

Stalking and abuse in the digital age: what you can do to protect your clients

■ BY HELEN CAMPBELL OAM



Helen Campbell is the Executive Officer of Women's Legal Service NSW.

Technology-facilitated stalking and abuse is real abuse causing real harm, and there are legal remedies available to address it. It is important to be aware of the remedies and to take action to protect your clients. It is still too frequently under-enforced by police. But the new powers of the e-Safety Commissioner may go some way to address this.

A key thing to note is that the behaviour of perpetrators in this area is not new, it's just that advances in technology have given them new tactics to continue to perpetrate.

What is technology-assisted domestic violence?

It is the use of technology, such as the internet, social media, mobile phones, computers and surveillance devices, to stalk, harass, intimidate or humiliate a partner or ex-partner.

Common behaviours include: demanding passwords; unauthorised access of accounts; using technology to spread rumours; constantly checking up on a person through technology or tracking through location settings; demanding, threatening to share or actually sharing private photos or videos without consent; hidden cameras, audio-recorders or GPS.

Unlike 'domestic violence', 'technology-assisted' or 'technology-facilitated' is not a legal term, just a descriptive one, so there is no real set of technologies that are included in the term. It could also include less modern technologies and non-communication technologies - regular phones, garage doors, security systems, etc.

There is debate as to whether the impact of technology-facilitated stalking and abuse is a unique and new phenomenon, or if it is simply old perpetrator tactics with a modern twist. Some academics argue it's just new tools for old behaviours, and the impact is therefore similar. However, recent studies have shown the impact of tech-facilitated stalking and abuse is unique. For example, victims can feel tethered to their abusive partners by technology, unable to escape. The perpetrators can have unfettered access and physically leaving a relationship no longer means truly being safe. The sense of 'no escape' combined with

Snapshot

- Technology-facilitated stalking and abuse is real abuse, causing real harm.
- It is important to be aware of the remedies and to take action to protect your clients.
- Generally speaking, behaviour that can be considered technology-facilitated stalking or harassment can amount to a criminal offence.
- There is also a range of effective new Commonwealth civil penalties and the eSafety Commissioner has been given greater powers of enforcement.

the constancy of the surveillance and abuse leads to high levels of emotional distress and impacts on victims' mental and physical health.

Technology-facilitated domestic violence is often seen as trivial or of less concern than physical violence. Law enforcement officers, professionals, even friends and family are more inclined to minimise or ignore some uses of technology to stalk/intimidate/harass, responding with 'just ignore it', 'just cancel your Facebook account then', or 'put your phone on silent' for example. These remarks betray a lack of understanding – both of the importance of technology in our lives, and the ways in which it can be used to keep us safe, as well as the dynamics of domestic

violence and the effects they have, whether that is in a physical or in an online space. Additionally, there is a permanence to some forms of tech abuse – for example the reputational damage that can be caused by sharing intimate images.

Legal framework

Generally speaking, behaviour that can be considered technology-facilitated stalking or harassment can amount to a criminal offence. There are also civil remedies but some such as defamation may not always be a practical course of action for many people.

These certainly aren't the only possible civil law implications, but it's still important to know civil remedies do exist and may be relevant, despite the practical obstacles faced by many people.

Some of the civil and criminal remedies are outlined below.

Harassment via technology

Apprehended Violence Order mandatory orders prohibit the defendant from threatening, stalking, harassing or intimidating the protected person, no matter its form. Multiple phone calls, text messages, threatening or intimidating messages/calls may constitute grounds for an Apprehended Violence Order to be made or a breach of the Order. There is some reluctance by police in online spaces.



What is possible under the law vs what police will likely do are different questions, and this is where inadequate responses can be prevalent and damaging.

The Code of Practice for the NSW Police Force Response to Domestic and Family Violence states: ‘There is no such lawful term as a “technical” or “minor” breach and any breach will be treated the same. Ignoring the breach conveys to the defendant and the victim that the order is not taken seriously. An outcome of this could be continued abuse, further police involvement in subsequent breaches and possible harm to victims and/or their children.’

Sharing intimate images without consent

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.

Division 15C of the *Crimes Act 1900* (NSW) covers the recording and distribution of intimate images without consent. It is an offence to record, distribute, threaten to record or distribute an intimate image, or to contravene a court order to remove or delete an intimate image. 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.

Commonwealth Civil Penalties Scheme

The *Enhancing Online Safety Act 2015* was amended in August 2018 with the passage of the *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018*. It creates a range of civil penalties for the non-consensual recording and sharing of intimate images, and gives new powers to the eSafety Commissioner to compel the removal of intimate images from online locations, issue warnings and infringement notices and seek penalty orders in court (Part 2, s 16).

The Office of the eSafety Commissioner is currently taking reports of image-based abuse from victims. It is able to:

- refer victims to appropriate services (police, counselling, legal assistance);
- request removal of the intimate image if it has been made available online (provided such a request would not interfere

with police investigations);

- keep the victim updated on the action taken and the outcome achieved.

The Office reports significant levels of compliance with its removal requests. In the event of non-compliance, there are civil and criminal sanctions available. More information is available online at: www.esafety.gov.au/image-based-abuse.

Use of a carriage service to Menace, Harass or Cause Offence

Under section 474.17 of the schedule to the *Criminal Code Act 1995* (Cth), this offence carries a maximum penalty of three years imprisonment. A carriage service includes fixed line and mobile phones, text and VOIP services such as Skype, but not social media. One hundred and thirty five charges were laid under this provision in the last financial year (www.cdpp.gov.au/statistics/additional-tables accessed 22/1/19).

Remedies are also available under the Telecommunications Industry Handling of Life-threatening and Unwelcome Communications Code (www.commsalliance.com.au/__data/assets/pdf_file/0006/60549/C525_2017-variation-1_2018.pdf).

Defamation

Intimate images in and of themselves are not defamatory unless they carry defamatory imputations. Photographs of private parts were deemed defamatory in *Ettingshausen v Australian Consolidated Press Limited*, [1991] 23 NSWLR 443, where the professional footballer received damages of \$100,000 after a magazine published a photo showing his genitals. It was held to be a defamatory imputation that he had deliberately exposed his genitals to readers.

In *Shepherd v Walsh & Ors* [2001] QSC the defendant had taken naked photos of an ex-girlfriend without her knowledge or consent. He then had his current girlfriend send the photos into a salacious magazine with a caption and received \$150 for the photo from the publisher. The plaintiff was awarded \$50,000 damages and \$20,000 punitive damages.

Equitable action for breach of confidence

In *Giller v Procopets* [2008] 24 VR 1; VSCA 236, the Court held that the claimant could recover damages for emotional distress in her equitable claim for breach of confidence. The claim was clearly one for breach of confidence, as the material that had been disclosed by the defendant, a videotape of intimate activities, had been created by the claimant and defendant while in a de facto relationship. The court unanimously agreed that the claimant could recover compensation for her consequent emotional distress as equitable compensation.

In *Wilson v Ferguson* [2015] WASC 15, Wilson and Ferguson were both employees of Cloudbreak Mine and in an intimate relationship. During the course of their relationship Wilson and Ferguson shared sexually explicit photos and videos of each



Technology-facilitated domestic violence is often seen as trivial or of less concern than physical violence. Law enforcement officers, professionals, even friends and family are more inclined to minimise or ignore some uses of technology to stalk/intimidate/harass, responding with “just ignore it”, “just cancel your Facebook account then”, or “put your phone on silent” for example. These remarks betray a lack of understanding – both of the importance of technology in our lives, and the ways in which it can be used to keep us safe, as well as the dynamics of domestic violence and the effects they have, whether that is in a physical or in an online space.



other. On one occasion Ferguson also surreptitiously accessed Wilson’s phone to obtain photos and videos which she had not voluntarily shared with Ferguson. When Wilson learned that Ferguson had accessed her phone for this purpose, she requested that he ensure that the photos and videos remain private (this request was reiterated by text message).

The relationship subsequently soured and Ferguson took the opportunity to post the photos and videos of Wilson on his Facebook page, which was accessible by some 300 Facebook friends including mutual work colleagues of the parties.

Wilson brought an action against Ferguson on the basis of a breach of confidence. She alleged that the posting of the images to Ferguson’s Facebook page humiliated and distressed her, which led to her need to see a counsellor and being unable to sleep. She also made a claim for loss of wages on the basis that she was unable to work for a period of approximately two and a half months from the anxiety and embarrassment she suffered as a result of her work colleagues having viewed the images. The Court found:

- the information was of a confidential nature, which was clear from the nature of the images;
- the information was communicated or obtained in circumstances importing an obligation of confidence, and some of the images were obtained by Ferguson without Wilson’s consent; and
- there was an unauthorised use of the information, namely posting the images on Facebook so that it was viewable by hundreds of people, including Wilson’s work colleagues.

As a result, the Court found that Ferguson had breached his equitable obligation of confidentiality owed to Wilson.

Surveillance

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, or to determine the geographical location of an object without the permission of the person in lawful possession or having lawful control of that object (*Surveillance Devices Act 2007* (NSW), s 9(1)).

The only exceptions that apply relate to using a tracking device ‘for a lawful purpose’. Under section 138 of the *Evidence Act 1995* (NSW), it may be lawful if the probative value outweighs how the evidence was obtained. In the case of *DW v R* [2014] NSWCCA 28, a daughter recorded a conversation with her father who was sexually assaulting her. This was held to be a lawful purpose.

Section 8(1)(c) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) now provides for stalking to include contacting or otherwise approaching a person using the internet or any other technologically assisted means.

Conclusion

The law and legal processes have started to keep up with the technology tactics used by people who choose to use violence in their relationships. However, as a society we need to ensure that crime and civil justice agencies are equipped to respond and that remedies are practical and accessible for all. **LSJ**

* Women’s Legal Service NSW monthly seminar series:

The first seminar for 2019, ‘Has he been violent before? Domestic Violence Disclosure Schemes’ with Dr Jane Wangman, Senior Lecturer, Faculty of Law, UTS, is on **Wednesday, 13th February**. Everyone is welcome to come and exchange ideas, share research and consider the latest developments in legal issues that directly impact women and children. All donations are gratefully received. See: www.wlsnsw.org.au/about-us/wls-foundation