



Australian Government

Office of the Children's eSafety Commissioner

Submission to the Parliamentary Inquiry into a better family law system to support and protect those affected by family violence

Introduction

The Office of the Children's eSafety Commissioner ("the Office") is Australia's leader in online safety. We are committed to helping people have safe, positive experiences online as well as encouraging behavioural change, where people act responsibly online—just as they would offline.

Many Australian women have experienced emotional abuse and violence from a current or former partner. In most cases this abuse and violence includes the use of technology to abuse, control and stalk, which is often referred to as "technology-facilitated abuse" (TFA). TFA is an emerging issue: as technology changes the way we communicate and interact, it is also changing the nature of our relationships, the way we form, develop, conduct and end them, and our comments below are made in this light.

Our Office receives numerous communications daily, formally through our enquiry line and reporting mechanisms and informally from stakeholders, regarding the impacts of technology in atmospheres of control and abuse. We are observing that technological developments are generating several areas of omission and ambiguity that would benefit from explicit attention in legislation or legal documents such as protection orders.

One of the programs our Office operates, eSafetyWomen, is designed to empower Australian women to take control of their online experiences. Safe access to technology is crucial for women so they can stay connected to their family and friends, engage with the world, and get information and support. The initiative forms part of the Australian Government's Women's Safety Package to Stop the Violence. The associated resources aim to help women manage technology risks and abuse by giving them the tools they need to be confident when online.

As part of this initiative, we deliver free two hour workshops to frontline, specialist and support staff in the domestic violence sector. The workshops raise awareness of TFA and provide staff with up-to-date skills and knowledge to support women and families.

Exchanges at these workshop have provided us with a wealth of information regarding emerging abusive practices facilitated by technological developments. In terms of the scope of this Inquiry, attendees have also advised us, anecdotally, of instances where technology has ramifications at the intersection between family violence and the family law system. The complexity of aspects associated with TFA adds weight to the approach of integrated and collaborative service systems where information and evidence can be shared across agencies.

1. Technology-Facilitated Abuse and evidentiary matters

The emergence of TFA and the covert use of technology to obtain evidence in contemplation of family court proceedings necessitates more specific attention to options open to the judiciary. While this is a broad interpretation of "capacity" as expressed in Term of Reference #5, the ramifications of electronic surveillance are increasingly significant and clarification is crucial.

A key aspect appears to be the use of recording devices to obtain, without consent, evidence which is later used in family court proceedings. Certainly, in some cases, admission of evidence of abusive behaviour obtained covertly can be in the best interests of a child or children, as appears to have contributed to the decision to admit in *Huffman & Gorman*. [REDACTED]

However, we are also hearing of cases where people are recording interactions with ex-partners, handovers of children, access visits and even general activity in the home including private conversations. The placing of a recording device in these latter contexts is particularly intrusive, as there is no limit to the content received: a device perhaps intended to record a woman speaking to her children may also record intimate exchanges with a new partner, for example. Such covert recording without context can constitute a re-victimisation of an individual who has already been subjected to TFA. We have been advised of the increasing popularity of apps which allow the use of old phones as cameras, for example. [REDACTED]

Current reliance on the surveillance legislation of jurisdictions and the scope of s.138 of the *Evidence Act 1995* continues to promote a lack of certainty and the potential for TFA to be compounded. The lack of clarity regarding the use of drones is also relevant here. [REDACTED]

A further instance of TFA in this context encompasses “gaslighting” approaches. [REDACTED]

[REDACTED] Generation of a mental health state which may then become relevant in Family Court proceedings requires specific contemplation, otherwise the courts may be placed in the invidious position of attempting to weigh the best interests of the child between a mentally ill parent on the one hand and an abuser on the other.

We also encounter a number of instances where the abuser denies guilt and the matter is considered unsuitable for further investigation. [REDACTED]

[REDACTED] Given the spectrum of offences cognate with TFA and image-based abuse (IBA), it would seem desirable for further consideration of police powers and search warrant scope in such circumstances.

It may be valuable for the Commonwealth to conduct further investigation and possibly legislative amendment to clarify the admissibility or otherwise of covertly obtained evidence in family court proceedings. The possibility of bolstering the powers of police to obtain evidence of TFA and IBA should be considered, as well as sanctions against the use of technology to attempt to affect outcomes in family court proceedings.

2. Harmonisation of legislation: definition of “family violence” to include TFA and the abuse of children

The need to be responsive to family violence, as outlined in Term of Reference #1 is predicated on a common understanding of the meaning of that term. As outlined above in relation to Term of Reference #5, developments both in technology and the way we use that technology necessitate increasingly specific approaches to addressing our legislative responses.

While TFA certainly falls within the definition of “family violence” in s.4AB of the *Family Law Act 1975 (Cth)*, the section and examples do not specifically reference technological aspects. Given the increasing pervasiveness of TFA, it would seem desirable to amend subsection 2 to include cyberstalking, taunts *online as well as in person*, and IBA.

The recent amendment to the *Restraining Orders Act 1997 (WA)* to include s.5A(2)(c) encompassing cyberstalking and (k) distributing or publishing, or threatening to distribute or publish, intimate personal images of the family member...” is instructive in this regard.

Anecdotal evidence from frontline workers at our eSafetyWomen workshops also indicates that children are often co-opted, overtly or covertly in parental surveillance. Some children are pressured to record a parent or grandparents and to pass the information to the other party. In numerous cases, children are given technological gifts, such as computers and telephones, which contain spyware or tracking apps. We have also been informed of cases where children are given seemingly innocuous gifts which do not appear to have technological aspects [REDACTED]. These “gifts” are then used for surveillance purposes. Such a practice is clearly abusive.

Accordingly, a wider definition of family violence to encompass TFA is encouraged. In addition to amending s.4AB(2) of the Family Law Act 1975 (Cth) to include cyberstalking, online taunts and IBA it would be highly desirable to amend s.4AB(3) of the Family Law Act 1975 to clarify that a child is exposed to family violence if utilised in the way outlined above.

3. Harmonisation of legislation: Intervention Orders

Term of Reference #6 flags the potential for a national approach for the administration and enforcement of intervention orders. Our comments below relate to the issue of intervention orders more broadly, based on instances raised with us where abusers have attempted to subvert intervention orders through the use of technology. A more targeted approach to intervention orders will also enhance the capacity of lawyers in relation to family violence matters as per Term of Reference #5.

The general terms of many protection orders encompass TFA, but do not specifically refer to it. Women’s Legal Services at smartsafe.org.au suggest wording which can be requested to cover situations of IBA (“The person bound is prohibited from directly or indirectly publishing, or sending by email or through other electronic communication, photographs or videos of the protected person engaging in sexual activities or in which the protected person appears naked or partially naked.”) or “‘tracking/surveillance device’ situations” (“The person bound is prohibited from attempting to locate, follow or keep the protected person under surveillance.”).

They also note that the “conditions that relate to technology-facilitated stalking and abuse” for Apprehended Domestic Violence Orders as outlined in s.35 of the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* are “prohibiting or restricting approaches by the defendant to the protected person and...prohibiting or restricting specified behaviour by the defendant that might affect the protected person”. Similar provisions apply in other state legislation.

Such an approach is beneficial but relies on the capacity of applicants and their legal representatives to cover all eventualities including the use of technology and online services. [REDACTED]

It is recommended that conditions addressing TFA be included as specific options for intervention orders. This approach ensures lawyers police and judges will consider the specific risk of TFA in each family violence matter.

Concluding Observations

It is always prudent to consider whether the best approach to online offences is to encompass them within provisions covering conduct more broadly or to create specific offences. In recent years the latter approach has been adopted as demonstrated by the introduction of specific offences for cyber-stalking and IBA.

The impetus for this approach has been the increasing prevalence of TFA and IBA combined with the increasingly innovative technological workarounds employed by perpetrators in the family violence sphere. Specific training to address the multiplicity of innovative techniques being employed by abusers is becoming increasingly important. The Office supports capacity building by providing free training for front line professionals dealing with clients affected by family violence to cover these aspects. Further information is available on our website at <https://www.esafety.gov.au/women/get-help/esafety-for-women-training>.

Overall, whether in the context of evidence, intervention orders or ambit more generally, more specific legislative and administrative responses are likely to be needed. These need to contemplate in clear terms the possibility of TFA and IBA and are necessitated by the ever-emerging technologies which shape the conduct of our relationships as well as the complex balancing act of lawful rights which must occur in the family violence context.