

LEGAL GUIDE TO APPREHENDED DOMESTIC VIOLENCE ORDERS 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 four guides that looks at areas of law relevant to people experiencing technology-facilitated stalking and abuse.

Legal Guide to Apprehended Domestic Violence Orders in NSW

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 Domestic Violence Orders (ADVOs)**.

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 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.

Legal Guide to Image-based Abuse in NSW

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 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.

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 12 months’ 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 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

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 17 of the *Crimes (Sentencing and Procedure) Act 1999*. As of July 2018, one penalty unit = \$110 (for individuals). Therefore, an offence with a maximum penalty of a fine of 50 penalty units will have a maximum fine of \$5,500.

APPREHENDED DOMESTIC VIOLENCE ORDERS

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('the Act') is the legislation in New South Wales that allows the courts to make orders protecting people from domestic or family violence.

A person who is experiencing domestic violence ('victim' or 'protected person') may apply to the Local Court of NSW for an apprehended domestic violence order ('ADVO'). An ADVO can protect a person by ordering the person against whom the ADVO is made ('defendant') not to commit further acts of domestic violence.

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

The Local Court will grant an ADVO if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person ('victim' or 'protected person') has reasonable grounds to fear, and in fact fears, a personal violence offence or, intimidation or stalking from the defendant. It is also possible for the court to grant an ADVO if it is satisfied that a victim has reasonable grounds to fear, even if the victim does not in fact fear, such an offence. An ADVO made in this circumstance may only include the mandatory orders. The court must form the opinion that the defendant's conduct is sufficient to warrant the making of the order.

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.

The Act considers domestic violence to be behaviour where there is a domestic relationship between the victim and the defendant, and:

- the defendant has committed a personal violence offence against the victim; and/or
- the defendant has engaged in conduct that intimidates the victim, or another person with whom the victim has a domestic relationship with; and/or
- the defendant stalks the victim.

Personal violence offence

'Personal violence offence' is the term given to a group of criminal offences in the *Crimes Act 1900* (NSW) and the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Some of the offences relevant to technology-facilitated stalking and abuse are the offences of:

- stalking or intimidation with intent to cause fear of physical or mental harm: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) section 13
- contravening an apprehended violence order: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14
- sending or delivering documents containing threats: *Crimes Act 1900* (NSW) section 31
- threatening to destroy or damage property: *Crimes Act 1900* (NSW) section 199
- When someone commits a personal violence offence against another person with whom they have or have had a *domestic relationship*, it is known as a *domestic violence offence*.

Intimidation

'Intimidation' is defined in section 7 of the Act. It includes:

- Conduct amounting to harassment or molestation of the person, or
- an approach made to the person by any means (including by telephone, telephone text messaging, e-mailing and other technologically assisted means) that causes the person to fear for their safety, or

- any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.

When the court considers whether a person's conduct is intimidation, it may consider any pattern of violence (especially violence constituting a domestic violence offence) in that person's behaviour.

Examples of intimidation:

- making numerous and unwanted calls to a person's mobile phone
- sending threatening and/or abusive messages (texting messaging, WhatsApp, Snapchat, Facebook messaging, Twitter)
- hacking into a person's email or social media account to discover information about them (example: what the person has been doing, where they have gone, etc)
- 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
- sharing, or threatening to share, intimate pictures of a person to force them to do (or not do) something

Stalking

'Stalking' is defined in section 8 of the Act. Stalking includes:

- following a person about
- watching or frequenting the vicinity of, or approaching, a person's place of residence, business, or work, or any place that a person frequents for the purposes of any social or leisure activity

When the court considers whether a person's conduct is stalking, it may consider any pattern of violence (especially violence constituting a domestic violence offence) in that person's behaviour.

Note: technology-facilitated stalking (e.g. tracking a person through GPS on their mobile phone) does not appear to come within the meaning of 'stalking' in the Act.

Intimidation and Stalking are offences

The Act creates an offence of stalking and intimidation.

It is an offence for a person ('the defendant') to stalk or intimidate another person with the intention to cause the other person to fear physical or mental harm. It is also an offence for a person to attempt this offence. The defendant is taken to intend to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person.

Maximum penalty: 50 penalty units or imprisonment for 5 years, or both.

Where can I find this information in the Act?

See sections 4, 7, 8, 13, 15, and 16 of the Act for more information about what behaviour constitutes domestic violence.

What is considered a domestic relationship?

The Act defines the meaning of domestic relationship broadly. A person has a "domestic relationship" with another person under the Act if the person:

- is or has been married to the other person
- is or has been a de facto partner of that other person
- has or has had an intimate personal relationship with the other person
- is living or has lived in the same household as the other person
- is living or has lived as a long-term resident in the same residential facility as the other person at the same time (excluding correctional centres and detention centres)
- has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person

- is or has been a relative of the other person
- in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture.

Two persons also have a "domestic relationship" with each other if they have both been married to, been the de facto partner of, or had an intimate personal relationship with, the same other person (i.e. current and former partners of the same man share a domestic relationship with each other).

Where can I find this information in the Act?

Please see the Act for a comprehensive definition of:

- domestic relationship (section 5)
- relative (section 6)

Who can apply for an ADVO?

The police may apply for an ADVO on behalf a person experiencing domestic violence (often referred to as the "protected person. If the protected person is 16 years or older, that person may also apply for an ADVO on their own at the Local Court of NSW.

Where can I find this information in the Act?

See section 48 of the Act.

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

ADVOs contain certain conditions restraining a respondent from committing domestic violence, including technology-facilitated stalking and abuse. A defendant must follow the conditions of an ADVO. If the defendant breaks any of the ADVO conditions (called contravening or breaching the ADVO), it is an offence and the police can investigate and lay charges against the defendant.

In every ADVO that the court makes, it is mandatory for the following conditions to be included ('mandatory orders').

The defendant must not:

- assault or threaten the protected person or any other person having a domestic relationship with the protected person
- stalk, harass or intimidate the protected person or any other person having a domestic relationship with the protected person
- intentionally or recklessly destroy or damage any property that belongs to or is in the possession of the protected person or any other person having a domestic relationship with the protected person.

The court may also include any condition in the ADVO prohibiting or restricting the behaviour of the defendant as appears *necessary or desirable* to the court and, in particular, to ensure the safety and protection of the person in need of protection and any children from domestic violence ('additional orders').

The Act provides some examples of additional orders that may be included in an ADVO. The conditions that relate to technology-facilitated stalking and abuse are:

- prohibiting or restricting approaches by the defendant to the protected person
- prohibiting or restricting the defendant from locating or attempting to locate the protected person
- prohibiting the defendant from destroying or deliberately damaging or interfering with the protected person's property
- prohibiting or restricting specified behaviour by the defendant that might affect the protected person

There are standard additional orders an applicant can request when applying for an ADVO. Standard additional order 5 is "You must not try to find the protected person except as ordered by a court."

The applicant for the ADVO can also ask the court to include conditions that are specific to their situation and which will make them feel safe, provided those conditions *restrain* a defendant's behaviour, rather than imposing *positive obligations*. For example:

ADVO order 12: Suggested wording to cover image-based abuse situations

The defendant must not directly or indirectly share or threaten to share intimate images or videos of the protected person

ADVO order 12: Suggested wording to cover 'surveillance device' situations

The defendant must not attempt to monitor or track the protected person or monitor the protected person's communications in any way.

Note: On 3 December 2016, new "plain English" ADVOs were introduced after the Act was amended. If you have an ADVO made by the court before this date, the language used in that ADVO will be different from that outlined above. You can find more information about orders made before 3 December 2016 at www.lawaccess.nsw.gov.au under "Representing Yourself".

Where can I find this information in the Act?

See section 35, 36, and 39 of the Act.

How long does an ADVO last?

An ADVO remains in force for a period specified by the court. The period is to be as long as necessary, in the opinion of the court, to ensure the safety and protection of the protected person. If the court does not specify a period, the ADVO will remain in force for a period of 12 months.

There is a current proposal to extend the default period to two years.

Where can I find this information in the Act?

See section 79 of the Act.

What if a person is in urgent need of protection?

Interim orders

If a person is in urgent need of protection, they can ask the court to make an interim order for their protection when they apply for an ADVO ('interim ADVO'). The court will make an interim ADVO if it appears to the court that it is necessary or appropriate to do so in the circumstances. An interim order takes effect immediately and may contain the same conditions as in a final order. It usually lasts until the court can hear more evidence and decide on whether or not to make a final order for an ADVO.

Where can I find this information in the Act?

See sections 22–24 of the Act.

Provisional orders

A provisional order for an ADVO ('provisional ADVO') is an interim ADVO applied for by the police. A police officer can apply for a provisional ADVO when an incident occurs involving the victim and defendant and the police officer has good reason to believe a provisional order needs to be made immediately to ensure the safety and protection of the victim or to prevent substantial damage to any property of that person. A police officer can apply for a provisional ADVO on the request of a person in need of protection, or on the applicant officer's own initiative. A provisional ADVO may contain the same conditions as in a final ADVO. A provisional ADVO remains in force until:

- it is revoked
- an interim or final ADVO is made in the same matter
- the application for a final apprehended violence order is withdrawn or dismissed

Where can I find this information in the Act?

See sections 25–34A of the Act.

Circumstances where court must make an Apprehended Domestic Violence Order

There are certain circumstances in which the court is obliged to make an ADVO.

Final ADVO

If the defendant pleads guilty to, or is found guilty of a ‘serious offence’, the court must make an ADVO for the protection of the victim, whether or not an application for an ADVO has been made, unless the court is satisfied that an ADVO is not required.

Where can I find this information in the Act?

See section 39 of the Act.

Interim ADVO

ADVO against the defendant for the protection of the victim, whether or not an application for an ADVO has been made, unless the court is satisfied that an interim ADVO is not required.

Where can I find this information in the Act?

See section 40 of the Act.

“Serious offence” is defined in section 40 of the Act. Some examples of a serious offence relevant to technology-facilitated stalking and abuse are the offences of:

- stalking or intimidation with intent to cause fear of physical or mental harm: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) section 13
- sending or delivering documents containing threats: *Crimes Act 1900* (NSW) section 31
- threatening to destroy or damage property: *Crimes Act 1900* (NSW) section 199

Circumstances where police must apply for a provisional ADVO

There are circumstances in which police are obliged to apply for a provisional ADVO. A police officer must apply for a provisional ADVO if the officer investigating the incident concerned suspects or believes that a domestic violence offence or a stalking/intimidation offence is likely to be, is about to be, is being, or has been committed against the person in need of protection; or if they have commenced proceedings against the defendant for such offences.

A police officer must also apply for a provisional ADVO if the officer has good reason to believe an order needs to be made immediately to ensure the safety and protection of the person who would be protected by the order or to prevent substantial damage to any property of that person.

Where can I find this information in the Act?

See section 27 of the Act.

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

When a person does not obey the conditions of an ADVO, this is called a breach or contravention of the ADVO. It is an offence to contravene, or attempt to contravene, an ADVO (provisional, interim, or final). The penalty is a maximum of two years in jail or a maximum fine of 50 penalty units or both. If a protected person aids, abets, counsels, or procures the respondent to engage in behaviour that contravenes the ADVO, the protected person will not have committed an offence.

Where can I find this information in the Act?

See section 14 of the Act.

How can a person apply for an ADVO?

A person can apply for an ADVO:

- In person, at the Local Court of NSW; or
- By reporting the domestic violence to the police and asking for them to assist with applying for an ADVO.

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 ADVO is necessary or an ADVO 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 NSW*, *Legal Guide to Relevant Criminal Offences in NSW* and *Legal Guide to Surveillance Legislation in NSW* for further information.