

THREATS TO KILL ASSAULT OFFENCES LAWYERS MELBOURNE

If You Have Been Charged with a Threat to Kill You Need Representation

The criminal justice system (CJS) comprising police, courts, magistrates and judges is a very unfamiliar and intimidating environment, particularly for unrepresented and/or first-time defendants. The CJS has the prosecutor's and public's best interests and rights, not yours. The relevant legislation for threatening to kill is very complex. The amount of evidence that must be preserved before it is lost/damaged (like witness statements), the various circumstances and nature of a threat and the number of aggravating and mitigating factors that must be considered for this offence means being well prepared and seeking legal advice from us as soon as possible before facing a Court is critical to receiving the most favourable outcome.

MK Law has a team of expert criminal and assault defence lawyers across our 4 offices (Melbourne, New South Wales, South Australia and Western Australia) who have represented thousands of parties with threatening to kill offences at jury trials and other criminal cases. We take allegations very seriously. During our confidential consultations, we carefully listen to our clients' unique instructions, consider all relevant factors and guide you through the most appropriate options (whether to plead not guilty or guilty so a lesser charge can be settled or admitting guilt to the elements of the crime and dispensing the need for the prosecution to prove guilt) to avoid the most severe penalties being imposed. We have prepared many strong and successful plea and defence strategies in the Victorian Courts by fighting the charge/s if you have been wrongly accused (including conducting our own investigations, requesting disclosure material and statements from witnesses, proactively looking for evidence police have overlooked and vigorously questioning the prosecution's case (like if they have not drafted statements, spoken to key witnesses or obtained CCTV footage), properly explaining the underlying circumstances of your offending and personal history and arranging and tendering evidence which supports your case, including defence witness statements, character references and expert reports (like psychological reports) to the Court). This means we are well equipped in navigating this complex environment of the law to work through the particular legal processes, procedures and factors that guide the Court. We have your best intentions in mind to help defend you and persuade the Court to hand down the fairest and most lenient penalty (like avoiding imprisonment, having the charges dismissed/withdrawn and/or a costs order made out against the prosecution where you are paid all legal costs for your defence).

Our Lawyers regularly attend professional development training to ensure we are up to date with the latest law in the area.

Contact our experienced team of criminal defence lawyers for free legal advice 24/7 on 1800 130 120 or marcus.mklawfirm.com.au.

What are 'Threats to Kill'?

Threatening to kill is a very serious (indictable) offence in Victoria which is provided for under s 20 of the *Crimes Act 1958* (CA). It is defined as a person who makes a threat to another person to kill them or another person and they intended (or were reckless as to whether) the person to/would fear the threat will be carried out, without having a lawful justification/excuse for making the threat.

Threats can be a result of words communicated to another person either physically (in person) or by conduct (like sending a virtual email, text or making a telephone call).

Examples of Threatening to Kill

Threatening to kill covers a broad range of actions and behaviours, and common everyday examples include:

- A driver of a motor vehicle unintentionally drives into the back of a motorcycle whereby the driver of the motorcycle follows them, and when stationary, verbally abuses to them they will be killed, before striking the rear of the motorcycle as they leave
- Emailing a colleague that you intend to kill your manager
- A person finds out their partner is having an affair and attempts to telephone the new partner (unsuccessfully) so leaves voicemail messages threatening to kill them with precise detail of where and when this will occur
- Texting an acquaintance telling them you will kill them
- Writing a letter to your ex-partner that unless you are able to have custody of your child you will kill them
- Telling a person you will get a hitman to kill their sister

NB: Intention is a difficult threshold to prove. This is why a range of circumstances, including the defendant's relationship to the victim is looked at. However, when police have a copy of what was sent to the victim (like a threatening text message), the defendant's intention becomes much harder to disprove.

Other related offences that involve a 'threat', include:

- Blackmail
- Bomb hoaxes
- Threatening to contaminate goods
- Contaminating goods causing public alarm or economic loss
- Dangerous goods on an aircraft
- Threats to the safety of an aircraft
- Endangering the safe operation of an aircraft
- Endangering safety of an aircraft
- Entering a level crossing when a train/tram is approaching
- Threats to destroy or damage property
- Extortion with threats to destroy property
- Extortion with threats to kill
- Obscene, indecent, threatening language and behaviour in public
- Offence to harass witnesses, etc.
- Threats to sabotage
- Setting traps to kill
- Threats to inflict serious injury
- Threatening injury to prevent arrest

Police Interview

If you have been alleged of threatening to kill, often you would be asked to attend a formal police interview that is recorded for the purposes of evidence and whether or not to formally charge you. At this stage, police have investigated the offence and have a range of evidence already against you that they will not inform you about (like statements from witnesses and the victim). Before the interview, you are given the option to contact a lawyer for legal advice/support/ representation. We can provide you with specialised confidential legal advice over the phone or in conference at our offices that addresses all your concerns before beginning a police interview. This includes: whether to make a statement to police, whether to attend a police interview, what to expect at the interview, what your rights and obligations are during the interview (like what you are not obliged to tell/give them), whether you should answer all questions asked of you or give a 'no comment', whether you have to provide DNA and/or your mobile phone and whether you will be reprimanded if you refuse to follow an order/instruction. We also prepare you well for answering questions police ask you to ensure you do not tarnish the defence that is later given in Court and help police that exceeds what they need in their investigation. We can accompany you at the formal police interview to help ease your apprehension and stress. Police are experts in interrogation and obtaining admissions from you to help them build a strong case against you.

Questions to Consider Before Pleading Guilty or Not Guilty

To determine whether you have a good prospect of success in defending your threat to kill charge in Court, it is important to weigh up the following important points:

- Has the prosecution correctly given me particulars of the charge/s I have been charged with?
- Does the prosecution have a strong case against me?
- Should I plead guilty or not guilty where I defend my charge at a contested hearing or at trial?
 - Did I threaten to kill a person?
 - Did I intend or was I reckless as to whether the person would fear the threat to kill would be carried out?
 - Did I turn my mind to whether the person may believe me and be frightened?
 - When did the offence occur and when was I charged by police?
 - What options are available to minimise my penalty?
 - Do I have a lawful reason to justify why I carried out the threat to kill offence (can a defence like mental impairment/illness be relied on to argue my innocence)?
 - Should we subpoena (legally seek access to inspect) relevant material from the opposing party?

Our experienced Lawyers will help answer all these questions and prepare a strong case for you.

What to Consider/Needs to be Established?

To determine whether you have been charged with threatening to kill, it is important to consider what constitutes the offence (see definition above). In other words, can the disputing party establish beyond reasonable doubt all elements of the offence?

- You *made a threat* to a person *to kill them or another person*?

- The threat must be by words (in writing) and/or conduct (*R v Rich* Vic CA 17/12/1997; *R v Jones* (1851) 5 Cox CC 226)
- Another person includes third persons (like arranging a hitman to carry out the killing) (*Barbaro v Quilty* (1999) ACTC 119)
 - This shows a threat is still a threat if it is conditional on a future event occurring (*R v Leece* (1995) 125 ACTR 1)
- Continually threatening and/or abuse conduct (like a violent attack occurring before the use of threatening words) satisfies this element
- The defendant need not know or have a particular relationship with the victim (*R v Solanke* [1970] 1 WLR 1; *R v Syme* (1911) 6 Cr App 257), however the jury must consider the relative relationship (if it exists)
 - For instance, what may initially appear to be threatening may not be so when the nature of the relationship is considered (*Barbaro v Quilty* [1999] ACTSC 119)
- The threat must be to *kill*, it cannot be a threat to cause *lesser harm* (like serious injury) (*R v Leece* (1995) 125 ACTR 1)
 - Such conduct may constitute a different offence (like threatening to inflict serious injury)
- The defendant who makes the threat may arrange for a different person to carry out the killing (*Barbaro v Quilty* [1999] ACTSC 119)
- You *intended* the person to fear you would carry out the threat? or
 - This element is all about the defendant's state of mind at the time of their offending
 - The defendant's threat must be a substantial or significant cause of the victim's fear
 - The defendant must have been aware when they committed the threat it would probably cause the victim's fear (*R v Alexander* [2007] VSCA 178; *Barbaro v Quilty* [1999] ACTSC 119)
 - Not intending to cause the killing (which occurred) is not necessary - the defendant must have intended to cause the threat (whereby a killing occurred) to satisfy the element (*Royall v R* (1991) 172 CLR 378)
 - For instance, you might have intended to threaten the victim, however the prosecution needs to prove you intended to threaten the victim *and* kill the victim in order to satisfy this element (*R v Westaway* (1991) 52 A Crim R 336)
 - The defendant's motive for making the threat is not relevant (*R v Solanke* [1970] 1 WLR 1)
 - All circumstances surrounding the defendant's conduct must be considered to establish whether they had the required intention (*R v Leece* (1995) 125 ACTR 1; *R v Alexander* [2007] VSCA 178)
 - The nature of the defendant's act can provide evidence of their intention (*R v McKnoulty* (1995) 77 A Crim R 333)
 - If the defendant was heavily impaired by alcohol/drugs, this can impact whether they formed the necessary intention
- You were *reckless* (did not care) as to whether or not the person would fear you would carry out the threat?
 - The defendant must have been *aware* when they committed the threat it would probably cause the victim to fear you would carry out the threat (*R v Crabbe* (1985) 165 CLR 464; *R v Sofa* Vic CA 15/10/1990)

- Being aware of a possibility or likelihood does not satisfy this element (*R v Crabbe* (1985) 156 CLR 464; *R v Campbell* [1997] 2 VR 585; *R v Nuri* [1990] VR 641)
 - A reasonable person in the accused's circumstances would have realised that the complainant would probably fear the threat does not satisfy this element (*R v Sofa* Vic CA 15/10/1990; c.f. *R v Nuri* [1990] VR 641)
- You made the threat *without lawful justification/excuse*?
 - Are you able to rely on a defence like self-defence or prevention of crime? (*R v Cousins* [1982] 1 QB 526)
 - See below for the range of possible defences

If the disputing party cannot establish beyond reasonable doubt all elements of the offence, you are not guilty of the offence.

Where Will my Matter be Heard?

Whilst threats to kill offences are serious (indictable) offences (under s 3 of the *Sentencing Act 1991*), they are generally dealt with summarily in the lower Court (Magistrates Court of Victoria). However, higher Courts (County and Supreme Courts) also have jurisdiction to deal with cases, but they are reserved for matters that are more serious in nature.

Defences

If you are pleading not guilty to your threat to kill charge, possible defences you have available to lawfully explain your behaviour will depend on the circumstances surrounding the alleged offending. Every case is unique and requires an individualised plan and approach. Possible defences include:

- The opposing party not being able to establish to the criminal standard of beyond reasonable doubt all elements of the offence (see above)
 - You did not make a threat (the threat does not satisfy the criteria because it was of a lesser harm (like to inflict injury))
 - You lacked the necessary state of mind (did not intend or were not reckless as to whether the victim would fear the threat would be carried out)
 - The prosecution must prove the defendant had the required intent/recklessness (despite being affected by alcohol and/or drugs) (*R v O'Connor* (1979) 146 CLR 64)
 - The defendant acting differently than how they would have had they not been under the influence of alcohol/drugs does not satisfy this element (an intoxicated intent satisfies this element)
 - However, if the alcohol and/or drugs affected the defendant's capacity to form the required intent (they did not intend to carry out the act and cause the particular result), there is a lack of intent (not guilty verdict)
- Self-defence/defence of another
 - You believed on reasonable grounds
 - The threat to kill occurred in the context of necessity (where you needed to defend yourself)
 - Was your response proportionate in the circumstances? (like being mentally impaired (by alcohol/drugs) at the time of the offending)

- The prosecution bears the onus of disproving at least 1 of the above elements to the criminal standard of beyond reasonable doubt (*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645). If this is not satisfied, the defendant cannot be found guilty
- Duress (is a complete defence) (*R v Japalijarri* (2002) 134 A Crim R 261)
 - You were forced to make the threat by another person
 - You must have felt so constrained and a fear you would be a victim of threat and physical harm
- An alibi
 - Your phone/bank records indicate you were at a different place when the threat was made
- Mistaken identity - there is factual dispute about the real facts to the case (what happened)
 - Witnesses incorrectly identified you as being involved (someone else made the threat to the victim)
- Mental impairment/illness (is a complete defence) (s 20 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*)
 - The defendant must be suffering at the time of the offending
 - The defendant must have not known the nature and quality of what they were doing, or did not know their conduct was unlawful
 - If this is satisfied, the defendant cannot be found guilty

Penalties

If you are found guilty of a threat to kill offence, the penalty imposed will depend on the Court who is dealing with the matter. One of the following penalties will likely be imposed:

- Term of **imprisonment**
 - Level 5 offence (maximum **10 years**)
- A **diversion** (conviction or non-conviction)
 - Most likely if first time offender or offender with a mental illness
 - No disclosable outcome is made against you, which means whilst you take responsibility for the offence, it occurs in circumstances where your criminal record remains clean
 - See [here](#) for more information about a diversion
- A **promise** (to the Court to be of good behaviour)
- A **financial fine** (conviction or non-conviction)
- A **community corrections order** (conviction or non-conviction)
 - This order to engage in a behavioural change program or counselling is most often handed down in stalking cases and this may be alongside a sentencing outcome
- **Youth Justice Centre Order** (see [here](#) for more information)

NB: In order to have a conviction or non-conviction applied for any of the penalties above, our Lawyers must make the relevant s 8 application to the Court following the conviction.

A conviction is where you have a disclosable criminal history, whilst a non-conviction is where you have no disclosable criminal history.

What is a Diversion?

A diversion is a type of penalty a Court may impose as a response to a stalking offence by a defendant. It is a program run by the Magistrates Court which the defendant participates in, which is aimed at diverting the defendant away from the CJS and protecting the defendant from having a criminal record (as the charge is discharged). The process involves the police or prosecution filing a notice of diversion with the Court and the Magistrate or judge reviewing the notice and deciding whether it is appropriate in the circumstances for the defendant to participate in the program.

If the Magistrate or judge decides it is not appropriate in the circumstances for the defendant to participate in the program, as counsel for the defendant we can make submissions to the Court to defend why it is appropriate in the circumstances and should be allowed. If the Magistrate or judge upholds their original decision, the defendant need not plead guilty as the decision is not a plea of guilt (s 59(3) *Criminal Procedure Act 2009* (Vic)). The notice will then be withdrawn, and the matter will proceed to open Court (like all other matters).

Successfully completing the program means the charge/s are discharged, whilst unsuccessfully completing the program means the charge/s are referred to open Court. Where a Magistrate does not record a conviction, the offence is included on the defendant's criminal record and this may not be removed until a given time.

Considerations When Sentencing

Courts consider a range of factors when determining the most appropriate penalty for the defendant.

- Nature/gravity of the offending conduct - the defendant's precise role in the threat to kill act
- Whether a guilty plea has been entered at the earliest possible opportunity (if so, Courts often give a more lenient penalty)
- Facts surrounding the threat to kill (like personal matters and criminal history of the defendant)
- Whether the offence has a mandatory (or standard) sentence
- Level of planning involved, and method used
- Length of time the threat occurred over
- Whether a type of weapon/instrument was involved, how it was used
- Whether drugs/alcohol was involved, and the type/quantity used
- Whether an injury was caused to the victim, and the seriousness/nature of it
- Location of the threat to kill
- Impact on the victim (in both the short and long term)

Persons with a criminal history and/or who commit the cruellest, carefully planned or motivated by hate and bias cases will attract the harshest penalties.

Our Lawyers have expertise arguing to the Court the unique circumstances of your offending to ensure they are aware of who is being sentenced, not just what you have unlawfully done.

Recent Threats to Kill Cases

- **Charges:** threats to kill (s 20 CA) and unlawful assault
- **Facts:** the defendant was travelling on an airplane along with a family member they had previously had some run ins with. Before exiting the airplane and departing the airport, the defendant approached the family member, physically throttled, verbally abused and threatened to kill them. The defendant engaged our lawyers to help prepare a strong case for them by pleading guilty. Our plea strategy (which took place via a case conference) relied on CVV footage at the airport which highlighted whilst the defendant had clearly verbally abused the victim, there was no evidence available to show they were physically throttled. In other words, the victim gave false evidence and was not a credible witness for the prosecution
- **Decision:** Police ultimately decided to withdraw the charges

- **Charges:** threats to kill (s 20 CA) and intentionally causing injury (s 18 CA)
- **Facts:** the defendant was in bed with a person whose partner fronted at the home and exposed them in the bedroom. The partner was very angry and began pulling and kicking the defendant. The defendant punched them in the face and back. The partner then left and reported the defendant's act to police, including a threat to kill them. The defendant engaged our lawyers to help prepare a strong case for them by pleading not guilty. Our defence strategy (which took place via a contest mention (to facilitate discussion between the police and us) in the Magistrates Court) relied on the partner's statement and claims not being supported by evidence. In other words, the victim gave partly false evidence and was not a credible witness for the prosecution
- **Decision:** Police ultimately decided to withdraw the charges

These cases highlight the importance of seeking representation from our Lawyers with extensive expertise in threats to kill assault offences. We understand the most favourable outcomes are not always argued through evidence and common sense, however by persisting the prosecution with good instructions (in these cases submitting persuasive arguments).

Relevant Important Resources

- SACStat higher courts: s 20 CA - make threat to kill
- SAC statistics: s 20 CA - make threat to kill