



# Domestic Violence and Technology: Advanced

## Helping victims of technology based stalking, revenge porn and harassment

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Alex Davis, Solicitor, Women's Legal Services NSW on 14 October 2014. This webinar can be viewed for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

This factsheet looks at:

- 'Revenge porn' scenarios
- Social media scenarios
- Unwanted communications scenarios
- Tracking / surveillance scenarios

### Relevant legislation

#### Criminal Law Implications

##### Commonwealth

- *Criminal Code 1995*
- *Telecommunications (Interception and Access) Act 1979*

##### NSW

- *Crimes Act 1900*
- *Crimes (Personal & Domestic Violence) Act 2007*
- *Surveillance Devices Act 2007*

#### Civil Law Implications

- *Victims Rights and Support Act 2013 (NSW)*
- Equitable action for breach of confidence
- Tort of intentional infliction of harm
- Tort of malicious or injurious falsehood
- Defamation

### 1. 'Revenge Porn' Scenarios

#### Betsy Scenario 1

**Betsy and Archi were in a relationship. While they were together, they made a sex tape together consensually. When they broke up, Betsy asked Archi to delete the copy of the tape. He refuses.**

- It's important to refer the client to a lawyer if they're concerned about their ex-partner sharing intimate photos or videos
- While this action may not be considered criminal, an injunction or an order with a similar effect that restrains the disclosure of this information may be available
- Eg, if Betsy & Archi have children and were in the process of getting court orders for parenting arrangements, an injunction can be made under the **Family Law Act 1975 (Cth)**; **AVOs** can also be tailored to include prohibitions against publishing or sharing such material or Betsy could seek an injunction for **breach of confidence**
- In 2014, a court in Koblenz, Germany held that one person's right to privacy outweighs another's ownership rights to intimate photos taken in the relationship. Even if the photos/filming was consensual, that consent can be withdrawn when the relationship ends. However, there is no precedent in Australia to suggest this is the law here

#### Betsy Scenario 2

**What if Archi filmed the sex tape without Betsy's knowledge or consent?**

Generally, this offence would fall under the *Crimes Act 1900 (NSW)*, s 91K:

- **Filming a person engaged in a private act** (s 91K): For the purpose of obtaining/enabling another person to obtain sexual arousal/gratification **without consent** & knowing the other person doesn't consent

Other sections *Crimes Act 1900* (NSW) (not relevant to our case study)

- **Filming a person's private parts** (s 91L): in circumstances in which a reasonable person would reasonably expect the person's private parts could not be filmed for sexual arousal/gratification **without consent** & knowing the other person doesn't consent
  - The double jeopardy provision (s 91L) prevents a person being convicted of both this offence and s 91K in respect of conduct occurring on the same occasion
- **Voyeurism** (s 91J): observing a person engaged in a private act for sexual arousal/gratification without consent & knowing the other person doesn't consent
- **Installing device to facilitate observation or filming** (s 91M)
  - This is a fallback provision. If other offences are not made out, this may be relied upon
- Each offence is aggravated where a minor is involved or where building was adapted to facilitate the offences, e.g. drilling hole in wall
- These provisions also cover attempts
- Note also that unless it meets the conditions of the aggravated offence the general offence is a summary offence, so proceedings must be commenced within 6 months
- These provisions only available for offences that took place after commencement on 1 Jan 2009 - *Crimes Amendment (Sexual Offences) Act 2008* (NSW)

### Betsy Scenario 3

Archi writes Betsy the below text message...

- This may amount to a blackmail charge under s 249K *Crimes Act 1900* (NSW)
- Archi may be charged under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13
- This may be grounds for an ADVO for Betsy's protection



#### Applying for an AVO for Betsy's protection

- For an AVO to be made, the court must find that on the balance of probabilities (more likely than not), Betsy has **reasonable grounds to fear**, and in fact fears a personal violence offence, **intimidation** or stalking, and Archi's conduct is sufficient to warrant the making of the order
- The police must apply for an ADVO if they suspect or believe:
  - A domestic violence offence or a stalking and/or intimidation offence has or will be committed; or
  - Child abuse of a child under 16 years old; or
  - The police have charged someone with a domestic violence offence, stalking, intimidation or child abuse

#### What orders to ask for on an AVO?

- The mandatory order on all AVOs prohibit the defendant from assaulting, molesting, harassing, stalking or intimidating the protected person
- This should cover any future conduct such as sending a sex tape or photos to the protected person's friends, family or work
- For additional clarity, you can help your client advocate for an additional order using order 12
- The magistrate will only make the order if they think it is necessary for the safety and protection of the protected person

## AVO order 12 suggested wording to cover “revenge porn” situations

*The defendant is prohibited from publishing on the internet, by email or other electronic communication any material about or featuring the protected person, or causing another person to do this on their behalf*

### Civil Avenues:

- Victims Support
  - Stalking/intimidating with intent to cause fear or physical or mental harm is considered an ‘act of violence’ for victims of domestic violence for making a Victims Support claim
- **Giller v Procopets** (2008) 24 VR 1:
  - The estranged de facto partner of the plaintiff maliciously passed around a sex tape to the plaintiff’s family and friends without her consent. The tape had been consensually filmed
  - The Court of Appeal awarded the plaintiff \$40000 in damages in an **action for breach of confidence** for the **mental distress** she suffered as a result of the publication
- Injunctions and take down orders may also be available
- Refer your client to Victims Services or a lawyer!

### How to help Betsy if it is posted online...

- Contact the webmaster of a website to find their details
  - **whois.domaintools.com** for international websites
  - **whois.auregistry.net.au** for Australian sites
- Consider contacting search engines such as Google to ask them to remove the content from search results, eg, **support.google.com/websearch**

Example whois search >

Whois response for asklois.org.au:	
Domain Name	asklois.org.au
Last Modified	18-Mar-2014 23:59:20 UTC
Registrar ID	<a href="#">WAR</a>
Registrar Name	<a href="#">Web Address Registration</a>
Status	ok
Registrar	WOMEN'S LEGAL RESOURCES LTD
Registrar ID	ABN 88002387699
Eligibility Type	Company
Registrant Contact ID	R-005119401-SN
Registrant Contact Name	Helen Campbell
Registrant Contact Email	helen.campbell@wlsnsw.org.au
Tech Contact ID	C-002441781-SN
Tech Contact Name	Helen Campbell
Tech Contact Email	helen.campbell@wlsnsw.org.au
Name Server	<a href="#">ns1.sgp6.sitground.asia</a>
Name Server	<a href="#">ns2.sgp6.sitground.asia</a>

## 2. Social networking scenarios

### Mavis Scenario 1

**Mavis and Robby met on an online dating site, Mavis wasn’t keen on Robby and broke it off after a few dates.**

**Robby was offended and decided to get back at Mavis. He makes a fake profile for Mavis on a different dating site using her photos and name.**

**He posts that she likes rough sex, and asks men to come to her actual address and that if she says no, she means yes and that it is a part of the game.**

**What laws may Robbie be breaking?**

### Relevant law:

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

- Stalk/intimidate with intent to cause fear/physical or mental harm (s 13)

*Criminal Code 1995* (Cth)

- Dealing in identification information that involves use of a carriage service (s 372.1A)
- Using a telecommunications service with intent to cause a serious offence (s 474.14)
- Using a carriage service to menace, harass or cause offence (s 424.17)

### Mavis Scenario 2

**Robby, still livid that Mavis would reject him decides to take it further...**

**He sets up a fake Facebook account in Mavis’ name with her photo and adds friends from her contact list.**

**He then begins to post nasty ‘status updates’ about her friends and family, saying she is having affairs with her friend’s husbands and threatening to hurt people’s children**

- Mavis should report this activity to the police. If the police or support services fail to properly appreciate the seriousness of the harassment, advocacy on behalf of your client may be necessary
- This activity may be an offence under the ***Criminal Code 1995 (Cth)***
  - Using a carriage service to make a threat (s 474.15)
  - Using a carriage service to menace, harass or cause offence (s 424.17)
- This activity may amount to **defamation**, allowing Mavis to seek damages or equitable relief under civil law

### Helping Mavis

1. **Contact Facebook and report the page-** [www.facebook.com/help/](http://www.facebook.com/help/)

2. **Contact police**

- Helpful to have screen shots (including the URL) and to save the files with the date and time accessed. To screenshot on a computer:
  - **PC:** Alt + Print screen key
  - **Mac:** Command + Shift + 4
- If the client cannot access the profile but a friend can, it is helpful for her to bring her friend to the police with her, along with her device from which she can view the profile
- Your client may offer written consent for police to log in to her account to see the activities for themselves
- In some situations, it may be useful for your client to know her IP address for her devices
  - Google 'what is my IP address' on any device to find this out
- It may be useful to download 'Facebook data' onto a computer and USB stick (see below)

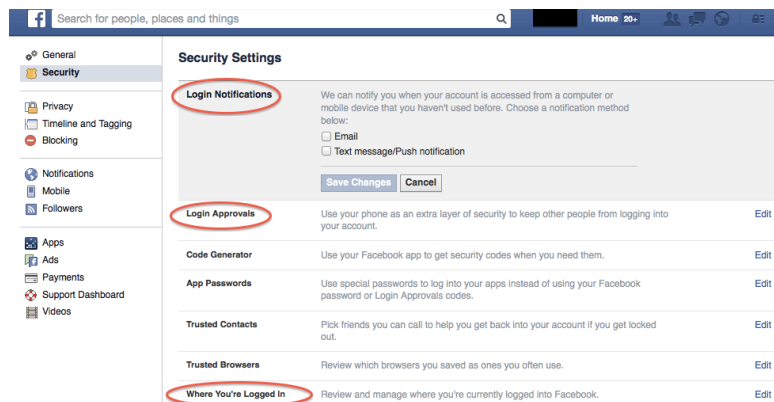
### Mavis Scenario 3

**What if Robby didn't set up a fake account, but actually accessed Mavis' actual Facebook account to make these nasty comments because she left her account logged in on Robbie's computer?**

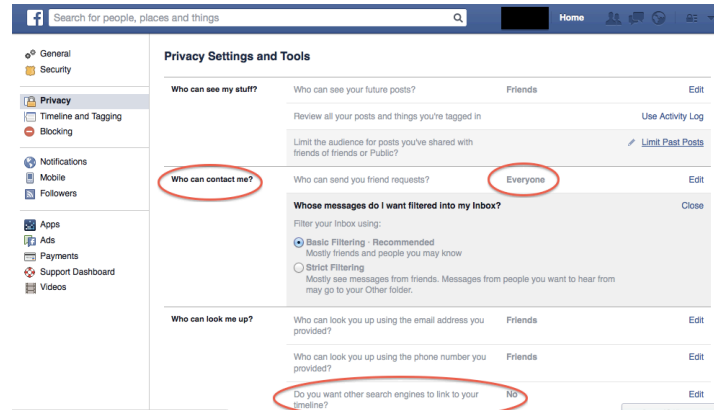
- Robby would be potentially breaking state criminal law that prevents unauthorised access to or modification of restricted data held in computer – s 308H *Crimes Act 1900 (NSW)*
- *Anders v Anders No.2* (2008) 220 FLR 318: the father was seeking to have admitted into evidence emails he had obtained by logging in to the mother's email address 2 years after separation using her password without consent. The Court found there was unauthorised access, but no restricted data for s 308H. The court held the probative value of the evidence outweighed the fact that it was improperly obtained and it was allowed into evidence

### Updating Facebook security settings

- *You have the option to set up login notifications so that you are notified if someone logs in to your account, add log in approvals and see where you're currently logged on*

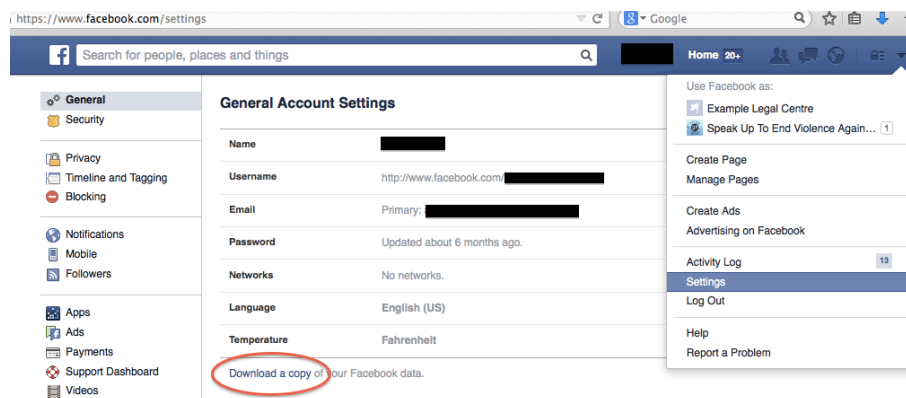


## Updating Facebook privacy settings



- You can restrict the people who can contact you on Facebook and prevent your profile from appearing in Facebook searches of your name

## Downloading Facebook data



- You can download your 'Facebook data' in settings. This data includes the same information available in your account including your Timeline information, posts, messages sent and received, photos, searches that you've carried out, past and existing friends and more
- It also includes information not available by logging into your account, like the IP addresses used when you log in or out, and the date and time associated with logins
- It doesn't include all historical IP addresses as they are deleted in a retention schedule
- Information you've deleted may not be included

## Blocking people on Facebook



- Blocking people on Facebook means they cannot see your profile if they search for you while logged in

- You can also restrict access, so for example, the other person still thinks you are friends, but cannot view your timeline or other information

**\*Warning:** If your client uses Facebook messenger app on their phone, this can be used by another person to pinpoint their address unless they adjust their location settings for the app!

### 3. Large volume of unwanted communications scenario

#### Doloris Scenario

**Doloris and Jack have been separated for 1 year, there was DV in the relationship. They have 4 children together and have interim family law orders in place.**

**The kids tell Jack that mum's got a new boyfriend. Jack's not coping too well...**

**Jack starts sending Doloris text messages that become increasingly hostile. She receives on average 30 abusive messages from him per day and 10 missed calls**

#### Practical tips to help Doloris

- Report to police and help advocate for an AVO
- Contact carriage service provider (see Handling of Life Threatening & Unwelcome Communications Industry Code below)
- Refer your client to a lawyer – in this scenario, Doloris may want to consider a family law injunction in the final parenting orders
- Help Doloris set up voice message service so messages can be used to evidence the abuse
- Help Doloris download her texts if she has a smartphone and save them as a file
- Consider blocking Jack's mobile number on Doloris' phone
- Place Jack on speaker phone so you can also hear him when he calls Doloris so you can help give evidence if it becomes a police matter

### Handling of Life Threatening & Unwelcome Communications Industry Code

- This code is to assist clients who are receiving a pattern of unwelcome communications – ie, a large volume of unwanted email, SMS, phone calls etc from a person. The code is used for investigation and warning letters through the service provider to stop the harassment
- **Unwelcome Communications** are unsolicited communications that, by virtue of the content, frequency or timing, are offensive or tend to menace and harass the recipient
- **Pattern of Unwelcome Communications** – 10 or more in 24 hours, 3 or more over 24-120 hours, or Unwelcome Communications made at consistent and/or regular intervals
- **A Life Threatening Communication** is more serious and involves the use of a Carriage Service connected with an event which gives a person reasonable grounds to believe that there is a serious and imminent threat to their life or health. These instances are referred to the police

#### What can't be investigated under the code?

- SMS or MMS from a mobile that doesn't have a public number or a machine system that isn't a mobile phone (eg, internet SMS service)
- A non-public number from overseas
- A shared public resource such as a public phone

#### Making a complaint

- It is important who initiated the unwanted communication. If it was your client, they should not use this mechanism
- Must make complaint within 30 days of an unwanted communication
- Supplier will give list of options, if the customer doesn't want to take any of them up, can pursue

investigation / warning letter process

- **Options:** include terminating contact with the other person, deleting the offensive messages, screening calls, contacting the police, etc (4.2.4)
- Customer must consent to disclosing **Communication Service Identification (CSI)** ie, telephone service, email address or an IP address. If they don't consent, no further action can be taken (4.2.6)
  - If they consent, the customer needs to make detailed records of 3 unwelcome communications including the time, date and approximate duration
- Two warning letters sent to the other party – if they fail to stop this activity, their service is disconnected

#### 4. Using tracking/surveillance devices scenario

##### Cecil Scenario

**Cecil and Hugo are in a long-term de facto relationship. Hugo has always been controlling, but his behaviour has been getting worse. Cecil thinks Hugo may be monitoring her through her phone or computer. She's not sure how, but lately it's as if he always knows where she is and whom she's talking to without her ever telling him. When Cecil asks Hugo how he knows her movements, he tells her that she must have forgotten telling him. Cecil says she feels like she's going crazy,**

##### Relevant law:

- *Surveillance Devices Act 2007 (NSW)*
  - Prohibition on installation, use and maintenance of listening devices (s 7)
  - Prohibition on installation, use and maintenance of tracking devices (s 9)
- *Telecommunications (Interception and Access) Act 1979 (Cth)*
  - Telecommunications not to be intercepted (ss 7 & 105)
- *Criminal Code 1995 (Cth)*
  - Using a carriage service to menace, harass or cause offence (s 474.17)
- Eg, *Wigfield v Dempsey* [2014] FCCA 195
  - In this case the father installed a tracking device in the mother's car, post separation. The father said he was scared she was suicidal. The court didn't accept this and accepted mothers account of family violence
  - The father was charged under the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* and the *Surveillance Devices Act 2007 (NSW)*. His actions had a significant impact on outcome of the family law matter because it demonstrated his lack of insight as a parent
- *Crimes (Personal & Domestic Violence) Act 2007 (NSW)*
  - Cecil may be able to apply for an AVO if she can show she is being tracked and surveyed or stalked. It may be useful to ask for an additional order 12 due to the circumstances

##### Additional Order 12 suggested wording:

*The defendant is prohibited from attempting to locate, follow or keep the protected person under surveillance*

##### Practical tips:

- Check for spyware on phone and computer
  - For your computer, free spyware can be downloaded, eg:
    - PC – eg, Windows Defender
    - Mac – Avira Free Antivirus
- Change passwords
  - See the Ask LOIS passwords tipsheet
- Be aware of passwords being saved in browsers and connected logins (eg, gmail and youtube, imessage and synced laptops)

### General tips on gathering evidence

- Don't delete messages/photos
- Don't delete voicemail messages
- Use screenshots that include the URL and record the date and time
- Use speaker phone wherever possible if with a support person
- Make copies of evidence on USB / thumbdrive
- Be aware of s 138 Evidence Act which does not allow evidence obtained improperly or illegally to be admissible, unless the desirability of admitting the evidence outweighs the undesirability of the way in which the evidence was obtained
- Be aware of *Surveillance Devices Act 2007* (NSW)
- Refer client to seek legal advice!

### *Surveillance Devices Act 2007* (NSW)

- Makes it a criminal offence to make recordings (sound or visual) where there is no consent by one party (consent can be implied or express)
- Also prohibits a person from installing a tracking device without consent
- The prohibitions depend on whether it is a 'listening device' or 'optical surveillance device' (ss 7 & 8)
- The recording is prohibited (ss 7 & 8) **and** the communicating/publishing is also prohibited as a separate offence (s 11)
- Exceptions apply such as where the recording was reasonably necessary for the protection of the lawful interests of that principal party (s 7(1)(b)(i))
- Generally anything recorded without the consent of both parties is not admissible in court, however, the court has discretion to admit into evidence
- Example: **DW v R** [2014] NSWCCA 28
  - The father had been found guilty of offence relating to the sexual assault and the production of child pornography of his daughter (aged 12-14 at the time of the offences). At trial the judge admitted into evidence a recorded conversation between the appellant and his daughter that the daughter had recorded, the exception in s 7(1)(b) applied

### Further information

- SmartSafe
  - [www.smartsafe.org.au](http://www.smartsafe.org.au)
- Digital stalking: a guide to technology risks for victims
  - [www.digital-stalking.com](http://www.digital-stalking.com)
- DVRC – technology safety planning
  - [www.dvrcv.org.au/knowledge-centre/technology-safety](http://www.dvrcv.org.au/knowledge-centre/technology-safety)
- Ask LOIS resources in Resource Library > Domestic Violence > Domestic Violence and Technology
  - [www.asklois.org.au/library/domestic-violence/domestic-violence-technology](http://www.asklois.org.au/library/domestic-violence/domestic-violence-technology)