

LEGAL GUIDE TO SURVEILLANCE LEGISLATION IN THE AUSTRALIAN CAPITAL TERRITORY

Introduction

Technology-facilitated stalking and abuse is the use of technology (such as the internet, social media, mobile phones, computers, and surveillance devices) to stalk and perpetrate abuse on a person.

Such behaviour includes:

- Making numerous and unwanted calls to a person's mobile phone
- Sending threatening and/or abusive messages (text messaging, Whatsapp, Snapchat, Facebook messaging, Twitter)
- Hacking into a person's email or social media account to discover information about them
- Hacking into a person's email or social media account to impersonate them and send abusive messages to family/friends of that person
- Using surveillance devices to spy on a person
- Using tracking devices to follow a person
- Sharing, or threatening to share, intimate pictures of a person

This legal guide is one of a set of three guides that looks at areas of law relevant to people experiencing technology-facilitated stalking and abuse.

Legal Guide to Surveillance Legislation in the ACT

This guide looks at what the law says about **surveillance devices** – when it is an offence to use them and what the restrictions are on sharing information/videos/pictures obtained through the use of surveillance devices.

For information on other areas of law see:

Legal Guide to Relevant Criminal Offences in the ACT

This guide looks at the various **criminal offences** that may apply to a person who is perpetrating technology-facilitated stalking and abuse.

Legal Guide to Domestic Violence Orders

This guide looks at how people can obtain protection orders from the court to protect them from technology-facilitated stalking and abuse. In the ACT these protection orders are called **Domestic Violence Orders (DVOs)**.

DISCLAIMER: The use of technology-facilitated violence is a developing area of the law. The legal information, examples and scenarios contained in the guide are intended to explain the law in general terms only and are not legal advice. They cannot be relied upon or applied by readers in their own cases. Each set of circumstances needs to be looked at individually. You should seek legal advice about your own particular circumstances.

Terminology

Language of 'Victim' vs 'Survivor'

Some women who are experiencing, or who have experienced, domestic violence use the term 'victim' of domestic violence to describe themselves. Others believe the term 'survivor' of domestic violence more accurately reflects their experience.

Whilst acknowledging that each woman's experience is unique and individual to her circumstances, for consistency, these guides will refer to women who are experiencing, or who have experienced, domestic violence as 'victims' of domestic violence.

Gender and Language

While domestic violence can happen in many circumstances (including in non-heterosexual relationships), in the vast majority of reported domestic violence cases men are the perpetrators and women the victims.

For this reason these guides use 'he' to refer to perpetrators and 'she' to refer to victims. This is not intended to exclude other situations.

Criminal Offence (or offence)

A criminal offence is an offence against the State. It is commonly referred to as 'breaking the law'.

Summary offence

Less serious offences (such as minor theft), are known as summary offences. Summary offences usually have a maximum penalty of no more than 2 years imprisonment or are not punishable by imprisonment at all.

Indictable (serious) offence

More serious offences (such as murder, manslaughter, sexual assault) are known as indictable offences. Indictable offences are punishable by imprisonment exceeding 2 years.

Charge

When a person is charged with an offence, it means that the police have formally accused that person of committing an offence.

Conviction

When a person is convicted of an offence, it means that person has either pleaded guilty to committing the offence, or a court has found that person guilty of committing the offence.

Penalty unit

A penalty unit describes the amount payable for a fine.

Penalty units are used instead of dollar amounts because the rate for penalty units is indexed for inflation and may therefore change from time to time.

The dollar amount for one penalty unit is set out in section 133 of the Legislation Act 2001 (ACT) and increases with inflation. As of 2015: one penalty unit = \$150 (for individuals).

Therefore, an offence with a maximum penalty of a fine of 50 penalty units will have a maximum fine of \$7,500.

SURVEILLANCE LEGISLATION IN THE AUSTRALIAN CAPITAL TERRITORY

The Listening Devices Act 1992 (ACT) regulates the use of listening devices in the Australian Capital Territory. It does not address the regulation of other surveillance devices such as optical surveillance, tracking, and data surveillance devices.

However, intimate observation using a device is dealt with under s 61B, *Crimes Act 1900* (ACT). This is covered in the *Legal Guide to Criminal Offences*.

1. Use of Listening Devices

A 'listening device' means any instrument, apparatus, equipment or device capable of being used to listen to or to record a private conversation, but does not include a hearing aid.

Common examples: Handheld devices such as mobile phones and tablets, which have inbuilt audio recording capabilities; voice recorders/dictation equipment, audio bug surveillance devices.

When is it an offence to use a listening device

It is an offence for a person to use a listening device with the intention of **listening to** or **recording a private conversation** when they **are not a party** to that private conversation.

If a person **is a party** to a private conversation, it is also an offence to use a listening device with the intention of **recording** that private conversation.

Remember this prohibition is only for **private conversations**. A listening device can be used where the conversation is not private. Private conversations are those between persons in circumstances that reasonably indicate that any of the principal parties in the conversation (those speaking or being spoken to) desires the conversation to be listened to only—

- by themselves; or
- by themselves and by some other person (with the consent of each principal party to the conversation)

For example:

- A conversation between two people in a crowded food court that is loud enough for the people seated next to them to hear would not be private
- A conversation between two people at low volume in a busy park where there is no one close to them would be a private conversation
- A conversation between two people taking place in a private home where they are alone would be a private conversation.

Maximum penalty: 50 penalty units.

Common scenario:

- It is an offence for a person to install an audio bug surveillance device in his home to record private conversations his wife has, for example to listen to what she says in telephone conversations with other people.
- If that person installed a bug on the telephone to intercept and listen/record both sides of the telephone conversation then it would also be a federal offence under the *Telecommunications (Interception and Access) Act 1979* (Cth)

Where can I find this information in the Act?

See section 4 of the Act and the Act's dictionary for definitions.

When can a listening device be used

It is legal if you **unintentionally hear** a private conversation you are not a party to through a listening device. However, it is an offence to publish this information (see below). For example, you do not commit an offence if you unintentionally heard a private conversation between two people coming from a baby monitor which was left on in a separate room of a house.

It is legal to record a conversation if each party to the conversation **consents** to the use of the listening device. It is also legal to record a conversation if one party consents to the use of the listening device and, either:

- The party believes, on reasonable grounds, that the recording of the conversation is necessary for the protection of that **party's lawful interests**; or
- The recording is **not made for the purpose of communicating, publishing or reporting** it to persons who are not parties to the conversation
 - **For example**, one party makes a recording of a private conversation, but only for the purpose of sharing it with the other party of the conversation.

Where can I find this information in the Act?

See section 4 of the Act.

2. Sharing of Private Conversations

Sharing of private conversations unlawfully listened to

If you know a private conversation directly or indirectly from having used a listening device, it is an offence to **divulge, communicate, or report** that private conversation. This offence applies where:

- The listening device was used unlawfully (in contravention of section 4); or
- A private conversation was unintentionally heard through a listening device; or
- A private conversation was recorded by a person who was a party to the conversation with consent of each principal party to record the conversation; or
- A private conversation was recorded by a person who was a party to the conversation to protect their lawful interests; or
- A private conversation was recorded by a person who was a party to the conversation but not for the purpose of communicating, publishing or reporting it to persons outside the conversation

Exceptions apply, the most relevant include, if the communication or publication is made –

- To a party to the private conversation; or
- With the consent of each principal party to the conversation; or
- Where the private conversation was recorded by a person who was a party to the conversation to protect their lawful interests, it was communicated or published in the course of **reasonable action taken to protect their lawful interests**

Maximum penalty: 50 penalty units, imprisonment for six months, or both.

Where can I find this information in the Act?

See section 6 of the Act.

Sharing of private conversations by parties to that conversation

It is an offence for **a person who is a party** to a private conversation to **divulge** or **communicate a record** of the conversation if that person knows that the record was directly or indirectly made using a listening device (whether or not in contravention of section 4).

Exceptions apply, the most relevant include, if the communication or publication:

- Is made to another party to the conversation
- Is made with the consent of each principal party to the conversation
- Is made in the course of civil or criminal proceedings
- Is considered by the party making it, on reasonable grounds, to be necessary for the protection of that party's lawful interests
- Is made to a person the party believes (on reasonable grounds) has an interest in the conversation as to make the communication or publication reasonable in the circumstances

Note: there is no bar to a party to a private conversation later telling another person (who is not a party to the private conversation) what was discussed in the private conversation as long as there was no use of a listening device.

Maximum penalty: 50 penalty units, imprisonment for six months, or both.

Where can I find this information in the Act?

See section 5 of the Act.

3. Possession of Records of Unlawfully Recorded Private Conversations

It is an offence for a person to possess a record of a private conversation if the person knows the record was obtained, directly or indirectly, through the use of a listening device in contravention of section 4.

Exceptions apply, if the person is in possession of the record:

- In connection with proceedings for an offence against the Act; or
- With consent of each principal party to the conversation; or
- As a consequence of a communication or publication of the record to that person in circumstances that do not constitute an offence against the Act

Maximum penalty: 50 penalty units, imprisonment for six months, or both.

Where can I find this information in the Act?

See section 7 of the Act.

4. Manufacture, supply or possession of listening devices

It is an offence for a person to manufacture, supply, sell, distribute, possess or offer to supply, sell or distribute a listening device knowing the device is intended or mainly designed for use in contravention of section 4.

Maximum penalty: 50 penalty units, imprisonment for six months, or both.

Where can I find this information in the Act?

See section 8 of the Act.

5. Admissibility

A person in any civil or criminal proceedings **may not give evidence** of a private conversation or a report of a private conversation if knowledge of that conversation came to them as a direct or indirect result of the listening device being used:

- In contravention of section 4; or
- Where a private conversation was unintentionally heard through a listening device; or
- Where a private conversation was recorded by a person who was a party to the conversation with consent of each principal party to record the conversation; or
- Where a private conversation was recorded by a person who was a party to the conversation to protect their lawful interests; or
- Where a private conversation was recorded by a person who was a party to the conversation but not for the purpose of communicating, publishing or reporting it to persons outside the conversation

Exceptions apply, the most relevant exceptions are:

- If each principal party to the conversation consents to the evidence being given
- If the proceedings are for an offence against the Act
- If the listening device was used by a person who was a party to the conversation to protect their lawful interests, for evidence that shows they were protecting their lawful interest
- For certain offences, if the court considers that the evidence should be admitted in the public interest, having regard to all relevant matters
- If the person sharing information also obtained knowledge of the private conversation or report from other circumstances that did not involve the use of a listening device

Where can I find this information in the Act?

See section 10 of the Act.

LEGAL ADVICE – At any stage, it is important for a person to obtain legal advice about their situation and the options available to them. Please see the legal services directory in the support page of www.smartsafe.org.au for referrals to the nearest legal service.