

## **UNAUTHORISED IMPAIRMENT OF ELECTRONIC COMMUNICATION (STATE)**

### **If You Have Been Charged with Unauthorised Impairment of Electronic Communication You Need Representation**

If yes, you must engage a law firm with proven experience in data related criminal law.

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. Courts take unauthorised impairment of electronic communication charges very seriously and often impose harsh penalties. There are a number of elements with precise definitions the prosecution must establish for this offence. Also, the amount of forensic 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 use helping you receive the most favourable outcome.

MK Law has a team of expert criminal defence lawyers across our 4 offices (Melbourne, New South Wales, South Australia and Western Australia) who have represented thousands of parties with unauthorised impairment of electronic communication charges. We take allegations very seriously. During our confidential consultations, we carefully listen to our clients' unique instructions and side of the allegation, consider all relevant factors, provide strategic advice by explaining the possible penalties and guiding you through the most appropriate options (whether to plead not guilty 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 successfully 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, analysing the police brief of evidence to identify elements of the offence that cannot be proven, proactively looking for evidence police have overlooked and vigorously cross examining/questioning the prosecution's case (like if they have not drafted statements or spoken to key witnesses), properly explaining the underlying circumstances of your offending and personal history to the Court and arranging and tendering evidence which supports your case, including forensics, defence witness statements, character references and psychological reports and engaging experts (to obtain data from your computer to help exonerate you) to be analysed and explained to the jury).

We appear in Court daily and know what works. We have in-house counsel who run contested hearings and trials from the beginning, so you will always receive the same lawyers who work on your case from the very beginning. If you decide to plead guilty, we will explain to the Court through legal submissions why you committed the offence in light of your personal and surrounding circumstances. 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, reducing the number of your charges, 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](http://marcus.mklawfirm.com.au).

### **What Does Unauthorised Impairment of Electronic Communication Mean?**

Unauthorised impairment to electronic communication is a serious (indictable) offence in Victoria which is provided for under State legislation - s 247D of the *Crimes Act 1958* (Vic) (CA). It is also provided for under Commonwealth legislation - s 477.3 of the *Criminal Code 1995* (Cth) (CC). See [here](#) for more information on this Commonwealth offence.

It is defined as a person who causes (and intends to cause) an unauthorised impairment of electronic communication to/from a computer, having knowledge the impairment is unauthorised and being reckless as to causing any such impairment.

Related computer/cyber crime offences include:

- Unauthorised impairment of electronic communication (Commonwealth offence - s 477.3 CC) - see [here](#) for more information
- Unauthorised access, modification or impairment (to restricted data) with intent to commit/facilitate a serious offence (Commonwealth offence - s 477.1 CC; State offence - s 247B CA) - see [here](#) for more information
- Internet sex offending - see [here](#) for more information
- Possessing, supplying, obtaining or producing data with intent to commit a serious computer offence (s 247F CA)
- Unauthorised impairment of data held in computer disk, credit card or another device
- Unauthorised modification of data to cause impairment (State/Commonwealth legislation)

### **Examples of Unauthorised Impairment of Electronic Communication Offences**

Unauthorised impairment to electronic communication covers a broad range of actions and behaviours, and common everyday examples include:

- A person interferes with electronic communication on a friend's computer without obtaining their authorisation

### **Police Interview**

If you have been alleged of unauthorised impairment to electronic communication, often you will 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, clear and confidential legal advice over the phone or in conference at our offices that addresses all your concerns before beginning a police interview. This includes: helping you understand what amounts to data, what is a serious computer offence, whether to attend a police interview, what to expect at the interview, what questions will likely be asked, what your rights and obligations are during the interview (like what you are not obliged to tell/give them), whether you should provide your side to the allegation, whether you should answer all questions asked of you or exercise your right to silence with 'no comment' answers, whether you have to provide DNA and/or your computer/device and when you may receive it back 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 also help you make a statement to police after the interview to explain your circumstances (if a defence is available - see below the available defences). The police interview is not a time to explain your side of the story.

A police interview is a very important phase of the process, and if it is not handled appropriately, it can limit your options. We understand how a police interview can impact your case in Court. We can accompany you at the formal police interview to help ease your apprehension and stress and avoid the risk compromising your situation. Police take note of everything you do and say - they are experts in interrogation, obtaining admissions and information from you and making you appear like you are not telling the truth, to help them with investigations and building a strong case. It is important to be courteous during the interview as it will be played in Court, and if you are disrespectful, it may harm your credibility and defence.

### **Questions to Consider Before Pleading Guilty or Not Guilty**

To determine whether you have a good prospect of success in defending your unauthorised impairment to electronic communication charge/s 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 and can prove it was me who carried out the offence/s?
  - Should I plead guilty or not guilty where I defend my charge at a contested hearing or a trial?
    - What is the link and is it clear?
    - Did I cause (and intend to cause) an impairment?
    - Did I know it was unauthorised?
- Was a co-accused charged or did I act alone?
- 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 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 unauthorised impairment to electronic communication, 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? (s 247D CA)

- You caused an *impairment of* electronic communication to/from a computer
- The impairment was *unauthorised*?
  - This will be a matter of fact
    - For example, an IT contractor may be authorised to make changes to a computer, but they may act outside of their contract
- You *intended* to or were *reckless* as to the consequence of causing this impairment?
  - Mere careless does not satisfy this element - the defendant must have intended to impair the data (this will depend on the surrounding circumstances of the offending)
- You *knew* the impairment was unauthorised?

NB: 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?**

Unauthorised impairment to electronic communication is a less serious (summary) criminal offence. Matters are usually dealt with in the lower Court (Magistrates Court of Victoria). However, the higher Courts (County and Supreme Courts of Victoria) have jurisdiction and will deal with very serious cases.

## **Defences**

If you are pleading not guilty to your unauthorised impairment to electronic communication charge/s, 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:

- Most commonly argued - the opposing party not being able to establish to the criminal standard of beyond reasonable doubt all elements of the offence
  - It is impossible to establish you impaired electronic communication (having no authorisation)
  - You did not cause an unauthorised impairment of electronic communication to/from a computer?
  - You did not intend to impair the electronic communication
  - You did not know you were not authorised to impair the data
  - You were not reckless when impairing the electronic communication
- Duress (is a complete defence) (s 3220 CA)
  - You were forced by another person to possess data
    - 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 offence occurred
- Mistaken identity - there is factual dispute about the real facts to the case (what happened)
  - Witnesses/police incorrectly identified you as being involved (a different person impaired the data)
  - You had authorisation to impair the data
- 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 plead or are found guilty of unauthorised impairment to electronic communication, one of the following penalties will likely be imposed:

- Term of **imprisonment**
  - Level 5 offence (maximum **10 years**)
  - Many defendants receive a significant (approximately 3 years) term of imprisonment
- A **diversion** (conviction or non-conviction)
  - Most likely if first time offender or offender with a mental illness
  - Non 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 on 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)
- **Youth Justice Centre Order** (see here for more information)

NB: the Magistrate or Judge cannot direct the defendant serve the sentence concurrently with any other sentence, and cannot make an order that suspends the whole/part of the defendant's sentence (*Sentencing Act 1991*).

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.

### **Considerations When Sentencing**

Courts consider a range of factors when determining the most appropriate penalty for the defendant, including:

- Nature/gravity of the offending conduct - the defendant's precise role in the offence
- Whether a guilty plea has been entered at the earliest possible opportunity (if so, Courts often give a more lenient penalty)
- Facts surrounding the offence (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 offence occurred over
- Type of computer/cyber crime
- Whether drugs/alcohol was involved, and the type/quantity used
- Location of the offence
- Impact on the victim (in both the short and long term)

NB: 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.