

LEGAL GUIDE TO SURVEILLANCE LEGISLATION IN SOUTH AUSTRALIA

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 South Australia

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 South Australia

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 Intervention Orders

This guide looks at how people can obtain protection orders from the court to protect them from technology-facilitated stalking and abuse. In South Australia these protection orders are called **Intervention Orders (IOs)**.

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 disorderly conduct), are known as summary offences. Summary offences are defined by the Summary Procedure Act 1921 (SA) and have a maximum penalty of no more than two years imprisonment or are not punishable by imprisonment at all.

Indictable offence

More serious offences are known as indictable offences. Indictable offences are divided into minor and major indictable offences.

- Minor indictable offences are less serious (such as stalking) and are usually dealt with in the Magistrates Court
- Major indictable offences are the most serious (such as murder, manslaughter, sexual assault) and are dealt with by the District or Supreme Court

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.

SURVEILLANCE LEGISLATION IN SOUTH AUSTRALIA

The *Listening and Surveillance Devices Act 1972* (SA) (**'the Act'**) regulates the use of listening devices, visual surveillance devices and tracking devices in South Australia.

It also restricts the communication and publication of information obtained through the use of a listening device.

A 'listening device' is considered separate to a 'surveillance device' (which means a visual surveillance device or a tracking device). However, there is no mention of data surveillance devices in the legislation.

1. Use of Listening Devices

A *listening device* means any instrument, apparatus, equipment or device capable of being used to overhear, record, monitor or listen to a private conversation when it is taking place. It does not, for example, 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 intentionally use a listening device to **overhear, record, monitor** or **listen** to a **private conversation** without the express or implied consent of the parties to that conversation. It does not make a difference whether you are a party to that conversation or not.

Remember this prohibition is only for **private** conversations. A listening device can be used where the conversation is not private. Private conversations include those where the circumstances indicate either of the parties wanted it to be confined to the parties to the conversation.

It does not include conversations where those involved should have reasonably expected that the conversation may be overheard, recorded, monitored or listened to by some other person.

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 a private conversation
- 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: \$10 000 or imprisonment for 2 years.

Common scenario:

- It is an offence for a person to install an audio bug surveillance device in his home to non-consensually record, monitor, or listen to private conversations his wife has with other people
 - Note: this activity could also potentially be an 'unlawful stalking' offence under section 19AA, Criminal Law Consolidation Act 1953 (SA). For further information please see the ***Legal Guide to Relevant Criminal Offences***
 - Note: If that person installed a bug on a 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.

When can a listening device be used

It is an exception to the offence where a party to a private conversation uses a listening device to overhear, record, monitor or listen to that private conversation if the listening device is used:

- In the **course of that person's duty** (eg, a police officer recording a statement); or
- In the **public interest**; or
- For the **protection of the lawful interests** of that person

Remember, these exceptions only apply if the person using the listening device **is a party to the conversation**. For example, if a person has set up a listening device and records two other people having a conversation about committing a crime, the person recording the conversation will not have a defence.

Common scenario:

- In *Groom v Police* [2015] SASC 101, a woman made audio recordings of her ex-partner contacting her in breach of a domestic violence intervention order. The court held the exception applied as she was both protecting her lawful interest and in the public interest.

Where can I find this information in the Act?

See section 7 of the Act.

2. Use of Visual Surveillance Devices

A 'visual surveillance device' means an electronic or mechanical device capable of being used to observe or record visually (whether for still or moving pictures) a person, place or activity; and associated equipment (if any).

When is it an offence to use a visual surveillance device

The Act **does not** specifically list any offences related to the use of a visual surveillance device.

However, if a police officer for example, wants to use a visual surveillance device and it requires them to enter or interfere with any premises, vehicle, or thing – that officer must first apply for a warrant.

While the Act does not forbid the use of visual surveillance devices, to do so could potentially be an 'unlawful stalking' offence under section 19AA, *Criminal Law Consolidation Act 1953* (SA). For further information please see the *Legal Guide to Relevant Criminal Offences*.

Where can I find this information in the Act?

See section 6 of the Act.

3. Use of Tracking Devices

A 'tracking device' means an electronic device capable of being used to determine the geographical location of a person or thing; and associated equipment (if any).

When is it an offence to use a tracking device

The Act does not specifically list any offences related to the use of a tracking device.

However, if a police officer for example, wants to use a tracking device and it requires them to enter or interfere with a premise, vehicle, or thing – that officer must first apply for a warrant.

While the Act does not forbid the use of visual surveillance devices, to do so could potentially be an 'unlawful stalking' offence under section 19AA, *Criminal Law Consolidation Act 1953* (SA). For further information please see the *Legal Guide to Relevant Criminal Offences*.

Where can I find this information in the Act?

See section 6 of the Act.

4. Sharing of Private Conversations

When is it an offence to share private conversations

It is an offence for a person to knowingly communicate or publish information or material derived from the use (whether by that person or another person) of a listening device. This applies even if the device was used lawfully under a section 7 exception.

Maximum penalty: \$10 000 or imprisonment for 2 years.

Where can I find this information in the Act?

See section 5 and 7 of the Act.

When can a private conversation be shared

If a person **unlawfully** used a listening device (an offence under section 4), knowledge of a private conversation derived from the use of that listening device can only be communicated or published to a person who was a party to the conversation or with the consent of each party to the conversation to which the information or material relates.

If a person **lawfully** used a listening device (relying on an exceptions under section 7) they may only communicate or publish information or material derived from the use of the listening device:

- To a person who was a party to the conversation; or
- With the consent of each party to the conversation; or
- In the course of duty or in the public interest; or
- As reasonably required to protect a person's lawful interests (the person must have been a party of the conversation); or
- If the information or material has been taken or received in public as evidence in a relevant proceeding

Where can I find this information in the Act?

See section 5 and 7 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.