

LEGAL GUIDE TO IMAGE-BASED ABUSE LEGISLATION IN SOUTH 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 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 SA

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 SA

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 SA

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 Intervention Orders in SA

This guide looks at how people can obtain protection orders from the court to protect them from technology facilitated stalking and abuse. In South Australia, these protection orders are called Intervention Orders (IOs).

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 are defined under the *Criminal Procedure Act 1921 (SA)*, and have a maximum penalty of no more than 2 years’ imprisonment or are not punishable by imprisonment at all.

Indictable offence

More serious offences are known as indictable offences. Indictable offences are divided into minor and major indictable offences. Minor indictable offences are less serious (such as stalking) and are usually dealt with in the Magistrates Court. Major indictable offences are the most serious (such as murder, manslaughter, sexual assault) and are dealt with by the District or Supreme Court.

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.

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 production, possession and dissemination of “child exploitation material” are criminal offences in South Australia subject to a maximum penalty of between 5 and 12 years’ imprisonment (depending on the specific offence and circumstances). “Child exploitation material” includes but is not limited to material which depicts or describes a person who is, or who appears to be, under the age of 17, engaged in sexual activity, or containing the image, or what appears to be the image, of a person under the age of 17, or the bodily parts of such a person, that is of a pornographic nature (*Criminal Law Consolidation Act 1935* (SA), Section 62). Some regulations of similar material exist in the *Criminal Code 1995* (Cth) (Divisions 273, 471B, 474D).

Image-Based Abuse Legislation in South Australia

Summary Offences Act 1953 (SA)

Engaging in filming (s 26B(1))

It is an offence to engage in *humiliating or degrading filming*.

Humiliating or degrading filming includes where a person is being filmed while being subjected to or compelled to engage in either:

- An assault or act of violence; or
- An act that a reasonable adult member of the community would consider to be humiliating or degrading to such a person (must cause more than minor or moderate embarrassment)

It does **not** include if a person consented to the filming at the time, for example, if a sexual video was consensually filmed by a couple while they were together.

Note: there can be no consent where:

- A person is under 16 years; or
- A person is mentally incapacitated; or
- Consent was obtained through duress or deception

Maximum penalty: Imprisonment for one year.

- **For example:** filming a woman who has passed out at a party being subjected to non-consensual sexual conduct.

The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

It is a defence to the above offence if the defendant can prove one or more of the following:

- The defendant did not knowingly film the images
 - For example, the filming took place accidentally or the filming took place in circumstances where the defendant did not know what images were being filmed.

- The defendant reasonably believed that the victim consented to the filming
 - However, there can be no apparent consent if the person was under 16 years or mentally incapacitated or if duress or deception was used.
- The conduct was for a *legitimate public purpose*
 - To be for a legitimate public purpose, the conduct must have been done in the public interest e.g. for a medical, legal or scientific purpose, or a purpose connected to law enforcement.
- **For example:** a person has cameras in their house for security purposes. They have a party at their house, at which a woman passed out and was sexually assaulted by another guest. The act was caught on camera. The person who owns the cameras only had them set up for security in their home and would have a defence as they did not knowingly film the images.

Distributing images from filming (s 26B(2))

It is an offence to distribute a moving or still image obtained by humiliating or degrading filming knowing or having reason to believe that the victim does not consent to that particular distribution. This includes if the victim does not consent to distribution of the image generally in addition to that particular distribution.

Maximum penalty: Imprisonment for one year. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

- **For example:** sending on to others a video of a woman who has passed out at a party being subjected to non-consensual sexual conduct
- This **would not** cover an incident in which sexual activity is filmed consensually but then shared without consent, due to the limited definition of *humiliating or degrading filming* (however, see s 26C, below).

It is a **defence** to the above offence if the defendant can prove one or more of the following:

- The defendant's distribution of the image was *neither intentional nor reckless*
- The conduct constituting the offence was for a *legitimate public purpose* (see above).

Engaging in a humiliating or degrading act while filming (s 26B(3))

It is an offence if the person who took part in the humiliating or degrading act also filmed that act (without consent).

Maximum penalty: Imprisonment for two years. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

- **For example:** a man films himself sexually assaulting a woman who has passed out at a party. He has committed offences against both ss 26B(1) and 26B(3) as well as sexual assault.

It is a **defence** to the above offence if the defendant can prove one or more of the following:

- The defendant did not knowingly film the images
 - Example provided in the Act: the filming took place accidentally or the filming took place in circumstances where the defendant did not know what images were being filmed.
- The defendant reasonably believed that the victim consented to the filming
 - However, there can be no apparent consent if the person was under 16 years or mentally incapacitated or if duress or deception was used.
- The conduct was for a *legitimate public purpose* (see above).
- **For example:** if a man reasonably believed his wife was consenting to the filming of them having sex and set up the camera in their bedroom so she could plainly see, he may have a defence. However, if he told her that if she did not allow him to film them, he would hurt her, there is no apparent consent as it is under duress.

Engaging in a humiliating or degrading act and distributing (s 26B(3))

It is an offence if the person who took part in the humiliating or degrading act also distributed a moving or still image from the filming (without consent).

Maximum penalty: Imprisonment for two years. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

- **For example:** a man's friend films him sexually assaulting a woman who has passed out at a party. He then gets a copy of the film and uploads it onto social media. He has committed offences against both ss 26B(1) and 26B(3)

It is a **defence** to the above offence if the defendant can prove one or more of the following:

- The defendant's distribution of the image was *neither intentional nor reckless*
- The conduct constituting the offence was for a *legitimate public purpose* (see above).

Distribution of an invasive image (Section 26C)

Under this section, it is an offence to distribute an "invasive image" of another person, knowing or having reason to believe that the other person does not consent to the distribution of the image, other than for a medical, legal or scientific purpose or a purpose connected to law enforcement.

Maximum penalty: \$10,000 or imprisonment for two years, unless the invasive image is on a person under the age of 17, in which case \$20,000 or imprisonment for four years.

- **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. The person has committed an offence under this section.

Indecent filming (Section 26D(1))

Under this subsection it is an offence to engage in indecent filming, meaning the filming of:

- (a) Another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy;
- (b) Another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or
- (c) Another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed

without the consent of the person being filmed.

Maximum penalty: \$10,000 or imprisonment for two years, unless the person filmed was under the age of 17 in which case \$20,000 or imprisonment for four years.

- **For example:** A person hides a camera in a bedroom and films a sexual encounter between himself and a partner, without obtaining the partner's consent. The person has committed an offence under this section.

Distribution of an image obtained by indecent filming (Section 26D(3))

Under this subsection it is an offence to distribute an image obtained by indecent filming, unless the person filmed consented to that particular distribution of the image, or to the distribution of the image generally, or the defendant did not know and could not reasonably be expected to have known that the indecent filming was without the person's consent.

Maximum penalty: \$10,000 or imprisonment for two years, unless the person filmed was under the age of 17, in which case \$20,000 or imprisonment for four years.

- **For example:** The person from the previous example takes the video he recorded secretly of himself and his partner having sex, and posts it to a website. He has committed an offence under this section.

It is a **defence** to the three above offences (ss 26C, 26D(1) and 26D(3)) to prove that the image was filmed/distributed by a licensed investigation agent and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit, and that the distribution of the image was for a purpose connected with that claim.

Threat to distribute an invasive image or image obtained from indecent filming (Section 26DA)

Under this section it is an offence to threaten to distribute an invasive image of a person, or an image obtained by the indecent filming of a person, and to intend to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused.

Maximum penalty: \$5,000 or imprisonment for one year, unless the image of filming is of a person under the age of 17, then \$10,000 or imprisonment for two years.

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

Definitions

Section 26A defines the key terms related to the above offences.

“Invasive image” means:

An image which depicts a person, other than in a public place, who is:

- (a) Engaged in a “private act”; or
- (b) In a state of undress such that –
 - (i) In the case of a female, the bare breasts are visible; or
 - (ii) In any case the bare genital or anal region is visible.

and which falls outside of the standards of morality, decency and propriety generally accepted by reasonable adults in the community.

“Private act” means:

- (a) A sexual act of a kind not ordinarily done in public;
- (b) An act carried out in a sexual manner or context; or
- (c) Using a toilet.

“Indecent filming” means filming (taking images by any means) of:

- (a) another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy;
- (b) another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or
- (c) another person’s private region in circumstances in which a reasonable person would not expect that the person’s private region might be filmed

“Private region” of a person means the person’s genital or anal region, or in the case of a female, the breast, when covered by underwear or bare.

“Image” means a moving or still image, and includes an image that has been altered by digital or other means.

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 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 on line (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 positing 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 on line (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 SA* and the *Legal Guide on Relevant Criminal Offences in SA* for further information.

October 2018