

LEGAL GUIDE TO IMAGE-BASED ABUSE LEGISLATION IN VICTORIA

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 VIC

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 VIC

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 VIC

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 Intervention Orders in VIC

This guide looks at how people can obtain protection orders from the court to protect them from technology facilitated stalking and abuse. In Victoria these protection orders are called "Family Violence Intervention Orders" (FVIO's).

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 (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.

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 usually 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 Department of Treasury and Finance set the dollar amount for one penalty unit; this value is updated on 1 July each year. As of 1 July 2018: one penalty unit = \$161.19.

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 distribution of “child abuse material” are criminal offences in Victoria subject to a maximum penalty of 10 years’ imprisonment. “Child abuse material” includes but is not limited to material which depicts or describes, in a way a reasonable person would find offensive, a person who is, or who appears or is implied to be, under the age of 18, engaged or apparently engaged in a sexual pose, or sexual activity; or material which depicts or describes the private parts of a person who is, or who appears to be or is implied to be, under the age of 18 (*Crimes Act 1958* (Vic) Subdivision (8D) of Divisions 1 or Part I). Some regulations of similar material exist in the *Criminal Code 1995* (Cth) (Divisions 273, 471B, 474D).

Image-Based Abuse Legislation in Victoria

Summary Offences Act 1966 (Vic)

Visually capturing genital or anal region (section 41B)

It is an offence to intentionally visually capture an adult person’s genital or anal region in circumstances in which it would be reasonable for that other person to expect that his or her genital or anal region could not be visually captured, without the consent of that person, other than by accessing the internet or a broadcasting or datacasting service, or by a law enforcement officer acting reasonably in the performance of his or her duty.

Maximum penalty: imprisonment for 2 years.

- **For example:** A person on a train uses a mobile phone to take a photo up the skirt of another passenger without her consent. The person has committed an offence under this section.

Distribution of an image of genital or anal region (section 41C)

It is an offence for a person who has visually captured an image of an adult person’s genital or anal region (whether or not in contravention of section 41B) to intentionally distribute that image for a particular purpose without the consent of the person whose genital or anal region is visually captured, other than where the person being visually captured has expressly or impliedly consented to distribution of the image for a similar purpose, or the image is distributed by a law enforcement officer acting reasonably in the performance of his or her duty.

Another exception applies to this section:

- Where the subject is a child or other person incapable of giving consent; and
- The capturing was not made in contravention of section 41B; and
- A reasonable person would regard the image as acceptable.

Maximum penalty: imprisonment for two years.

- **For example:** The person from the previous example, who takes a photo up the skirt of another passenger without her consent, sends that photo to a group of his friends. The person has committed an offence under this section.

Distribution of an intimate image (S 41DA)

It is an offence to intentionally distribute an intimate image of an adult person to a third party, if the distribution of the image is contrary to community standards of acceptable conduct, where the person has not expressly or impliedly consented, or could not reasonably be considered to have expressly or impliedly consented to the distribution.

Maximum penalty: imprisonment for seven years.

- **For example:** A person asks his girlfriend to send him naked photographs of herself. She is reluctant, but he convinces her by promising her that he will keep them to himself, and she complies. He then shares the photographs with a group chat of his friends without her consent. He has committed an offence under this section.

Definitions

Section 40 defines the key terms related to the above offences.

“Consent” means free agreement.

“Distribute” includes publishing, exhibiting, communicating, sending, supplying or transmitting to any other person, whether to a particular person or not, or making available for access by any other person, whether by a particular person or not

“Genital or anal region” means the genital or anal region of a person whether bare or covered by underwear.

“Intimate image” means a still or moving image that depicts:

- A person engaged in sexual activity; or
- A person in a manner of context that is sexual; or
- The genital or anal region of a person, or, in the case of a female person, the breasts.

“Visually capture” means capture moving or still by a camera or any other means in such a way that a recording is made of those images or those images are otherwise capable of being distributed.

“Community standards of acceptable conduct” includes standards of conduct having regard to the following:

- The nature and content of the image;
- The circumstances in which the image was captured;
- The circumstances in which the image was distributed;
- The age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image; and
- The degree to which the distribution of the image affects the privacy of a person depicted in the image.

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* (Cth).

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 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 VIC*** and the ***Legal Guide on Relevant Criminal Offences in VIC*** for further information.

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