

LEGAL GUIDE TO RELEVANT CRIMINAL OFFENCES IN SOUTH 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 Relevant Criminal Offences in SA

This guide looks at the various **criminal offences** that may apply to a person who is perpetrating technology-facilitated stalking and abuse.

For information on other areas of law see:

Legal Guide to Surveillance Legislation in SA

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 Intervention Orders in SA

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

Legal Guide to Image-Based Abuse in SA

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 ‘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 disorderly conduct), are known as summary offences. Summary offences are defined by the *Summary Procedure Act 1921* (SA) and have a maximum penalty of no more than two years imprisonment or are not punishable by imprisonment at all.

Indictable offence

More serious offences are known as indictable offences. Indictable offences are divided into minor and major indictable offences. Minor indictable offences are less serious (such as stalking) and are usually dealt with in the Magistrates Court. Major indictable offences are the most serious (such as murder, manslaughter, sexual assault) and are dealt with by the District or 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.

RELEVANT CRIMINAL OFFENCES

Some forms of technology-facilitated stalking and abuse are against the law. If it is unlawful, then the person responsible can be charged with a criminal offence.

This guide will look at the offences under **South Australian** and **Commonwealth** laws that are relevant to technology-facilitated stalking and abuse.

Note: The *Listening and Surveillance Devices Act 1972 (SA)* and *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* also contain relevant offences – these offences are covered in the **Legal Guide to Surveillance Legislation in SA** and the **Legal Guide to Intervention Orders in SA**. The image-based offences are covered in greater detail in the **Legal Guide to Image-Based Abuse in SA**.

This guide covers the following legislation:

Summary Offences Act 1953 (SA)

1. Humiliating or degrading filming (s 26B)
2. Distribution of invasive image (26C)
3. Indecent filming (s 26D)
4. Threat to distribute an invasive image (s26DA)
5. Indecent or offensive material (s 33)

Criminal Law Consolidation Act 1935 (SA)

6. Unlawful threats (s 19)
7. Unlawful stalking (s 19AA)
8. Assault (s 20)
9. Unauthorised modification of computer data (s 86G)
10. Unauthorised impairment of electronic communication (s 86H)
11. Misuse of personal identification information (s 144C)
12. Prohibited material (s 144D)
13. Blackmail (s 172)
14. Criminal defamation (s 257)

Classification (Publications, Films and Computer Games) Act 1995 (SA)

15. Leaving films in certain places (s 44)
16. Possession or copying of film for purpose of sale or exhibition (s 45)
17. Sale of unclassified RC publications (s 46)
18. Leaving or displaying publications in certain places (s 52)
19. Making available or supplying objectionable matter on on-line service (s 75C)

Criminal Code 1995 (Cth)

20. Dealing in identification information (s 372.1)
21. Interception devices (s 474.4)
22. Offences using a carriage service
 - To make a threat (s 474.15)
 - To menace, harass or cause offence (s 474.17)

Telecommunications (Interception and Access) Act 1979 (Cth)

23. Telecommunication not to be intercepted (s 7)
24. No dealing in intercepted information or interception warrant information (s 63)
25. Civil remedies unlawful interception or communication (s 107A)

Summary Offences Act 1953 (SA)

1. Humiliating or degrading filming (section 26B)

Engaging in filming (section 26B(1))

It is an offence to engage in *humiliating or degrading filming*.

Humiliating or degrading filming includes where a person is being filmed while being subjected to or compelled to engage in either:

- An assault or act of violence; or
- An act that a reasonable adult member of the community would consider to be humiliating or degrading to such a person (must cause more than minor or moderate embarrassment)

It does **not** include if a person consented to the filming at the time, for example, if a sexual video was consensually filmed by a couple while they were together.

Note: there can be no consent where:

- A person is under 16 years old; or
- A person is mentally incapacitated; or
- Consent was obtained through duress or deception

Maximum penalty: Imprisonment for 1 year.

- **For example:** filming a woman who has passed out at a party being subjected to non-consensual sexual conduct.

The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

It is a defence to the above offence if the defendant can prove one or more of the following:

- The defendant did not knowingly film the images
 - For example the filming took place accidentally or the filming took place in circumstances where the defendant did not know what images were being filmed.
- The defendant reasonably believed that the victim consented to the filming
 - However, there can be no apparent consent if the person was under 16 years or mentally incapacitated or if duress or deception was used.
- The conduct was for a *legitimate public purpose*
 - To be for a legitimate public purpose, the conduct must have been done in the public interest e.g. for a medical, legal or scientific purpose, or a purpose connected to law enforcement.
- **For example:** a person has cameras in their house for security purposes. They have a party at their house, at which a woman passed out and was sexually assaulted by another guest. The act was caught on camera. The person who owns the cameras only had them set up for security in their home and would have a defence as they did not knowingly film the images.

Distributing images from filming (section 26B(2))

It is an offence to distribute a moving or still image obtained by humiliating or degrading filming knowing or having reason to believe that the victim does not consent to that particular distribution. This includes if the victim does not consent to distribution of the image generally in addition to that particular distribution.

Maximum penalty: Imprisonment for 1 year. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

- **For example:** sending on to others a video of a woman who has passed out at a party being subjected to non-consensual sexual conduct

Note that this **would not** cover an incident in which sexual activity is filmed consensually but then shared without consent, due to the limited definition of *humiliating or degrading filming* (however, see s 26C, below).

It is a defence to the above offence if the defendant can prove one or more of the following:

- The defendant's distribution of the image was neither *intentional nor reckless*
- The conduct constituting the offence was for a *legitimate public purpose* (see above).

Engaging in a humiliating or degrading act while filming (section 26B(3))

It is an offence if the person who took part in the humiliating or degrading act also filmed that act (without consent).

Maximum penalty: Imprisonment for 2 years. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

- **For example:** a man films himself sexually assaulting a woman who has passed out at a party. He has committed offences against both ss 26B(1) and 26B(3) as well as sexual assault.

It is a defence to the above offence if the defendant can prove one or more of the following:

- The defendant did not knowingly film the images
 - Example provided in the Act: the filming took place accidentally or the filming took place in circumstances where the defendant did not know what images were being filmed.
- The defendant reasonably believed that the victim consented to the filming
 - However, there can be no apparent consent if the person was under 16 years or mentally incapacitated or if duress or deception was used.
- The conduct was for a *legitimate public purpose* (see above).
- **For example:** if a man reasonably believed his wife was consenting to the filming of them having sex and set up the camera in their bedroom so she could plainly see, he may have a defence. However, if he told her that if she did not allow him to film them, he would hurt her, there is no apparent consent as it is under duress.

Engaging in a humiliating or degrading act and distributing (section 26B(3))

It is an offence if the person who took part in the humiliating or degrading act also distributed a moving or still image from the filming (without consent).

Maximum penalty: Imprisonment for 2 years. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

- **For example:** a man's friend films him sexually assaulting a woman who has passed out at a party. He then gets a copy of the film and uploads it onto social media. He has committed offences against both ss 26B(1) and 26B(3)

It is a defence to the above offence if the defendant can prove one or more of the following:

- The defendant's distribution of the image was *neither intentional nor reckless*
- The conduct constituting the offence was for a *legitimate public purpose* (see above).

2. Distribution of invasive image (section 26C)

It is an offence to distribute an *invasive image* of another person, knowing or having reason to believe that the other person does not consent to that particular distribution. This includes if the other person does not consent to distribution of the image generally in addition to that particular distribution.

An *invasive image* is a moving or still image of a person:

- Engaged in a sexual act of a kind not ordinarily done in public; or
- Using a toilet; or
- In a state of undress so their bare genital or anal region is visible

It does not include an image of a person who is or looks under the age of 16 years or an image of a person who is in a public place.

This would cover where a sexual activity is filmed consensually within a relationship but then shared without consent when that relationship ends.

Maximum penalty: \$10 000 or imprisonment for 2 years. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

It is a **defence** if the defendant can prove that the conduct was done:

- For a purpose connected to law enforcement; or
- For a medical, legal or scientific purpose; or
- By a licensed investigation agent in the course of obtaining evidence for a legal claim

3. Indecent filming (section 26D)

Engaging in indecent filming (section 26D(1))

It is an offence to engage in indecent filming.

Indecent filming means:

- Filming another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy; or
- Filming another person in circumstances in which a reasonable person would expect to be afforded privacy while that person is either:
 - Engaged in a sexual act of a kind not ordinarily done in public; or
 - Using a toilet
- Filming another person's genital or anal region (either covered by underwear or bare) in circumstances in which a reasonable person would not expect that the person's private region might be filmed

Maximum penalty: If the person filmed was a minor, \$20 000 or imprisonment for 4 years, or in any other case \$10 000 or imprisonment for 2 years. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

- **For example:** it would be an offence to set up a covert camera in a bathroom and use it to secretly film a person getting naked.

It is a defence if the defendant can prove one or more of the following:

- The indecent filming occurred with the **consent** of the person filmed
 - However, there can be no apparent consent if the person was under 16 years or mentally incapacitated or if duress or deception was used
- The image was filmed by a licensed investigation agent in the course of obtaining evidence for a legal claim

Distributing indecent filming (s 26D(3))

It is an offence to distribute a moving or still image obtained by *indecent filming*.

Maximum penalty: If the person filmed was a minor, \$20 000 or imprisonment for 4 years, or in any other case \$10 000 or imprisonment for 2 years. The court may also order that the records of the moving or still images be forfeited (s 26E(3)).

It is a defence if the defendant can prove one or more of the following:

- The indecent filming occurred with the **consent** of the person filmed
 - However, there can be no apparent consent if the person was under 16 years or mentally incapacitated or if duress or deception was used
- The image was filmed by a licensed investigation agent in the course of obtaining evidence for a legal claim
- The defendant did not know, and could not reasonably be expected to have known, that the indecent filming was without the person's consent
- The indecent filming was undertaken by a licensed investigation agent in the course of obtaining evidence for a legal claim

4. Threat to distribute an invasive image or image obtained from indecent filming (Section 26DA)

It is an offence to threaten to distribute an invasive image of a person, or an image obtained by the indecent filming of a person, and to intend to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused.

Maximum penalty: \$5,000 or imprisonment for 1 year, unless the image of filming is of a person under the age of 17, then \$10,000 or imprisonment for 2 years.

- **For example:** A person tells his partner that she must perform certain sexual acts for him, and that if she refuses, he will post the video he has recorded of the two of them having sex to her Facebook page.

5. Indecent or offensive material (section 33)

In relation to *indecent or offensive material*, it is an offence to:

- Produce it for sale
- Sell it
- Exhibit it in a public place
- Exhibit it to a person to offend or insult them
- Deliver or exhibit it to a minor
- Cause or permit someone else to do one of the above actions

However, it does not include, for example, where there is artistic merit or where the material was for legal, medical or scientific knowledge.

There must be consent of the Minister to prosecute a charge under this section.

Indecent material refers to material that is wholly or partly indecent, immoral or obscene.

Offensive material includes where the subject matter involves violence, cruelty, drugs, crime or revolting or abhorrent phenomena that would cause serious and general offence amongst reasonable adult members of the community.

Maximum penalty: \$20 000 or imprisonment for 6 months. The court can also order for the indecent or offensive material to be forfeited (s 33(9)).

- **For example:** a woman's ex-partner sells naked photos of her with a sex toy to a "revenge porn" website.

Criminal Law Consolidation Act 1935 (SA)

6. Unlawful threats (section 19)

It is an offence to make threats to:

- Kill or endanger another's life (s 19(1)); or
- To cause harm to another (s19(2))

intending to arouse fear that the threat will be or is likely to be carried out, or is recklessly indifferent as to whether such fear is aroused.

Maximum penalty 19(1): 10 years imprisonment or 12 years for an aggravated offence.

Maximum penalty 19(2): 5 years imprisonment or 7 years for an aggravated offence.

Note: if the victim was in a domestic relationship with the offender (e.g. was or is in an intimate or family relationship with them), the offence is an aggravated offence (see s 5AA).

- **For example:** a man who has been violent towards his ex-partner in the past sends her a text message saying he will kill her.

7. Unlawful stalking (section 19AA)

It is an offence for a person to stalk a person.

A person stalks another if on *at least two* separate occasions that person:

- Gives or sends offensive material to the other person, or leaves offensive material where it will be found by, given to or brought to the attention of the other person; or
- Publishes or transmits offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, the other person; or
- Communicates with the other person, or to others about the other person, by way of mail, telephone (including associated technology), facsimile transmission or the internet or some other form of electronic communication in a manner that could reasonably be expected to arouse apprehension or fear in the other person; or

- Keeps the other person under surveillance;

intending to cause serious physical or mental harm to a person or intending to cause a serious apprehension of fear. This fear can extend to a fear of being embarrassed and does not have to be fear for personal safety (*Police v Gabrielsen* [2011] SASC 39).

Note: This section covers a broad range of conduct that can be considered as stalking, above are only those types of conduct most relevant to technology-facilitated stalking and abuse.

Maximum penalty: imprisonment for 3 years or 5 years for an aggravated offence.

Note: if the victim was in a domestic relationship with the offender (e.g., was or is in an intimate or family relationship with them), the offence is an aggravated offence (see s 5AA).

- **For example:** where a woman's ex-partner sends her numerous emails or text messages containing crude insults and accusations (*as in Police v Gabrielsen* [2011] SASC 39).

8. Assault (section 20)

An offence is committed where a person threatens to apply force (directly or indirectly) to the victim and there are reasonable grounds for the victim to believe that person making the threat can carry it and intends to or there is a real possibility they will carry it out.

Maximum penalty: 2 years imprisonment or 3 years for an aggravated offence

- **For example:** a man sends his ex-partner a text message with a photo of his gun and the words "I'm going to kill you."

9. Unauthorised modification of computer data (section 86G)

It is an offence for a person to knowingly cause an unauthorised *modification* (deletion, alteration or addition) of computer data (including things stored on a computer), intending to or recklessly causing harm or inconvenience by impairing access, reliability, security or operation of computer data.

Maximum penalty: Imprisonment for 10 years.

- **For example:** a man infects his ex-partner's computer with spyware software so he can monitor her movements, emails, see her keystrokes and access information stored on her computer.

10. Unauthorised impairment of electronic communication (section 86H)

It is an offence to knowingly cause an unauthorised *impairment* of electronic communication and intends by doing so to cause harm or inconvenience.

Impairment includes the prevention or delay of electronic communications. It only includes interception of communication if it impairs its arrival at an intended destination.

Maximum penalty: Imprisonment for 10 years.

- **For example:** a man infects his ex-partner's computer with a computer virus which means her emails will no longer send

11. Misuse of personal identification information (section 144C)

It is an offence for a person to use another person's *personal identification information* intending to commit or facilitate the commission of a serious criminal offence (includes indictable offences).

Personal identification information includes a person's name, address, date or place of birth, marital status, relatives, their driver's licence details, passport details, voiceprint, credit card details or digital signature (s 144A).

Maximum penalty: the penalty appropriate to an attempt to commit the serious criminal offence.

- **For example:** a man posts his ex-partner's name, photo and address on a forum instructing other people on the forum to go to her house and rape her.
- When someone posts a person's personal identification information online in this manner, it is sometimes referred to as 'doxing'

12. Prohibited material (section 144D)

It is an offence for a person to produce *prohibited material* or be in possession of it with the intention of using it for a criminal purpose.

Prohibited material is defined widely to mean anything (including personal identification information) that enables a person to assume a false identity or to exercise a right of ownership that belong to someone else (s 144A).

Maximum penalty: Imprisonment for 3 years

- **For example:** a man is in possession of naked photos of his ex-partner and threatens to post them online along with her name and personal details without her consent.

13. Blackmail (section 172)

It is an offence for a person to *menace* another person intending to get the other to submit to a demand.

Menace means making an unwarranted threat to harm the person or a third person. Harm includes physical, mental, economic harm, harming property or humiliation or serious embarrassment. For the behaviour to be *menacing* it must be a threat that would have been taken seriously by a reasonable person of normal stability and courage, or the victim took the threat seriously because of a particular vulnerability known to the person making the threat.

Maximum penalty: imprisonment for 15 years, or 20 years for an aggravated offence.

Note: if the victim was in a domestic relationship with the offender (e.g. was or is in an intimate or family relationship with them), the offence is an aggravated offence (see s 5AA).

- **For example:** a person demands to see his children or will post a sex tape of the victim on the Internet.

14. Criminal defamation (section 257)

It is an offence for a person to publish defamatory material about another living person without *lawful excuse* and:

- Knowing the matter to be false or being recklessly indifferent as to whether it is true or false; and
- Intending to cause serious harm or being recklessly indifferent as to whether it will cause harm.

A person has *lawful excuse* if they can prove they would have a defence to civil law defamation. Some defences include proving the defamatory allegations are substantially true or are a fair report of proceedings (e.g., a court matter) or that it was an honest opinion with a proper basis or that the matter is trivial and it is unlikely the defamed person suffered any harm.

Maximum penalty: Imprisonment for 3 years.

- **For example:** a person posts on the Facebook page of a school where his ex-partner works as a teacher. He makes up false accusations that his ex-partner is having sex with students at the school, and as a consequence, her reputation is damaged.

Classification (Publications, Films and Computer Games) Act 1995 (SA)

Refused classification (RC) includes, for example, films that deal with sex, crime, cruelty or violence in way that offends the standards of morality, decency and propriety generally accepted by reasonable adults (*National Classification Code (May 2005)*).

X 18+ includes, for example, films (that are not RC) that contain real depictions of actual sexual activity between consenting adults that would be unsuitable for a minor to see (*National Classification Code (May 2005)*).

R 18+ includes, films (that are not RC or X 18+) that are unsuitable for a minor to see (*National Classification Code (May 2005)*).

MA 15+ includes, films (that are not RC, X 18+ or R 18+) that deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing by persons under 15 (*National Classification Code (May 2005)*).

15. Leaving films in certain places (section 44)

It is an offence for a person to leave a film in a public place or on private premises (without the occupier's permission), where if it were ever put before a classification board, that film would be:

- *Refused classification* or rated X 18+
 - **Maximum penalty:** \$10,000.
 - Or, Rated R 18+ or MA 15+
 - **Maximum penalty:** \$1,250.
- **For example:** a person leaves a sex tape of his ex-partner on her parent's doorstep.

16. Possessing or copying film (section 45)

It is an offence for a person to possess or copy a film with the intention of exhibiting it or selling it, where that film would be *refused classification* or rated X 18+ if it were ever put before a classification board.

If the person was in possession of, or made, 3 or more copies of the film, that is sufficient to prove the person had the intention of exhibiting or selling the film, absent evidence to the contrary.

Maximum penalty: \$10,000.

17. Sale of unclassified RC publications (section 46)

It is an offence for a person to intentionally sell or deliver a publication (can be written or pictorial), where:

- If it were ever put before a classification board, it would be likely to be *refused classification*; or
- Where it would cause offence to a reasonable adult; or
- Where it would be unsuitable for a minor to see.

Maximum penalty: \$10,000

18. Leaving or displaying publications in certain places (section 52)

It is an offence for a person to leave a *publication* (can be written or pictorial) in a public place, or so it is visible in a public place or on private premises (without the occupier's permission), where:

- If it were ever put before a classification board, it would be likely to be *refused classification*; or
 - Where it would cause offence to a reasonable adult; or
 - Where it would be unsuitable for a minor to see.
- **For example:** a person prints out naked photos of his ex-partner and plasters them on street poles around her neighbourhood.

Maximum penalty: \$10,000

19. Making available or supplying objectionable matter on on-line service (section 75C)

It is an offence for a person, by means of an on-line service, to make available or supply to another person *objectionable* matter, knowing it was objectionable matter or being reckless to it being objectionable matter.

Objectionable matter includes a film that would be *refused classification* or rated X 18+ if it were ever put before a classification board (s 75A).

Maximum penalty: \$10,000

- **For example:** a person uploads to social media a film of his ex-partner having sex with someone.

Criminal Code 1995 (Cth)

20. Dealing in identification information (section 372.1)

It is an offence to *make, supply or use* the identification information of another person to pretend to be, or to pass oneself off as another person for the purpose of committing or facilitating a Commonwealth indictable offence (meaning, a crime under a Commonwealth Act that is punishable by imprisonment for more than 12 months).

This is commonly referred to as 'identity fraud'.

Maximum penalty: Imprisonment for 5 years.

- **For example:** a person makes a social media account in his ex-partner's name, pretending to be her. He posts her personal details and tries to add her friends so they see the account. In order to harass her, he starts posting offensive comments from this account (see also s 474.17).

21. Interceptions devices (section 474.4)

It is an offence to *manufacture, advertise, sell, or possess* an interception device.

Interception device includes an apparatus or device that is capable of intercepting a communication passing over a telecommunication system that could reasonably be regarded as having been designed for that purpose (see s 473.1).

Maximum penalty: Imprisonment for 5 years.

- **For example:** it is an offence for a person to have in their possession an audio bugging device used to intercept and listen to phone calls.

22. Offences relating to the use of a carriage service (sections 474.15 and 474.17)

A 'carriage service' means a service for carrying communications by means of guided and/or unguided electromagnetic energy (s 7 *Telecommunications Act 1997* (Cth)). Examples include:

- Telephone services
- Internet access services
- Voice over Internet Protocol (VoIP) services (eg, Skype)

Using a carriage service to make a threat to kill (s 474.15)

It is an offence for a person to use a carriage service to make a **threat** to a person that they will **kill** them or a third person, intending them to fear the threat will be carried out. It is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.

Maximum penalty: Imprisonment for 10 years.

- **For example:** sending a person a text message, email or instant message or a telephone or videoconference call where they threaten to kill their ex-partner or her child

Using a carriage service to make a threat to cause serious harm (s 474.15)

It is also an offence for a person to use a carriage service to make a threat to a person that they will cause them or a third person **serious harm**, intending them to fear the threat will be carried out. It is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.

Maximum penalty: Imprisonment for 7 years.

- **For example:** sending a person a text message, email or instant message or a telephone or videoconference call where they threaten to break the limbs of their ex-partner or her child

Using a carriage service to menace, harass or cause offence (s 474.17)

It is an offence for a person 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.

- **For example:** sending a person a large volume of offensive text messages, emails or instant messages or a telephone or videoconference calls

Telecommunications (Interception and Access) Act 1979 (Cth)

23. Interception of telecommunications (section 7)

It is an offence for a person to intercept or do any act or thing that will enable that person or another person to *intercept a communication passing over a telecommunications system*.

Interception of a communication passing over a telecommunications system means listening or recording the communication without the knowledge of the person making the communication.

There are limited exceptions, for example, where there was a warrant issued.

Maximum penalty: Imprisonment for 2 years (see s 105).

- **For example:** someone pays a person to set up a phone bug on their ex-partners phone without their knowledge, to listen in on their calls.

Due to the definition of *passing over* (s 5F) it would not be an offence to read a person's inbox of emails or SMS messages without their consent because the messages have already been received and are not in transit

24. Dealing in intercepted information (section 63)

A person must not communicate to another person, make use of, or make a record of, or give evidence in a proceeding any information that has been intercepted (subject to the other provisions of Part 2-6).

Maximum penalty: Imprisonment for 2 years (see section 105).

25. Civil remedies relating to unlawful interception and communication (section 107A)

The legislation provides for civil remedies for the unlawful interception of a communication passing over a telecommunications system, and the unlawful communication of such information.

Some orders the court can make are:

- An order declaring the interception or communication was unlawful
- An order that the defendant pay to the protected person damages or another amount representing the income derived by the defendant from the interception
- An injunction

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. It is civil legislation not criminal, however may be relevant if there are criminal charges being laid in relation to distributing intimate images without consent. In addition to pressing criminal charges the images can be reported to the eSafety Commissioner in an attempt to have the images removed.

The Office of the eSafety Commissioner (OeSC) can investigate complaints of abusive and harmful material online and issue removal notices to service or hosting providers and/or the user (abuser). Complaints can be made at esafety.gov.au.

- **Non-consensual sharing of images** (Part 6) - see the *Legal Guide to Image-Based Abuse Legislation*

handout for each State for more information about the *Online Safety Act 2021* (Cth).

- **Cyber-abuse material targeting an Australian adult** (Part 7). Establishing cyber-abuse requires that:
 - an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect of causing serious harm to a particular Australian adult (physical harm and/or harm to mental health); and
 - an ordinary reasonable person in the position of the Australian adult would regard the material as being, in all the circumstances, menacing, harassing or offensive.

Maximum penalty for non-compliance with removal notice: 500 penalty units.

- **Cyber-bullying material targeting an Australian child** (Part 5). Establishing cyber-bullying requires that:
 - an ordinary reasonable person would conclude that it is likely that the material was intended to have an effect on a particular Australian child; and
 - the material would be likely to have the effect on the Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child.

Maximum penalty for non-compliance with removal notice: 500 penalty units.

You can find more information about the Online Safety Act 2021 at <https://www.esafety.gov.au/>

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

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