentional following someone; or
- Watching or approaching a place where a person lives, works or happens to be; or
- Breaching a restraining order or bail condition

Stalking with intent to intimidate (s 338E(1))

It is an offence for a person to **pursue** another with the intent to **intimidate** them or a third person.

Maximum penalty: imprisonment for 3 years or 8 years if aggravated.

- For example, a person repeatedly text messages and calls his ex-partner stating that he is watching her and is going to “get her” and it can be shown he intended to intimidate her

Stalking generally (s 338E(2))

It is an offence for a person to **pursue** another in a manner that could reasonably be expected to intimidate and in fact does.

Maximum penalty: imprisonment for 12 months and a fine of \$12 000.

- For example, a person repeatedly calls his ex-partner and hangs up before she can pick up the phone. This happens about 10 times a day over a week. He argues that he just wanted to talk but would get nervous and hang up. This behaviour could reasonably be expected to intimidate the victim, even if it was not his intention.

6. Criminal defamation (s 345)

It is an offence for a person to publish defamatory material about another living person without *lawful excuse* and:

- Knowing the matter to be **false** or without having regard to whether it is true or false; and
- Intending to cause **serious harm** or without having regard to whether it will cause harm

A person has *lawful excuse* if they can prove they would have a defence to civil law defamation. Some defences include proving the defamatory allegations are substantially true or are a fair report of proceedings (e.g., a court matter) or that it was an honest opinion with a proper basis or that the matter is trivial and it is unlikely the defamed person suffered any harm.

Maximum penalty: Imprisonment for 3 years.

- For example, a person posts on the Facebook page of a school where his ex-partner works as a teacher. He makes up false accusations that his ex-partner is having sex with students at the school, as a consequence, her reputation is damaged

7. Threats or demands to extort etc. (ss 397 & 398)

It is an offence to:

- Make written or oral threats of injury or detriment of any kind (s 397); or
- Accuse or threaten to accuse a person of committing an indictable offence (s 398)

To extort or gain anything from that person.

Maximum penalty: imprisonment for 14 - 20 years, depending on the circumstances.

- For example, a person tells his ex-partner he will make up a lie and tell the police she is sexually abusing their child unless she agrees to film a sex tape with him

8. Unlawful use of computer (s 440A)

It is an offence for a person to use a restricted-access computer where they are not authorised to do so or they do not use it in accordance with their authorisation. The person will be liable if they intend or do in fact gain benefit or cause detriment to the owner (does not have to be monetary).

Use means to gain access to information stored in the system or operate the system in some other way.

Restricted-access computer is one that requires a password, which is only known to the user.

Maximum penalty: imprisonment for 2 - 10 years, depending on the circumstances.

- For example, a person hacks into his ex-partner's computer and deletes all her personal files, including work files

9. Making, using or supplying identification material with intent to commit indictable offence (s 490)

It is an offence for a person to make, use or supply identification material with the intention that the material will be used to commit an indictable offence.

Identification information could include, for example a person's name, address, date or place of birth, marital status, relatives, bank details or records of their details.

Maximum penalty: imprisonment for 7 years or the penalty appropriate to an attempt to commit the indictable offence, whichever is greater.

- For example, a man posts his ex-partner's name, photo and address on a forum instructing other people on the forum to go to her house and rape her.
- When someone posts a person's personal identification information online in this manner, it is sometimes referred to as 'doxing'.

Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)

Refused classification (RC) includes, for example, films that deal with sex, crime, cruelty or violence in way that offends the standards of morality, decency and propriety generally accepted by reasonable adults (*National Classification Code (May 2005)*).

X 18+ includes, for example, films (that are not RC) that contain real depictions of actual sexual activity between consenting adults that would be unsuitable for a minor to see (*National Classification Code (May 2005)*).

R 18+ includes, films (that are not RC or X 18+) that are unsuitable for a minor to see (*National Classification Code (May 2005)*).

MA 15+ includes, films (that are not RC, X 18+ or R 18+) that deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing by persons under 15 (*National Classification Code (May 2005)*).

10. Leaving publications in certain places (s 65E)

It is an offence for a person to leave a **publication** (can be written or pictorial) in a public place, or so it is visible in a public place, where:

- If it if ever put before a classification board, it would be likely to be refused classification; or
- Where it would cause offence to a reasonable adult; or
- Where it would be unsuitable for a minor to see

Maximum penalty: \$10 000.

- For example, a person prints out naked photos of his ex-partner and pastes them on street poles around her neighbourhood

11. Unclassified, RC and X 18+ films, sale of (s 73)

It is an offence for a person to **sell** an unclassified film.

Maximum penalty: \$15 000 or imprisonment for 18 months.

- For example, a person sells a sex tape of his ex-partner for profit that has not been classified

12. Leaving films in certain places (s 80)

It is an offence for a person to leave a film in a public place or on a private premises (without the occupier's permission), where it if ever put before a classification board, that film would be classified *X 18+*.

Maximum penalty: \$5,000

- For example, a person leaves a sex tape of his ex-partner on her parent's doorstep

13. Possession or copying of certain films (s 81)

Possession or copying refused classification film (s 81(1))

It is an offence for a person to **possess** or **copy** a film where it would be *refused classification* if ever put before a classification board.

Maximum penalty: \$10,000

- Possession or copying *X 18+*, *R 18+* or *MA 15+* film (s 81(2))
- It is an offence for a person to **possess** or **copy** a film with the intention of exhibiting it or selling it, where that film would be classified *X 18+*, *R 18+* or *MA 15+* if it were ever put before a classification board.
- If the person was in possession of, or made 10 or more copies of the film, that is sufficient to prove the person had the intention of exhibiting or selling the film, in the absence of contrary evidence.

Maximum penalty: \$10,000

Criminal Code 1995 (Cth)

14. 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'

15. 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

16. 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)

17. 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

18. 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).

19. 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