

## LEGAL GUIDE TO FAMILY VIOLENCE ORDERS 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 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)**.

#### 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 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.

## 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.

## FAMILY VIOLENCE ORDERS

The *Family Violence Act 2016* (ACT) ('the Act') is the piece of legislation in the Australian Capital Territory that allows the courts to make orders protecting people from domestic and family violence. The *Personal Violence Act 2016* (ACT) covers violence, threats, stalking, harassment, intimidating behaviour and property damage between people who are not "family members" (see definition below). This guide will focus on the *Family Violence Act 2016* (ACT).

A person who is experiencing domestic or family violence ('affected person') may apply to the ACT Magistrates Court for a Family Violence Order ('FVO') or have an FVO made by the police. An FVO can protect a person by ordering the person against whom the FVO is made ('respondent') not to commit further acts of domestic violence against the affected person.

It is important to note that an FVO is a *civil* order, meaning it is not a criminal charge. However, an application for an FVO may be accompanied by related criminal charges and criminal penalties may apply if an FVO is breached.

### What are the types of FVOs and when are they made?

A person can apply for an *interim FVO* if they think there is an immediate risk to their personal safety. An interim order is a temporary order that is in place until a final order is decided at court. The court may make an interim order if satisfied that the order is necessary to either ensure the safety of an affected person from family violence, or prevent substantial damage to an affected person's property, until the application for the final order is decided.

If urgent protection is required after business hours or on public holidays, the police may apply for an *after-hours interim order*.

The court may make a *final FVO* against the respondent for the protection of the affected person if it is satisfied on the balance of probabilities (more likely than not) that the affected person has reasonable grounds to fear family violence by the respondent, or that the respondent has used family violence against the affected person.

### Where can I find this information in the Act?

Please see divisions 3.3 and 3.5, and Part 7 of the Act.

### Can technology-facilitated stalking and abuse be a form of domestic violence?

Yes, technology-facilitated stalking and abuse may be a form of domestic violence.

Under the Act, family violence includes behaviour done to *control or dominate* a person and causes them to *feel fear* for the safety of themselves or another person. This is wide enough to cover behaviours such as use of surveillance devices, sharing intimate photos of the person without consent and technology-facilitated stalking (e.g. tracking a person through GPS on their phone).

Further, the Act also captures threats to a person, their property or pets that are made, for example, over the phone, email or social media.

Under the Act, family violence means any of the following behaviour by a person in relation to a family member of the person:

- physical violence or abuse,
- sexual violence or abuse,
- emotional or psychological abuse,
- economic abuse,
- threatening behaviour,
- coercion or any other behaviour, that

controls or dominates the family member and causes them to feel fear for the safety or wellbeing of the family member or another person, or behaviour that causes a child to hear, witness or otherwise be exposed to behaviour mentioned above, or the effects of the behaviour.

**Where can I find this information in the Act?**

Please see section 8 of the Act.

**Who is a family member?**

“Family member” of a person is defined broadly to include:

- Current or former partners (e.g. spouses, de facto, intimate partners) of the person
- Relatives (e.g. brother, aunt, cousin, step-father) of the person
- Those who could be considered relatives according to Aboriginal or Torres Strait Islander custom or tradition
- Children of a current or former partner of the person
- A parent of a child of the person

**Note:** If there is technology-facilitated stalking and abuse, but the perpetrator is not a family member of the victim, a person may still be able to apply for a *personal protection order* under the *Personal Violence Act 2016* (ACT).

**Where can I find this information in the Act?**

Please see section 9 of the Act.

**Who can apply for a FVO?**

An application for an FVO may be made by:

- The police
- An affected person
- A litigation guardian for the affected person, or any other person with a right to apply for the person (e.g. a parent or guardian of a child, an agent of the person)

“Affected person” means a person against whom family violence has been, or is likely to be, committed, and includes any child who hears, witnesses or is otherwise exposed to family violence committed against another person.

Only the police can apply for an after-hours FVO.

**Where can I find this information in the Act?**

Please see sections 16 of the Act.

**Applying for an FVO**

To apply for an FVO for their (or their child’s) protection, a person can go to the police and make a statement. The police can apply for an after-hours FVO in some circumstances.

If the police refuse to act or a person feels uncomfortable going to the police, they can apply to the Court for an FVO. Application forms are available online at the Magistrates Court website: [www.courts.act.gov.au/magistrates](http://www.courts.act.gov.au/magistrates)

They can get legal advice from a community legal centre (e.g. Women’s Legal Services ACT), Legal Aid or a private lawyer on applying for an FVO.

**Where can I find this information in the Act?**

Please see sections 18 & 19 of the Act and the Act’s dictionary.

## How can an FVO protect a person from technology-facilitated stalking or abuse?

The conditions in an FVO depend on the particular circumstances of the matter.

The Act sets out what conditions the applicant can apply for which may assist in prohibiting technology-facilitated domestic violence. These include, orders prohibiting the respondent from:

- Being on or near certain premises, e.g. where the person lives, works or is likely to be
- Contacting the person
- Harassing, threatening or intimidating the person or getting someone else to do for them
- Damaging their property or getting someone else to do for them
- Remaining at any place the affected person/persons may be living, working or visiting

A person can also apply for an order requiring the respondent to return something that belongs to the affected person.

The most useful orders for technology-facilitated stalking or abuse, are orders prohibiting the respondent from contacting the protected person, those prohibiting the respondent from locating or attempting to locate the protected person, or those prohibiting the respondent from threatening, harassing or intimidating the protected person.

For these conditions to be imposed on a final order, the Magistrate must decide they are necessary, having regard to the personal rights and liberties of the respondent, but giving paramount consideration to the safety and protection of the affected person and any child directly or indirectly affected by the violence.

A respondent **must** follow the conditions of an FVO. If the respondent breaks any of the FVO conditions (called breaching or contravening the FVO), it is an offence and the police can lay charges against the respondent.

### **Where can I find this information in the Act?**

See sections 36, 37 and 38 of the Act.

## How long does an FVO last?

A final **order** remains in force for two years, or a shorter period if so stated in the order. If there are special or exceptional circumstances that justify a longer period, the order may state a longer period, except if the final order is made by consent, in which case it cannot last longer than two years.

### **Where can I find this information in the Act?**

See section 35 of the Act.

## What if a person breaks the conditions of an FVO by engaging in technology-facilitated stalking or abuse?

When a person does not obey the conditions of an FVO, this is called a **breach** or **contravention** of the FVO.

It is an offence to contravene an FVO (final or interim). All contraventions should be reported to the police so they can investigate.

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

### **Where can I find this information in the Act?**

See section 43 of the Act.

## Effect of Domestic Violence Orders interstate

From 25 November 2017, a Domestic Violence Order made in any Australian state or territory is now automatically recognised and enforceable Australia-wide.

A Domestic Violence Order issued prior to 25 November 2017, can be “declared” a *nationally recognised Domestic Violence Order* by any local court in Australia. Find more information about the National Domestic Violence Order Scheme here: <https://www.ag.gov.au/ndvos>.

## 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 an FVO is necessary or an FVO has been contravened include:

- 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 conduct in relation to technology-facilitated stalking or abuse may constitute a criminal offence. Please see the *Legal Guide to Image-based Abuse in the ACT*, *Legal Guide to Relevant Criminal Offences in the ACT* and *Legal Guide to Surveillance Legislation in the ACT* for further information.