

## LEGAL GUIDE TO IMAGE-BASED ABUSE LEGISLATION 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 Image-Based Abuse Legislation 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.

#### 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 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 Violence Orders (ADVOs).

## 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 ‘victim-survivors’ 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 people perpetrating the abuse and women are the victim-survivors. 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 parking violations), are known as summary offences. Summary offences normally have a maximum penalty of no more than 12 months’ imprisonment or are not punishable but 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 2021, 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.

## 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 abuse material” are criminal offences in NSW subject to a maximum penalty of imprisonment for 10 years. (*Crimes Act 1900* (NSW) s 91H) “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 under the age of 16, or who appears to be or is implied to be under the age of 16, engaged in a sexual pose, or sexual activity; or material which depicts or describes the private parts of a person who is, appears to be or is implied to be, under the age of 16 (*Crimes Act 1900* (NSW) s 91FB). Some regulations of similar material exist in the *Criminal Code 1995* (Cth) (Divisions 273, 471B, 474D).

## IMAGE-BASED ABUSE LEGISLATION IN NSW

### *Crimes Act 1900* (NSW)

Division 15C of the *Crimes Act 1900* (NSW) regulates the recording and distribution of intimate images.

#### Record an intimate image without consent (section 91P)

It is an offence to intentionally record an intimate image of another person without the consent of the person, and knowing the person did not consent to the recording or being reckless as to whether the person consented to the recording.

**Maximum penalty:** 100 penalty units or imprisonment for 3 years, or both.

- **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.

#### Distribute intimate image without consent (section 91Q)

It is an offence to intentionally distribute an intimate image of another person without the consent of the person, and knowing the person did not consent, or being reckless as to whether the person consented, to the distribution.

**Maximum penalty:** 100 penalty units or imprisonment for 3 years, or both.

- **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 section 91Q, regardless of whether the image itself was taken with the consent of the victim.

#### Threaten to record or distribute intimate image (section 91R)

It is an offence to threaten to record or distribute an intimate image of another person without the consent of the other person, and intending to cause that other person to fear that the threat will be carried out.

A threat may be made by any conduct, whether explicit or implicit, conditional or unconditional. It is not

necessary to prove that the other person actually feared the threat would be carried out, or that the intimate image which is the subject of the threat even exists.

**Maximum penalty:** 100 penalty units or imprisonment for 3 years, or both.

- **For example:** A person tells his partner that she must perform certain sexual acts for him, and that if she refuses, he will post a video he has recorded of the two of them having sex to her Facebook page. The person has committed an offence under section 91R, regardless of whether he has in fact recorded such a video or plans to share it.

### **Contravene a court order to take reasonable action to remove, retract, recover, delete or destroy any intimate image recorded or distributed by the person (section 91S)**

Under this section, a court that finds a person guilty of an offence against section 91P or 91Q may order the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image recorded or distributed by the person in contravention of the section within a period specified by the court.

A person who, without a reasonable excuse, contravenes an order made under this section is guilty of an offence.

**Maximum penalty:** 50 penalty units or imprisonment for 2 years, or both.

Unlike offences against sections 91P, 91Q and 91R, which are all indictable offences, an offence against section 91S is a summary offence.

- **For example:** A person has been found guilty of an offence against section 91Q for posting naked photographs of his girlfriend to a range of websites. The court orders the defendant to destroy the photographs, and, within two weeks, to contact every website on which the photographs are hosted and request that they be removed. After two weeks, the defendant has failed to destroy the photos or contact the websites. The defendant has committed an offence under this section.

A prosecution of a person under the age of 16 years under any of the above sections requires the approval of the Director of Public Prosecutions.

### **Definitions**

Section 91N defines the key terms related to the above offences.

**“Distribute”** includes send, supply, exhibit, transmit or communicate to another person, or make available for viewing or access by another person, whether in person or by electronic, digital or any other means.

**“Intimate image”** means:

- an image of a person’s private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or
- an image that has been altered to appear to show a person’s private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.

**“Private parts”** means:

- a person’s genital area or anal area, whether bare or covered by underwear, or
- the breasts of a female person, or transgender or intersex person identifying as female.

**“Engaged in a private act”** means:

- in a state of undress, or
- using the toilet, showering or bathing, or
- engaged in a sexual act of a kind not ordinarily done in public, or
- engaged in any other like activity.

**“Image”** means a still or moving image, whether or not it has been altered.

The definitions of “image” and “intimate image” when read together will mean that images or videos which have been altered to appear to show a person engaged in a private act, or a person’s private parts, are covered by the offences created by sections 91P, 91Q, 91R and 91S, even if the image does not *in fact* show what it appears to show.

- **For example:** If a video created using “artificial intelligence technology” which digitally imposes the face of one woman (person A) onto the body of another woman (person B) engaged in sexual activity and which as a result appears to show person A engaged in sexual activity (sometimes referred to as “deepfake videos”), is shared by someone without the consent of person A, the sharer will have committed an offence under this section.

## Consent

Section 91O outlines what does and does not constitute “consent” for the purposes of the above offences:

- Consent must be given “freely and voluntarily”
- Consent must be given to the recording of the image, and to each separate instance of distribution of the image
- A person who consents to recording of an image on one occasion is not assumed to consent to subsequent recordings
- A person who consents to distribution of an image on one occasion is not assumed to consent to subsequent instances of distribution of that image
- A person who distributes an image of herself is not assumed to consent to any other distributions of that image
- A person does not consent to the recording or distribution of an intimate image in the following circumstances:
  - The person is under the age of 16 or does not otherwise have capacity to consent (such as in the case of an intellectual disability)
  - The person is unconscious or asleep
  - The person “consents” because of threats of force against or terror instilled in the person or any other person
  - The person “consents” because they are unlawfully detained

The grounds on which it may be established that a person did not consent to the recording or distribution of an intimate image are not limited to the grounds specified in this section.

## 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.

### 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.

## Online Safety Act 2021 (Cth)

The *Online Safety Act 2021* (Cth) is legislation that attempts to keep Australians safe online and includes mechanisms to have abusive and harmful content removed from online.

The Act requires industry to develop new codes to regulate illegal and restricted content. The content that can be removed refers to the seriously harmful material including content that includes nudity and violence. Therefore it prohibits the non-consensual sharing or threatened sharing of intimate images.

### Intimate image (Section 15)

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

### Non consensual intimate image of a person (Section 16)

If an intimate image of a person is provided on a social media service (s13), a relevant electronic service (s13A) or a designated internet service (s14) and the person did not consent to the image being shared on that service then the intimate image is a non-consensual image of the person.

### Consent (Section 21)

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.

### Posting an Intimate Image (Section 75)

A person must not post, or make a threat to post, an intimate image of another person online (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 s75 (s76).

- **For example:** A man posts nudes of his ex-partner on his Instagram account after they separate. He posts these up without her consent. The man has committed an offence under section 75.

### Complaints (Section 32)

If a person has reason to believe that s75 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 33)

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 online (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 77 and 78)

If an individual made a complaint or objection notice under s32 or s33 and the relevant image was non-consensually posted online (by an end-user or 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 24 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 (s79).

### Compliance with removal notice (Section 80)

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 s80.

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

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