

## LEGAL GUIDE TO IMAGE-BASED ABUSE LEGISLATION 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 four guides that looks at areas of law relevant to people experiencing technology-facilitated stalking and abuse.

### Legal Guide to Image-Based Abuse Legislation in the ACT

This guide looks at what the law says about image-based abuse – when it is an offence to record or distribute intimate images and what legal options exist for victims of image-based 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 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.

### Legal Guide to Family Violence Orders in the ACT

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 "Family Violence Orders (FVOs)".

## Language

### **‘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**

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.

## Terminology

### ***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 by 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***

Criminal legislation usually describes the amount payable for a fine in a “penalty unit”. Penalty units are used instead of dollar amounts because the rate for penalty units is indexed for inflation and may 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 2018, 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.

## IMAGE-BASED ABUSE

Image-based abuse occurs when a nude, sexual or otherwise intimate image is taken or shared without the consent of the person featured in the image. It can also include the threat to share such an image whether or not the image is in fact shared, or whether or not the image in question even exists.

Image-based abuse is often referred to as “revenge porn”. This term is inaccurate, as in many cases the sharing or threat to share an intimate image is not motivated by ‘revenge’, and similarly the image need not be ‘pornographic’ to be intimate and private. Image based abuse can occur for a wide range of motives, such as a desire to control, punish, humiliate or otherwise harm the victim, financial incentives, a desire for social status or notoriety or many others, and can include many different kinds of videos or images.

This guide focuses on the image-based abuse of adults. The possession and trade of “child exploitation material” are criminal offences in the Australian Capital Territory subject to a maximum penalty of 7 and 12 years’ imprisonment respectively. “Child exploitation material” includes but is not limited to material which represents the sexual parts of a child, a child is engaged in an activity of a sexual nature, or someone else engaged in sexual activity in the presence of a child, substantially for the sexual arousal or gratification of someone other than the child (*Crimes Act 1900* (ACT) ss 64, 64A, 65). Some regulations of similar material exist in the *Criminal Code 1995* (Cth) (Divisions 273, 471B, 474D).

### Image-Based Abuse Legislation in the Australian Capital Territory

#### *Crimes Act 1900* (ACT)

##### Observing or capturing visual data where indecent or an invasion of privacy (section 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 or imprisonment for 2 years or both.

- **For example:** setting up a surveillance camera in a woman’s bedroom to observe her without her knowledge.

##### Observing or capturing visual of private region (section 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
- The breasts of a female person or a transgender or intersex person who identifies as a female; 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 or imprisonment for 2 years or both.

- **For example:** using a mobile phone to take photos of a woman’s underwear under her skirt or down the front of her blouse without her consent.

### Non-consensual distribution of intimate image (section 72C)

Under this section, it is an offence to distribute an intimate image of another person knowing the other person does not consent, or being reckless as to whether the other person consents, to the distribution.

**Maximum penalty:** 300 penalty units or imprisonment for 2 years, or both.

- **For example:** A person receives a nude photograph of his partner sent by text message to his phone. He forwards the photograph to several friends without obtaining the consent of his partner.

### Non-consensual distribution of intimate image of a young person (section 72D)

Under this section, it is an offence to distribute an intimate image of a person under the age of 16. It is a defence to this section to prove either:

- that the defendant reasonably believed the person of whom the image was taken was at least 16 years old; or
- that the image is of a person older than 10 years and not more than 2 years younger than the defendant, and that person consented to the distribution of the image.

**Maximum penalty:** 500 penalty units or imprisonment for 5 years, or both.

- **For example:** A 40 year-old person posts a photo of a naked 15 year-old person taking a shower to a website.

### Threaten to capture or distribute intimate image (section 72E)

Under this section, it is an offence to threaten to capture or distribute an intimate image of another person while intending the other person fear, or being reckless as to whether the other person fears, that the threat will be carried out.

A threat may be made by any conduct, whether explicit or implicit, conditional or unconditional. It is not necessary to prove that the other person actually feared the threat would be carried out, or even that carrying out the threat was possible (for example, if the image does not exist).

**Maximum penalty:** 300 penalty units or imprisonment for 3 years, or both.

- **For example:** A person tells his partner that she must perform certain sexual acts for him, and that if she refuses, he will post a video he has recorded of the two of them having sex to her Facebook page. The person has committed an offence under this section, regardless of whether he has in fact recorded such a video or plans to share it.

### Definitions

Section 72A defines the key terms related to the above offences.

**“Distribute”** includes sending, supplying, exhibiting, transmitting or communicating to another person; or making available for viewing or access by another person, whether done in person, electronically, digitally or in any other way, except if done solely by a person in their capacity as an internet service provider, internet content host or a carriage service provider. A person is taken to have distributed an image whether or not another person views or accesses the image.

**“Intimate image”** means a still or moving image in any form that shows, or has been altered to appear to show:

- a person’s genital or anal region (whether covered by underwear or bare); or
- the breasts of a female person or a transgender or intersex person who identifies as female
- of a person engaged in sexual activity; or
- a person in a sexual manner or context.

**“Engaged in a private act”** means:

- in a state of undress; or
- using the toilet, showering or bathing; or
- engaged in an act of a sexual nature of a kind not ordinarily done in public.

## “Consent”

Sections 67 and 72F outline what does not constitute “consent” for the purposes of the above offences.

Consent is negated if that consent is caused:

- by the infliction of violence or force on the person, or on a third person who is present or nearby;
- by a threat to inflict violence or force on the person, or on a third person who is present or nearby;
- by a threat to inflict violence or force on, or to use extortion against, the person or another person;
- by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person;
- by the effect of intoxicating liquor, a drug or an anaesthetic;
- by a mistaken belief as to the identity of that other person;
- by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person;
- by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person;
- by the person’s physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
- by the unlawful detention of the person.

Also, a person does not consent to the distribution of an intimate image only because the person:

- consented to the offender distributing the image or another intimate image on another occasion;
- consented to someone else distributing the image or another intimate image on another occasion;
- consented to the offender or someone else distributing the image or another intimate image in a different way to the way the offender distributed the image; or
- distributed the image or another intimate image to someone else.

The grounds on which it may be established that a person did not consent to the recording or distribution of an intimate image are not limited to the grounds specified in this section.

## Criminal Code 1995 (Cth)

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

A carriage service is defined in section 7 of the *Telecommunications Act 1997* (Cth) as a service for carrying communications by means of guided and/or unguided electromagnetic energy. It includes:

- telephone services
- internet access services, and
- Voice over Internet Protocol services *eg. Skype*)

Under section 474.17 it is an offence 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.

### Aggravated offences involving private sexual material- using a carriage service to menace, harass or cause offence (Section 474.17A)

It is an offence if the person commits the underlying offence (s 474.17) and the commission of that offence involves the transmission, making available, publication, distribution, advertisement or promotion of material and the material is private sexual material.

**Maximum penalty:** Imprisonment for 5 years.

- **For example:** A man encourages a young woman on social media to send him intimate photos of herself. He then threatens to disclose the photos to the victim’s family and workplace. The man has committed an offence under section 474.17A.

It is a special aggravated offence if the person meets the elements of the aggravated offence above and prior to the commission of the underlying offence, received at least 3 civil penalty orders for contraventions of s 44B(1) of the *Enhancing Online Safety Act 2015*.

**Maximum penalty:** Imprisonment for 7 years.

### Private sexual material (Section 473.1)

This is defined as material that depicts a person who is, or appears to be, at least 18 years old and is engaged in, or appears to be in, a sexual pose or sexual activity in circumstances in which reasonable persons would have an expectation of privacy.

It also includes material that predominantly depicts a sexual organ or the anal region of a person who is, or appears to be, at least 18 years old or the breasts of a female person who is, or appears to be, at least 18 years old, in circumstances in which reasonable persons would have an expectation of privacy.

## Commonwealth Civil Penalties Scheme - Enhancing Online Safety Act 2015 (Cth)

*Enhancing Online Safety Act 2015* (Cth) prohibits the non-consensual sharing or threatened sharing of intimate images.

### Posting an intimate image (Section 44B)

A person must not post, or make a threat to post, an intimate image of another person online (on a social media service, relevant electronic service or designated internet service) if either they or the person photographed is ordinarily a resident in Australia.

**Maximum penalty:** 500 penalty units.

The elements of the offence are not met where consent to the posting of the image by the first person was given.

It is also not an offence if the intimate images depicts or appears to depict an individual without a particular piece of clothing of religious or cultural significance and the perpetrator did not know that, due to the other person's religious or cultural background, they consistently wore that piece of clothing whenever they were in public.

The eSafety Commissioner may issue a formal warning if a person contravenes s 44B (s 44C).

### Intimate image (Section 9B)

Material is considered an intimate image of a person if it is a depiction of private parts:

- It can be still or moving images
- Depicts or appears to depict the person's genital area or anal area (bare or covered by underwear) or if, the person is a female or a transgender or intersex person identifying as female, either or both of the person's breasts in circumstances in which an ordinary reasonable person would expect privacy

Material is considered an intimate image of a person if it is a depiction of private activity:

- It can be still or moving images
- Depicts or appears to depict the person in a state of undress, using the toilet, showering, having a bath, engaged in a sexual act of a kind not ordinarily done in public or engaged in any other like activity in circumstances in which an ordinary reasonable person would expect privacy

Material is considered an intimate image of a person if it is a depiction of a person without attire of religious or cultural significance:

- It can be still or moving images
- Because of the person's religious or cultural background, the person consistently wears particular attire of religious or cultural significance whenever they are in public
- The image depicts or appears to depict the person without that attire and in circumstances in which an ordinary reasonable person would expect privacy

## Consent (Section 9E)

Consent must be express, voluntary and informed. It does not include consent given by a child or by an adult who is in a mental or physical condition (temporary or permanent) that makes them incapable of giving consent or substantially impairs their capacity to give consent.

## Complaints (Section 19A)

If a person has reason to believe that s 44B has been contravened with respect to an intimate image of themselves or someone on whose behalf they are authorised to act, the person may lodge a complaint with the eSafety Commissioner. If they are not able to identify the alleged perpetrator, they must state this in their complaint.

## Objection notice (Section 19B)

If a person has reason to believe that an intimate image of themselves or someone on whose behalf they are authorised to act, has been provided on line (a social media service, relevant electronic service or a designated internet service by an end-user) the depicted individual may lodge an objection notice with the eSafety Commissioner, regardless of whether they consented to the original posing of the image.

## Removal notice given to the provider of a social media service, relevant electronic service or designated internet service OR to an end-user (Section 44D and 44E)

If an individual made a complaint or objection notice under s 19A or 19B and the relevant image was non-consensually posted online (by an end-user on a social media service, relevant electronic service or a designated internet service) the Commissioner may issue a written notice to the service provider or the end user. This removal notice will require that all reasonable steps be taken to ensure the removal of the intimate image from the service and to do so within 48 hours, or longer if the Commissioner allows.

If the relevant image is hosted by a hosting service provider, the Commissioner may give the hosting service provider a written notice to take reasonable steps to cease the hosting of the image (s 44F).

## Compliance with removal notice (Section 44G)

A person must comply with a requirement under a removal notice to the extent that the person is capable of doing so.

**Maximum penalty:** 500 penalty units.

The eSafety Commissioner may issue a formal warning if a person contravenes s 44G (s 44H).

You can find more information online at <https://www.esafety.gov.au/image-based-abuse>

## Gathering evidence to prove technology-facilitated stalking or abuse

Sometimes it can be difficult to prove technology-facilitated stalking or abuse. Some tips for gathering evidence to show that technology-facilitated stalking or abuse has occurred are:

- 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

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

