



## Using a carriage service to menace, harass or cause offence

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Under section 474.17(1) of the Criminal Code 1995 (Cth) (“the Code”), a person commits an offence if they use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. The “service” can include a fixed or mobile telephone service, an internet service, or an intranet service.

The legislation stipulates that a person is guilty of an offence if:

1. the person uses a carriage service; and
2. the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

This means that the prosecution must prove **both** elements (a) and (b) of the offence.

### Element (a) – Use of a carriage service

#### What is a carriage service?

A carriage service means:

*“any service for carrying communications by means of guided and/or unguided electromagnetic energy”.*

## Types of communications

The communication could be words, pictures, videos, or a combination of those things. It could even include emojis.

## What is guided electromagnetic energy?

This includes the use of wire, cable and waveguide amongst other means.

“Unguided electromagnetic energy” means radiocommunication.

## Intention to use the carriage service

Paragraph 474.17(1)(a) of the Code contains a physical element of conduct. This means that a person must **intentionally** use the carriage service to be found guilty of the offence.

However, that does not mean that the person must intend to harass, menace or cause offence.

## Element (b) – Reasonable person would regard as menacing, harassing or offensive

### Who is a reasonable person?

The question is, would a reasonable person in the complainant's position have considered the accused's conduct menacing, harassing or offensive. The question is not whether the complainant actually considered the conduct menacing, harassing or offensive.

To determine what a reasonable person might regard as being, “*in all the circumstances, menacing, harassing or offensive*”, it is necessary to consider the particular circumstances.

### What might constitute menacing, harassing or causing offence?

As determined in [R v Monis \[2013\] HCA 4 at \[336\]](#), the authorities make it clear that, for the use of the carriage service to be criminally offensive, the degree of offensiveness must be serious. It must involve more than mere hurt feelings on the part of a reasonable person.

Examples include:

- Sending threatening messages via Facebook - [Agostino v Cleaves \[2010\] ACTSC 19](#)
- Sending unsolicited photos of genitals - [Grott v The Commissioner of Police \[2015\] QDC 142](#)

- Telephoning or texting someone excessively - [R v Vaughan \[2011\] QCA 224](#)

These are just examples of conduct that has already been considered by the courts to be capable of amounting to communication which is menacing, harassing or offensive.

It is important to remember that the range of acts that may constitute such conduct is wide. Further, you may consider that the communication is funny and/or a joke, but the assessment is whether a reasonable person in the position of the recipient would be offended, not the sender.

## Penalties

The maximum penalty for this offence is three years imprisonment.

The more serious offence of using a carriage service to make a threat to cause serious harm (s474.17(2)) carries a maximum penalty of 7 years imprisonment.

Using a carriage service to make a threat to kill (section 474.15) or using a carriage service to make a hoax threat (section 474.16) carry a maximum penalty of 10 years imprisonment.

## Defences

It is a defence under section 473.5 of the Code if a carrier, carriage service provider, internet service provider or internet content host is engaging in any of the above behaviour in its capacity as a carrier or carriage service provider. This means that a carrier, such as Telstra, would not be criminally responsible for transmitting offensive messages if it is merely acting as the carrier.

In addition to the legislative defence above, we would always consider other avenues of defence. These could include:

1. Can the prosecution prove beyond reasonable doubt the identity of the sender?
2. Does the conduct reach the threshold of being sufficiently offensive?
3. Was the sender acting in the course of a legal duty?

## Get help from a criminal lawyer

If you're being spoken to by police about this or related offences or you've been charged with this offence, it is [vital that you seek legal advice](#). Gilshenan and Luton are [award-winning criminal defence lawyers](#). Seeking advice early is crucial to ensure all avenues of your defence can be applied in a timely manner.

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