

## LEGAL GUIDE TO SURVEILLANCE LEGISLATION IN VICTORIA

### 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 Victoria**

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 Victoria**

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 Victoria these protection orders are called **Family Violence Intervention Order (FVOs)**.

*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, 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 parking violations), are known as summary offences. Summary offences normally have a maximum penalty of no more than 12 months imprisonment or are not punishable but 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 12 months.

### 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.

For example, some offences have a maximum penalty of a fine of 100 penalty units, others have a maximum penalty of a fine of 50 penalty units.

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 Department of Treasury and Finance set the dollar amount for one penalty unit; this value is updated on 1 July each year. As of 1 July 2015: one penalty unit = \$151.67.

Therefore, an offence with a maximum penalty of a fine of 50 penalty units will have a maximum fine of \$7,583.50.

## SURVEILLANCE LEGISLATION IN VICTORIA

The *Surveillance Devices Act 1999* (Vic) ('the Act') regulates the installation, use, maintenance and retrieval of surveillance devices in Victoria. It replaced the *Listening Devices Act 1969* (Vic), which primarily regulated the use of listening devices.

A 'surveillance device' means a data surveillance device, a listening device, an optical surveillance device or a tracking device.

A device that combines two or more of the devices above is also considered a surveillance device.

A 'device' includes instruments, apparatus and equipment.

### **Where can I find this information in the Act?**

See section 3 of the Act.

### **1. Use of Listening Devices**

A 'listening device' means any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear.

A 'private conversation' means a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves. It does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else.

### **When is it an offence to use a listening device**

It is an offence for a person to knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party without the permission of each party to the conversation.

### **When can a listening device be used**

A person can use a listening device to record a private conversation that he or she is a party to.

### **Where can I find this information in the Act?**

See sections 3 and 6 of the Act.

## 2. Use of Optical Surveillance Devices

An 'optical surveillance device' means any device capable of being used to record visually or observe an activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment.

A 'private activity' means an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves. It does not include an activity carried on outside a building or an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.

### When is it an offence to use an optical surveillance device

It is an offence for a person to knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the permission of each party to the activity.

### When can an optical surveillance device be used

A person can use an optical surveillance device to:

- record a private activity that the person is a party to
- record any other activity that is not a private activity (example: filming a street performer, filming an activity taking place in a front yard or on a house)

### Where can I find this information in the Act?

See sections 3 and 7 of the Act.

## 3. Use of Tracking Devices

A 'tracking device' means an electronic device the primary purpose of which is to determine the geographical location of a person or an object.

### When is it an offence to use a tracking device

It is an offence for a person to knowingly install, use or maintain a tracking device to determine the geographical location of a person, without the express or implied consent of that person.

Likewise, it is also an offence for a person to knowingly install, use or maintain a tracking device to determine the geographical location of an object, with the express or implied consent of the person who has lawful possession or lawful control of that object.

### When can a tracking device be used

A tracking device can only be legally used with the consent, expressed or implied, of the person being tracked by the tracking device.

Or in the case of an object, if the person who has lawful possession or lawful control of that object has expressly or impliedly consented.

### Where can I find this information in the Act?

See sections 3 and 8 of the Act.

## 4. Use of Data Surveillance Devices

A 'data surveillance device' means any device capable of being used to record or monitor the input of information into or the output of information from a computer. It does not include an optical surveillance device (ie, a video camera filming the typing of words on a computer is not a data surveillance device).

In Victoria, the *Surveillance Devices Act* only regulates the installation, use and maintenance of data surveillance devices by law enforcement officers; it is silent on the use of data surveillance devices by the general population. However, the unauthorised installation, use, or maintenance of a data surveillance device could potentially be an offence under the *Crimes Act 1958* (Vic) sections 247A to 247I 'computer offences'. For further information please see the *Legal Guide to Relevant Criminal Offences*

### Where can I find this information in the Act?

See sections 3 and 9 of the Act.

## 5. Sharing of Private Conversations or Recordings of Activities

### When is it an offence to share a private conversation or recordings of activities

It is an offence for a person to knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device.

#### Common scenarios:

- If two people consensually film a sexual act in private (not a contravention of the surveillance legislation) and one person later shares it without the consent of the other party, it would be an offence for that person to share it.

### When can a private conversation or recordings of activities be shared

There are several exceptions that apply, however. Most relevantly in this context, communication or publication is allowed if it is no more than is reasonably necessary for the protection of the lawful interests of the person making it.

### Where can I find this information in the Act?

See section 11 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](http://www.smartsafe.org.au) for referrals to the nearest legal service.**