

## LEGAL GUIDE TO RELEVANT CRIMINAL OFFENCES IN NEW SOUTH WALES

### 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 NSW**

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 NSW**

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 Apprehended 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 NSW these protection orders are called Apprehended Violence Orders (AVOs).

*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, 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 parking violations), are known as summary offences. Summary offences normally have a maximum penalty of no more than 12 months 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 12 months.

### 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.

For example, some offences have a maximum penalty of a fine of 100 penalty units, others have a maximum penalty of a fine of 50 penalty units.

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.

Section 17 of the Crimes (Sentencing Procedure) Act 1999 (NSW) states the dollar amount for one penalty unit. As of July 2015: one penalty unit = \$110.

Therefore, an offence with a maximum penalty of a fine of 50 penalty units will have a maximum fine of \$5,550.

## 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 looks at some of the offences under NSW and Commonwealth law that are relevant to technology-facilitated stalking and abuse.

*Note: The Surveillance Devices Act 2007 (NSW) and Crimes (Domestic and Personal Violence) Act 2007 (NSW) also contain relevant offences – these offences are covered in the **Legal Guide to Surveillance Legislation** and the **Legal Guide to Apprehended Violence Orders**.*

This guide covers the following legislation:

### Crimes Act 1900 (NSW)

1. Documents containing threats (s 31)
2. Voyeurism (s 91J)
3. Filming a person engaged in a private act (s 91K)
4. Filming a person's private parts (s 91L)
5. Installing device to facilitate observation or filming (s 91M)
6. Blackmail offence (s 249K)
7. Unauthorised access, modification or impairment with intent to commit serious indictable offence (s 308C)
8. Unauthorised access to or modification of restricted data held in computer (s 308H)
9. Publishing indecent articles (s 578C)

### Criminal Code 1995 (Cth)

10. Dealing in identification information (s 372.1)
11. Interception devices (s 474.4)
12. 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)

13. Telecommunication not to be intercepted (s 7)
14. No dealing in intercepted information or interception warrant information (s 63)
15. 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](http://www.smartsafe.org.au) for referrals to the nearest legal service**

## Crimes Act 1900 (NSW)

### 1. Documents containing threats (section 31)

It is an offence for a person, knowing the document's contents, to intentionally or recklessly send, deliver, or directly or indirectly cause to be received, any document threatening to kill or inflict bodily harm on any person.

**Maximum penalty:** Liable to 10 years imprisonment.

- **For example**, sending a message (email, text messaging, Whatsapp, Snapchat, Facebook messaging, Twitter) threatening to kill or hurt someone.

### 2. Voyeurism (section 91J)

It is an offence to observe a person, without the person's consent or knowing that the person has not consented, engaging in a private act for the purpose of obtaining sexual arousal or gratification.

**Maximum penalty:** Imprisonment for two years or a fine of 100 penalty units, or both.

A person is **engaged in a private act** if:

- the person is in a state of undress, using the toilet, showering or bathing, engaged in a sexual act of a kind not ordinarily done in public, or engaged in any other like activity; and
- the circumstances are such that a reasonable person would reasonably expect to be afforded privacy.

### 3. Filming a person engaged in a private act (section 91K)

It is an offence to **film another person who is engaged in a private act**, without the person's consent or knowing that the person has not consented, for the purpose of obtaining or enabling another person to obtain sexual arousal or sexual gratification.

**Maximum penalty:** Imprisonment for two years or a fine of 100 penalty units, or both.

- **For example**, where a sex-tape is filmed without one or both parties' consent.

If the offender constructs or adapts the fabric of any building to facilitate the filming of a person engaged in a private act, this is considered a circumstance of aggravation and the offender can be charged with an aggravated offence with a maximum penalty of imprisonment for five years.

**Maximum penalty:** Imprisonment for five years.

- **For example**, A person drills holes into the ceiling and walls of his bedroom to hide video cameras so that he can film himself have sex with his girlfriend, knowing that his girlfriend has not consented to him filming them having sex.

### 4. Filming a person's private parts (section 91L)

It is an offence to film another person's private parts, without the person's consent or knowing that the person has not consented, in circumstances in which a reasonable person would reasonably expect not to be filmed, for the purpose of obtaining or enabling another person to obtain sexual arousal or sexual gratification.

**Maximum penalty:** Imprisonment for two years or a fine of 100 penalty units, or both.

- **For example**, placing a video camera in a bathroom to film another person, without that person's consent, getting in and out of the shower.

If the offender constructs or adapts the fabric of any building to facilitate the filming of a person's private parts, this is considered a circumstance of aggravation and the offender can be charged with an aggravated offence.

**Maximum penalty:** Imprisonment for five years.

- **For example**, a person drills holes into the walls of a bathroom to hide video cameras so that he can film a family member using the shower, knowing that the person has not consented to him doing so.

*Note: A person cannot be convicted of both a section 91K offence and a section 91L offence for the same conduct that occurred on a particular occasion (the 'double jeopardy' provision).*

## 5. Installing device to facilitate observation or filming (section 91M)

It is an offence for a person, with the intention of enabling himself or another person to commit an offence against sections 91J, 91K or 91L, to install a device, construct or adapt the fabric of any building in order to facilitate the observation or filming of another person.

**Maximum penalty:** Imprisonment for two years or a fine of 100 penalty units, or both.

If offences against sections 91J, 91K or 91L are not proven, this offence may be relied upon as an alternative verdict.

## 6. Blackmail (section 249K)

It is an offence for a person to make an unwarranted demand with menaces with the intention of obtaining a gain or causing a loss.

**Maximum penalty:** Imprisonment for 10 years.

- **For example,** A person threatens to release intimate pictures of his ex-girlfriend to her family unless she gives him half of her monthly salary.

## 7. Unauthorised access to or modification of restricted data held in computer (section 308H)

It is an offence for a person to intentionally cause any unauthorised access to or modification of restricted data held in a computer, knowing that the access or modification is unauthorised. Data is restricted when it is, for example, protected by a password.

**Maximum penalty:** Imprisonment for two years.

Although the maximum penalty for this offence is two years imprisonment, this offence is considered a summary offence.

- **For example,** a person hacks a woman's computer to download intimate pictures she has of herself.

## 8. Unauthorised access, modification or impairment with intent to commit serious indictable offence (section 308C)

It is an offence for a person, knowing it is unauthorised, to:

- access data held in any computer, or
- modify data held in any computer, or
- impair electronic communication to or from any computer

with the intention of committing a serious indictable offence, or facilitating the commission of a serious indictable offence (whether by the person or by another person).

**Maximum penalty:** The maximum penalty applicable if the person had committed, or facilitated the commission of, the serious indictable offence in this jurisdiction.

- **For example,** a person hacks into his ex-girlfriend's computer to obtain intimate pictures she has of herself in order to blackmail her into giving him half of her monthly salary.

## 9. Publishing indecent articles (section 578C)

It is an offence for a person to publish an indecent article.

**Maximum penalty** for an individual: Imprisonment for 12 months or a fine of 100 penalty units, or both.

- **For example,** a man posted nude photographs of his ex-girlfriend on his Facebook account. He later removed the photographs, but then reposted them and requested, through Facebook, to be friends with the victim's relatives in order to show them the photographs. He was charged with and found guilty of an offence under s 578C. (*Police v Ravshan USMANOV* [2011] NSWLC 40).

## Criminal Code 1995 (Cth)

### 10. 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'

### 11. 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

### 12. 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)***13. 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

**14. 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).

**15. 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