

STALKING CHARGES VICTORIA

If You Have Been Charged with Stalking 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 is very complex. The amount of evidence that must be preserved before it is lost/damaged (like witness statements) 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 stalking defence lawyers across our 4 offices (Melbourne, New South Wales, South Australia and Western Australia) who have represented thousands of parties with stalking offences. 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 spoken to key witnesses or obtained CCTV footage), properly explaining the underlying circumstances of your offending and personal history and arranging and tendering 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hand down the fairest and most lenient penalty (like avoiding imprisonment for stalking, having the charges dismissed/withdrawn and/or a costs order made out against the prosecution where you are paid all legal costs for your defence).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 is Stalking?

Stalking is a very serious (indictable) offence in Victoria which is provided for under s 21A of the *Crimes Act 1958* (CA). Stalking is defined as a person who intentionally engages in a "course of conduct" to cause physical or mental/emotional harm to another person, or makes, knew or ought to have known engaging in such behaviour would likely make them suffer self-harm or apprehend fear for their or another person's safety, and it actually did have that result.

NB: The offence of stalking in Victoria was amended in June 2011 and became an offence under statute (the CA).

Examples of Stalking

Stalking covers a broad range of actions and behaviours, and common everyday examples include:

- Following a person (s 21A(2)(a) CA; *Slaveski v State of Victoria and Others* [2010] VSC 441)
 - For example, following a former partner from one place to another with an intention to cause fear or mental harm
 - The defendant need not be walking directly behind the person, however they cannot be watching the person merely walk by in order to satisfy this offence
- Contacting a victim by post, telephone, fax, text, message, email or any other electronic communication (s 21A(2)(b) CA)
 - For example, calling or sending multiple unwarranted text messages to a former partner where they have told you to stop
- Publishing on the internet, email or by another other electronic communication a statement or material relating to the person (s 21A(2)(c) CA)
 - For example, sending text messages to a work colleague telling them you will send an email attaching rude photo to management and their colleagues
- Causing an authorised computer function in a computer owned by the person
- Tracing the person's use of the internet, email or any other electronic communication
 - For example, accessing another person's social media account/s without their consent
- Loitering (s 21A(2)(d) CA)
 - For example, continually entering, walking past, loitering, sitting in a parked car or standing outside/near a person's home, business or any other place that the victim often goes to, for no lawful reason
 - The defendant had to have loitered with an intent to cause physical/mental harm or aroused apprehension in their mind of fear for their safety in order to satisfy this offence (*Nadarajamoorthy v Moreton* [2003] VSC 283)
- Interfering with property in the person's possession (whether or not you have an interest in the property)
- Keeping the complainant under surveillance (s 21A(2)(f) CA; *R v Anders* [2009] VSCA 7)
 - For example, setting up outside a property to observe/record/take photographs of a person's activities without their knowledge
- Making threats or using abuse or offensive words/acts towards the person
- Giving offensive material to the person or leaving it in a space where it will be found, given to or brought to their attention

Police Interview

If you have been alleged of a stalking charge, 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. We can accompany you at the formal police interview to help ease your apprehension. 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 stalking 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?
 - Did I intend to cause another person to fear their physical/mental safety?
 - Did I engage in a “course of conduct”?
 - Did the person ask me to stop carrying out my act on them?
 - 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 stalking 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 discuss what amounts to a “course of conduct” as well as help answer all these other questions and prepare a strong case for you.

What to Consider/Needs to be Established?

To determine whether you have been charged with stalking, 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 *intentionally* stalked a person by *engaging* in a “*course of conduct*”?
 - A “course of conduct” includes (s 21A(2)(a)-(g) CA):
 - Following the victim or any other person
 - Contacting the victim or any other person by post, telephone, fax, text message, email or other electronic communication or by any other means
 - Publishing on the internet, by email or other electronic communication to any person a statement or other material relating to the victim or any other person; or purporting to relate to or originate from the victim or any other person

- Causing an unauthorised computer function in a computer owned or used by the victim or any other person
 - Tracing the victim's or any other person's use of the internet, email or other electronic communications
 - Entering or loitering outside/near the victim's or any other person's home, business or any other place frequented by them
 - Interfering with property in the victim's or any other person's possession (whether or not you have an interest in the property)
 - Giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to their attention
 - Keeping the victim or any other person under surveillance
- You committed the "course of conduct" with an *intent to cause physical/mental harm* to the victim OR intended to arouse *apprehension of fear for their or another person's safety*?
 - Harm includes self-harm
 - Mental harm includes psychological harm and suicidal thoughts (s 21A(8)(a)-(b) CA)
 - Such conduct includes (s 21A(3)(a)-(b) CA):
 - *Knowing* by engaging in the "course of conduct" of such a kind it would likely cause such harm or cause apprehension of fear? OR
 - *Ought to have known* by engaging in the "course of conduct" of such a kind it would likely cause such harm or cause apprehension of fear, and it did have that result?

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?

Stalking offences 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, where they are more serious in nature.

Defences

If you are pleading not guilty to your stalking 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 intend to stalk the victim
 - The prosecution must prove the defendant had the required intent (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)

- There is no “course of conduct” - it was engaged in without malice (s 21A(4A) CA)
 - In the normal/lawful course of performing a job, business, trade, profession or enterprise (s 21A(4A)(a) CA); or
 - It is immaterial the offence occurred outside Victoria, so long the victim was in Victoria when some or all of the conduct occurred (s 21A(6)-(7) CA)
 - Being involved in an industrial dispute (s 21A(4A)(b) CA); or
 - Engaging in lawful political protest/activities or discussion or communicating with respect to public affairs (s 21A(4A)(c) CA)
- Impossibility
- An alibi
 - Your phone/bank records indicate you were at a different place when the stalking occurred
- Honest and reasonable mistake of belief
- Mistaken identity - there is factual dispute about the real facts to the case (what happened)
 - Witnesses incorrectly identified you as being involved (someone else stalked 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 stalking offence, one of the following penalties will likely be imposed:

- **Term of imprisonment**
 - This offence is a high-level violent offence but only imposes a significant term of imprisonment for the most severe examples of stalking
 - Level 5 offence (maximum **10 years** - if heard in a higher Court)
 - The offence is generally heard summarily in the Magistrates Court (maximum **2 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, counsel for the defendant 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 stalking
- Whether a guilty plea has been entered at the earliest possible opportunity (if so, Courts often give a more lenient penalty)
- Facts surrounding the stalking (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 stalking 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 stalking
- 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 Stalking Cases

- **Charges:** stalking (s 21A CA) and trespass
- **Facts:** the young defendant was charged following statements from staff they trespassed on to a local primary school property and left threatening letters to teachers. The defendant engaged our lawyers to help prepare a strong case for them by pleading not guilty. Their aim was to avoid a criminal record (proceed by a contested hearing and be found not guilty or receive a diversion). We negotiated the defendant's charges with the prosecution and our defence strategy highlighted all elements of the offence could unlikely be proven (the alleged threats were not adequately directed to a certain teacher and whilst the defendant agreed to entering the school it occurred on 1 single occasion), the defendant's young age, clean criminal history and severe mental health issues did not warrant a term of imprisonment. We argued the case best justified a diversion on a lesser charge of engaging in stalking behaviour be handed down
- **Decision:** the prosecution ultimately decided to accept the application for a diversion for stalking with a number of conditions, and upon successful completion of the program, the charge would be discharged

- **Charge:** stalking (s 21A CA)
- **Facts:** the young defendant had received a phone call from their partner explaining they wanted to end their relationship. At the time, the defendant was suffering poor mental health and did not take this news well. The defendant proceeded to telephone their former partner multiple times, including frightening and threatening behaviour which the victim had recorded and provided to police. Our plea strategy highlighted whilst the defendant's intention was to induce fear in the victim (which means the charge could only be challenged, not withdrawn), the defendant's mental health at the time, the number of telephone calls made had been blown out of proportion and the defendant's early plea of guilt and ongoing cooperation with police did not warrant such a harsh penalty being imposed. We argued the case best justified a fine (with no conviction) be handed down
- **Decision:** the prosecution ultimately decided to accept our submission

- **Charge:** stalking (s 21A CA)
- **Facts:** the child defendant had engaged in stalking of a sexual nature. The defendant had a poor family history and suffered a range of mental health issues. Due to the age of the defendant we sought to have the matter heard before the Court as soon as practicable. Our plea strategy highlighted whilst the defendant's intention was to induce fear in the victim (which means the charge could only be challenged, not withdrawn), the very young age of the defendant did not warrant such a harsh penalty being imposed. We argued the case best justified a Therapeutic Treatment Order (TTO) be handed down where the defendant be given the chance to receive treatment
- **Decision:** the Magistrate accepted our submission and ordered a TTO application be fast tracked. We forwarded this order onto relevant bodies and the defendant was assessed as being suitable to undertake the program. Upon successful completion of the order, the charge would be struck out by the Court and the defendant avoids a criminal record

NB: A TTO is a specialised course of treatment for children (aged under 15 years) who engage in sexually abusive behaviours.

These cases highlight the importance of seeking representation from our Lawyers with extensive expertise in stalking 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 this case appearing at the diversion hearing and submitting persuasive arguments).

Relevant Important Resources

- [Bullies beware: you're now stalkers under Victorian law](#)
- [Stalking among juveniles](#)
- [Cyber-stalkers face stiff jail terms](#)
- [Stalking information](#)