

# TECHNOLOGY-FACILITATED STALKING AND ABUSE: PUTTING OUR LEGAL FRAMEWORK TO THE TEST

By Charissa Sun



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**A**dvances in information and communication technology, together with increased access to such technology, have led to a rapid rise in technology-assisted domestic violence (also known as technology-facilitated stalking and abuse). This is reflected in the experiences of clients seen by Women's Legal Services NSW ('WLS NSW') as well as in the results of the latest national survey of domestic violence workers – 98 per cent of whom stated that they had clients who had experienced technology-facilitated stalking and abuse (*Technology Facilitated Abuse*, DVRCV Advocate, Autumn/Winter 2015).

Through the use of the internet, social media, email, mobile devices, and surveillance software and devices – domestic violence perpetrators have access to new methods and tools to abuse, threaten, intimidate, harass and stalk their victims. In turn, victims of such abuse can feel tethered to their abusive partners by technology, unable to escape. The sense of no escape, combined with the constancy of the surveillance and abuse, leads to high levels of emotional distress and impacts on victims' mental and physical health. (Delanie Woodlock, (2013) *Technology-facilitated Stalking: Findings and Recommendations from the SmartSafe Project*, Domestic Violence Resource Centre Victoria, Collingwood.)

## What does technology-assisted stalking and abuse look like?

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);

## Snapshot

- Technology-assisted stalking and abuse is a form of domestic violence (DV) that is rapidly on the rise.
- Despite the pervasiveness of technology-facilitated stalking and abuse, recognition of the seriousness of such conduct and the corresponding effect it has on victims is lagging behind.
- It is imperative that lawyers, police officers, and the judiciary recognise what technology-facilitated domestic violence looks like, that it has a devastating and long lasting impact on victims, and that the legal framework should be used to its fullest extent to protect victims from such abuse.

- 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 software and devices to spy on or stalk a person (eg placing a GPS tracker on a person's car, placing a video camera in and around a person's home to monitor both the person and other people who may come to the house); and
- sharing, or threatening to share, intimate pictures of a person.

## Legal responses

There are several mechanisms in the legal framework that provide some assistance and protection to victims of technology-facilitated stalking and abuse. This article will consider three of these mechanisms: protection orders, surveillance and telecommunications offences, and other criminal offences.

## Protection Orders

Of broadest application is the use of apprehended domestic violence orders ('ADVOs') to restrain DV perpetrators from engaging in behaviour that constitutes technology-facilitated stalking and abuse. ADVOs contain mandatory orders that the person whom the ADVO is made against ('the defendant') cannot assault, molest, harass, threaten, intimidate, stalk or otherwise interfere with the person the ADVO is made to protect ('the protected person'). The court may also make additional orders, including that the defendant cannot approach or contact the protected person. If the defendant breaches any of the conditions in the ADVO, it is an offence and the police may charge the defendant.

## Surveillance and telecommunications offences

DV perpetrators commonly use surveillance devices such as listening, optical surveillance, and GPS tracking devices to spy on and stalk their victims. The use of such devices in NSW is regulated by the *Surveillance Devices Act 2007* (NSW) ('SD Act').

*Listening device*: Generally, it is an offence for a person to knowingly install, use or cause to be used, or maintain a listening device to record a private conversation, whether or not that person is a party to that private conversation. If a person is not a party to a private conversation, then it is also an offence for that person to knowingly install, use or cause to be used, or maintain a listening device to overhear, monitor, or listen to a private conversation (*SD Act*, s 7).

For example, it would be an offence for a person to install an audio bug surveillance device in his home in order to overhear, monitor, or listen to private conversations his partner has with other people. If that person installed a bug on the telephone to intercept and listen/record both sides of the telephone conversation then it would be a federal offence under the *Telecommunications (Interception and Access) Act 1979* (Cth) s 7.

It is worth noting that any device capable of recording sound may be considered a listening device – therefore a video camera that captures both audio and visual information is considered a listening device.

*Optical surveillance device:* Generally, if the installation, use or maintenance of an optical surveillance device involves:

- entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle; or
- interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object,

it would be an offence to knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any other object, to record visually or observe the carrying on of an activity (*SD Act*, s 8).

For example, it would be an offence for a person to break into his ex-partner's house or enter her property without her consent to install a surveillance camera. However, a person may generally install surveillance cameras on his own property (subject to the operation of other offences – see *Relevant Criminal Offences* below).

*Tracking device:* A 'tracking device' means any electronic device capable of being used to determine or monitor the geographical location of a person or an object. Common examples include standalone GPS tracking devices and mobile devices embedded with a GPS tracker. Generally, it is an offence to knowingly install, use or maintain a tracking device to determine the geographical location of a person without their permission.

For example, it is an offence to track someone's geographical location without their consent by using a standalone GPS tracking device, an application on a person's mobile phone that tracks GPS location, or a program such as 'find my iPhone'.

#### **Relevant Criminal Offences**

Lastly, there are several NSW and Commonwealth offences that target specific behaviours relating to technology-facilitated stalking and abuse, including the sending of threatening emails and messages, filming an intimate act without consent, and publishing intimate pictures.

Some of these offences are:

*Crimes Act 1900* (NSW)

- sending documents containing threats (s 31);
- voyeurism (s 91J);
- filming a person engaged in a private act (s 91K);
- filming a person's private parts (s 91L);
- installing device to facilitate observation or filming (s 91M); and
- publishing indecent articles (s 578C) – eg posting intimate pictures of ex-partner on social media – see *Police v Ravshan Usmanov* [2011] NSWLC 40.

*Crimes (Domestic and Personal Violence) Act 2007* (NSW)

- stalking or intimidation with intent to cause fear of physical or mental harm (s 13)

*Criminal Code 1995* (Cth)

- using a carriage service to make a threat to kill or cause serious harm (s 474.15); and
- using a carriage service to menace, harass or cause offence (s 474.17).

#### **Challenges**

Whilst there are existing legal avenues to assist victims of technology-facilitated stalking and abuse to protect themselves and hold perpetrators to account, a key issue is that these laws were not drafted to address specific behaviours related to technology-facilitated stalking and abuse. Therefore, existing laws are not used as often as they could be, and when they are used, it sometimes requires a creative application of the law to meet the needs of the victim. It is imperative that lawyers, police officers, and the judiciary recognise what technology-facilitated domestic violence looks like, that it has a devastating and long lasting impact on victims, and that the legal framework should be used to its fullest extent to protect victims from such abuse.

Despite the pervasiveness of technology-facilitated stalking and abuse, recognition of the seriousness of such conduct and the corresponding effect it has on victims is lagging behind. Physical harm, or the threat of physical harm, is still taken more seriously and, by extension, better protected against.

This has led to cases where the legal system has failed to respond to this sort of abuse through protective court orders such as ADVOs. It is a common experience amongst WLS NSW clients that police often do not take action

when they report technology-facilitated stalking and abuse that does not include threats to the client's physical safety. For example, a woman who reported to police that she had received a large number of unwanted and abusive phone calls and text messages from her ex-partner was told that the police cannot do anything unless there is a direct threat made to her physical safety.

#### **Where to from here?**

The key to meeting these challenges is to raise awareness of the issues surrounding technology-facilitated domestic violence and to provide relevant and useful resources to help women use technology safely, to protect themselves, and to hold perpetrators to account.

*Recharge: Women's Technology Safety* is a joint project by WLS NSW, the Domestic Violence Resource Centre Victoria ('DVRCV') and WESNET, and in partnership with the Australian Communications Consumer Action Network ('ACCAN').

This project will create an Australia-specific and Australia-wide resource for women experiencing technology-facilitated domestic violence and those trying to assist them. The resources being developed include legal guides for all states and territories, technology-safety toolkits, how-to videos, advice and tip sheets, and a dedicated national website to house these resources.

These resources will be published in July 2015 and will be available on the national website at [www.smartsafe.org.au](http://www.smartsafe.org.au). **LSJ**

#### *Gender and language:*

*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 perpetrators and women are the victims. For this reason this article has used 'he' to refer to perpetrators and 'she' to refer to victims. This is not intended to exclude other situations.*

#### *Language of '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, this article has referred to women who are experiencing, or who have experienced, domestic violence as 'victims' of domestic violence.*