

LEGAL GUIDE TO FAMILY VIOLENCE RESTRAINING ORDERS IN WESTERN 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 Family Violence Restraining Orders in WA

This guide looks at how people can obtain protection orders from the court to protect them from technology-facilitated stalking and abuse. In Western Australia these protection orders are called **Family Violence Restraining Orders (FVROs)**.

For information on other areas of law see:

Legal Guide to Surveillance Legislation in WA

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 WA

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 WA

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 obscenity or loitering), are known as summary offences. Summary offences are dealt with by the Magistrates Court.

Indictable offence

More serious offences (such as murder, manslaughter, sexual assault) are known as indictable offences. Indictable offences are heard by the District Court or the 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.

VIOLENCE RESTRAINING ORDERS

The *Restraining Orders Act 1997* (WA) (the “Act”) is the piece of legislation in Western Australia that allows the courts to make orders protecting people from abuse.

A person who is experiencing domestic violence (‘person seeking to be protected’) may apply to the Magistrates Court of Western Australia for a Family Violence Restraining Order (‘FVRO’). Applications are made through the police who can also make temporary orders that last until the matter goes to court (interim order). An FVRO can protect a person by ordering the person against whom the FVRO is made (‘respondent’) not to commit further acts of domestic violence against the person seeking to be protected.

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

When can an FVRO be made?

A FVRO is made when the respondent has committed *family violence* against the person seeking to be protected, and the respondent is likely to do so again in future, or the person seeking to be protected (or a person applying for an FVRO on their behalf) has reasonable grounds to fear that the respondent will commit family violence against them.

Family violence is defined as violence or the threat of violence, towards a family member, or any other behaviour that coerces or controls the family member or causes them to be fearful, such as:

- Assaulting or causing injury to a family member or threatening to do so
- Kidnapping or depriving a family member of their liberty or threatening to do so
- Stalking or cyber-stalking a family member
- Distributing or publishing intimate personal images of the family member, or threatening to do so
- Making repeated derogatory remarks against the family member
- Behaving in a ongoing manner that is intimidating, offensive or emotionally abusive
- Damaging property

It also includes getting another person to do any of the above acts on that person’s behalf.

If the parties are not in a family relationship and the respondent is behaving in a violent manner, the person seeking to be protected may apply for a *Violence Restraining Order*. If a person requires that a non-family member be restrained from behaving in an intimidating or offensive manner, or from damaging property, they may apply for the *Misconduct Restraining Order* (see sections 11A and 34 of the Act).

Where can I find this information in the Act?

Please see sections 5A and 10D of the Act.

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

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

For example threats made over the phone, email or social media would be captured by the above definition of family violence. Behaviours such as the use of surveillance devices, sharing intimate photos of the person without consent or technology-facilitated stalking (e.g. tracking a person through GPS on their phone) also fall within the definition of family violence.

To amount to family and domestic violence, there must be a *family relationship*. This is defined broadly in the Act to include:

- Current or previous de factos or spouses
- Relatives (e.g. brother, aunt, cousin, father, step-brother, etc.)
- A child who resides, regularly stays with or is under guardianship of a person
- Those who have been in an intimate personal relationship or other personal relationship (relationships of a domestic nature in which the lives of the persons are interrelated and the actions of one affect the other)
- Relatives through the current or previous de facto or spouse (e.g. in laws such as a brother-in-law, one party's child or parent)
- Those who could be considered relatives according to the person's cultural, social or religious background

Where can I find this information in the Act?

Please see sections 4 and 5A of the Act.

Who can apply for an FVRO?

An application for an FVRO may be made by:

- The police
- A person seeking protection if they are over 16
- A parent, guardian or child welfare officer where the person seeking protection is a child

Applying for an FVRO

If the police have not made an application, a person can apply for an FVRO at their local Magistrates Court, filling out the application and affidavit in support of the application (forms are available online at http://www.magistratescourt.wa.gov.au/r/restraining_orders.aspx)

When the application is lodged, the court will provide a date and time for the first hearing. The courtroom will be closed to the public and the applicant can request that the respondent not be present. The Magistrate may grant an *interim order* if satisfied that the respondent committed family violence against the person seeking to be protected or there are reasonable fears the respondent will commit family violence. This is a temporary order that comes into effect when the police serve it on the respondent. It usually lasts until a decision about a final order is made, however, if the respondent does not lodge a consent or objection within 21 days of being served, the order will automatically become a final FVRO.

Seek legal advice from a community legal centre (e.g. Women's Law Centre), Legal Aid or a private lawyer on applying for an FVRO. Court support and assistance can also be sought from the Family Violence Service.

Where can I find this information in the Act?

See sections 24A, 26, 27, 31 and 32 of the Act.

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

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

The court can impose whatever restraints it considers appropriate to prevent the respondent committing family violence or from behaving in a manner that would make the person who is protected fear family violence.

The Act sets out examples of 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
- Communicating or attempting to communicate with the other person by whatever means
- Limiting a person's use of certain property, even if the person owns that property (e.g. preventing them from accessing a shared computer)
- distributing or publishing, or threatening to distribute or publish, intimate personal images of the person seeking to be protected
- Causing or allowing another person to engage in any of the above conduct

The applicant for the FVRO can also ask the court to include any other conditions that are specific to their situation and which will make them feel safe.

Suggested wording to cover image-based abuse situations

The person bound must not directly or indirectly publish, share or threaten to publish or share images or videos of the person protected that are of an intimate nature

Suggested wording to cover 'tracking/surveillance device' situations

The person bound must not attempt to locate, ask someone else to locate, follow or keep the person protected under surveillance.

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

Where can I find this information in the Act?

See section 10G of the Act.

What if a person is in urgent need of protection?

Where for example, a matter is urgent or it is late at night or the person is in a rural location, an application for an FVRO may be made:

- By the police as a *police order* or;
- As a *telephone application*.

A police order may be made where the officer believes a person has committed an act of *family violence* or fears they will and the order is necessary to ensure the person's safety. It comes into effect as soon as it is served on the respondent, and lasts for 72 hours or less. It provides temporary protection until an application for an FVRO can be made.

Another option is to make a telephone application, through the police. Once an application is made, a hearing can occur by telephone, fax, radio, videoconference, email or another similar method. An authorised magistrate may decide to make a telephone order (which lasts for 72 hours or less), an interim order or decide to adjourn or dismiss the matter.

Where can I find this information in the Act?

See sections 17 – 24 and 30A – 30F of the Act.

How long does an FVRO last?

A final FVRO usually lasts for the period specified in it, or if not specified, then 2 years.

Where can I find this information in the Act?

See sections 16 and 17 of the Act.

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

When a person does not obey the conditions of an FVRO, this is called a breach or contravention of the FVRO. It is an offence to breach an FVRO or a police order.

Maximum penalty: \$6 000 or imprisonment for two years, or both. If a person has repeatedly breached the FVRO, a prison sentence must be imposed, or the court must provide written reasons for not imposing one.

All contraventions should be reported to the police so they can investigate.

If the person, who is protected aids, abets, counsels, or procures the respondent to engage in behaviour that contravenes the FVRO, the person seeking to be protected **will not** have committed an offence. However, it may lead to a variation or cancellation of the order

- **For example:** there is an order prohibiting the person bound from contacting the person protected in any way. If the person protected sends the person bound a text message and he replies, he has breached the order and she cannot be charged with an offence. However, the order may be modified at court.

Where can I find this information in the Act?

See sections 61, 61A and 61B 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 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 conduct in relation to technology-facilitated stalking or abuse may constitute a criminal offence. Please see the **Legal Guide to Image-based Abuse in WA**, **Legal Guide to Relevant Criminal Offences in WA** and **Legal Guide to Surveillance Legislation in WA** for further information.