

LEGAL GUIDE TO SURVEILLANCE LEGISLATION IN WESTERN 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 Western 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 Western 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 Violence Restraining Orders

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

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'.

Simple offence

Less serious offences (such as common assault), are known as simple offences. When an offence is not stated in legislation to be an indictable offence (see below), it is a simple offence (see the Interpretation Act 1984 (WA)).

Indictable offence

More serious offences (such as murder, manslaughter, sexual assault) are known as indictable offences.

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 WESTERN AUSTRALIA

Legislation

The *Surveillance Devices Act 1998* (WA) regulates the use of surveillance devices in Western Australia. It also restricts the communication and publication of information obtained through the use of surveillance devices. A 'surveillance device' means a **listening device**, an **optical surveillance device** or a **tracking device**. However, there is no mention of data surveillance devices in the legislation.

Time limit: Proceedings for an offence under this Act must be commenced within **2 years** after the offence was committed.

Where can I find this information in the Act?

See section 3 of the Act for definitions of terms used in the Act and s 38 for the time limit.

1. Use of Listening Devices

A 'listening device' means any instrument, apparatus, equipment, or other device capable of being used to record, monitor or listen to a private conversation or words spoken to or by any person in private conversation. This does not include, for example 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

Generally, it is an offence to install, use, or maintain a listening device to **record** a private conversation, whether or not the person is a party to the conversation.

If a person is not a party to a private conversation it is also an offence for them to install, use, or maintain a listening device to **monitor** or **listen** to the private conversation.

It is also an offence to **cause** a listening device to be installed, used, or maintained for one of the above purposes. For example, paying someone to install a device for you.

Remember this prohibition is only for **private** conversations. A listening device can be used where the conversation is not private. Private conversations do not include conversations where those involved should have reasonably expected that the conversation may be overheard.

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 penalties: for an individual, \$5,000 or 12 months imprisonment (or both). For a company, \$50,000.

Common scenario:

- It is an offence for a person to install an audio bug surveillance device in his home to record, monitor, or listen to private conversations his wife has with other people, 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 sections 5 and 34 of the Act.

When can a listening device be used

It is legal if you **unintentionally hear** a private conversation through a listening device. For example, 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 private conversation you are a party to if all of the **principal parties** to that conversation consent. A **principal party** is a person in the conversation who is being spoken to or who is speaking. Consent can be express (“yes, you can record”) or implied (for example, seeing the person you are having a private conversation with get out a recording device and pressing record and you not objecting). It could be argued there is no consent if for example; a person threatens you if you do not comply with the recording.

A listening device can be legally used to record, monitor or listen to a private conversation where, for example, there is a **police warrant** allowing it.

It is legal to use a listening device to record a private conversation in certain circumstances if it is in the **public interest** or where, for example, it is to protect the **best interests of a child**. ‘Public interest’ includes the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens.

- **For example**, if a mother sets up a listening device in her child’s bedroom because she suspects the child’s father is asking the child for sexual favours, this could be argued as necessary to protect the best interests of the child, in the public interest.

It is legal to record a private conversation where a person who is a principal party in the private conversation consents to the use of the listening device (expressly or impliedly) and its use is **reasonably necessary to protect that person’s lawful interest**. Only the person whose lawful interest is being protected needs to consent to the listening devices use.

The onus of proof for establishing the above exception lies on the party seeking to establish the exception, and to prove it on the balance of probabilities (more likely than not).

Reasonably necessary for the protection of the lawful interest of that principal party:

There is a distinction between lawful interest and legal interest. Lawful interests are interests which are not unlawful; its meaning is similar to the expressions ‘legitimate interests’ or ‘interests conforming to law’ – see *Farris v Boase* [2013] WASC 227 and *Violi v Berrivale Orchards Ltd* (2000) 173 ALR 518, 523 [28]. For example, where a serious verbal dispute arises and one of the parties begins to record the dispute, as they are concerned there would otherwise be different versions of the events.

Common scenario:

- A woman has been getting constant calls from a private number, she picks up and recognises the voice to be her ex-partner who threatens to harm her. The woman installs an App on her smartphone that records telephone conversations so the next time the private number calls, she records the incoming call and his direct threats to her safety. The woman was protecting her lawful interest and can use this recording for police assistance.

Where can I find this information in the Act?

See sections 3, 5, 24 and 26 of the Act.

Use of Optical Surveillance Devices

An 'optical surveillance device' means any instrument, apparatus, equipment, or other device capable of being used to record visually or observe a private activity. It does not include, for example, spectacles or contact lenses.

Common examples: handheld devices such as mobile phones and tablets with a camera, cameras, drones with cameras, binoculars, 'spy cameras'.

When is it an offence to use an optical surveillance device

Generally, it is an offence to install, use, or maintain an optical surveillance device to **record** visually a **private activity**, whether or not the person is a party to the private activity.

If a person is not a party to the private activity it is also an offence for them to install, use, or maintain a listening device to **observe** a private activity.

It is also an offence to **cause** an optical surveillance device to be installed, used, or maintained for one of the above purposes. For example, paying someone to install a device for you.

Remember this prohibition is only for on **private activities**. An optical surveillance device can be used where the activity is not private, for example, using binoculars to watch a soccer match being played in a public field. Private activities are where the circumstances may reasonably be taken to indicate **any** of the parties to the activity desire it to only be observed by themselves. It does not include activities where those involved should have reasonably expected that activity might be observed.

Maximum penalties: for an individual, \$5,000 or 12 months imprisonment (or both). For a company, \$50,000.

Common scenarios:

- If a woman is separated but living under the same roof as her ex-partner, it would be an offence for her ex-partner to install a surveillance camera in her bedroom without her consent
- A person puts a video-camera in the bathroom of their own home to film a person getting in and out of the shower, knowing the person has not consented to being filmed in such a way
- A person deliberately leaves a laptop with its web-cam on in a bedroom to live-stream them having sex with a woman and the woman is unaware of the live-streaming

Where can I find this information in the Act?

See sections 3 and 6 of the Act.

When can an optical surveillance device be used?

It is legal to **record** visually a private activity you are a party to if all of the **principal parties** to that activity consent. A **principal party** is a person who takes part in the activity. Consent can be express ("yes, you can record") or implied (for example, seeing the person you are engaging in a private activity with get out a camera and you not objecting to them taking photos). It could be argued there is no consent if for example; a person threatens you if you do not comply with the recording.

An optical surveillance device can be legally used to record or observe a private activity where, for example, it is carried out by a police officer in their normal course of duty.

It is legal to use an optical surveillance device to record a private activity in certain circumstances if it is in the **public interest** or where, for example, it is to protect the **best interests of a child**. 'Public interest' includes the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens.

- **For example**, if a mother sets up an optical surveillance device in her child's bedroom because she suspects the child's father is sexually assaulting the child, this could be argued as necessary to protect the best interests of the child, in the public interest.

It is legal to **record** visually a private activity where a person who is a principal party in the private activity consents to the use of the optical surveillance device (expressly or impliedly) and its use is **reasonably necessary to protect that person's lawful interest**. Only the person whose lawful interest is being protected needs to consent to the optical surveillance devices use.

The onus of proof for establishing the above exception lies on the party seeking to establish the exception, and to prove it on the balance of probabilities (more likely than not).

Reasonably necessary for the protection of the lawful interest of that principal party:

There is a distinction between lawful interest and legal interest. Lawful interests are interests which are not unlawful; its meaning is similar to the expressions 'legitimate interests' or 'interests conforming to law' – see *Farris v Boase* [2013] WASC 227 and *Violi v Berrivale Orchards Ltd* (2000) 173 ALR 518, 523 [28].

Common scenarios:

- A woman begins to visually record her ex-partner at changeover for the children because he is physically intimidating her and begins throwing objects at her
- A person sets up surveillance cameras on their property to protect themselves from theft or trespass

Where can I find this information in the Act?

See sections 6, 24 and 27 of the Act.

2. Use of Tracking Devices

A 'tracking device' means any instrument, apparatus, equipment, or other device capable of being used to determine the geographical location of a person or object.

Common examples: GPS tracking device, mobile phones with GPS tracking activated, a desktop computer/laptop/mobile device linked to a GPS tracker on the person being tracked.

When is it an offence to use a tracking device

Generally, it is an offence to attach, install, use, or maintain a tracking device to determine the geographical location of a person without their permission, or to determine the geographical location of an object without the permission of the person in possession or having control of that object.

It is also an offence to cause a tracking device to be attached, installed, used, or maintained for one of the above purposes. For example, paying someone to install a tracking device for you.

Maximum penalties: for an individual, \$5,000 or 12 months imprisonment (or both). For a company, \$50,000.

Common scenarios:

- A person cannot give a person a smartphone that has software loaded on to it that they use to monitor the person's movements without that person's permission
- A person cannot put a GPS tracking device onto another person's car

Where can I find this information in the Act?

See section 7 of the Act.

When can a tracking device be used?

A tracking device can only be legally used with the express or implied consent, 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.

A tracking device can also be legally used, for example, by a police officer in their normal course of duty.

Where can I find this information in the Act?

See section 7 of the Act.

3. Sharing of Private Conversations or Activities

When is it an offence to share private conversations or activities

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

Maximum penalties: for an individual, \$5,000 or 12 months imprisonment (or both). For a company, \$50,000.

Common scenarios:

- A person uses a listening device to monitor another person's private telephone conversations without their consent then publishes the details of that conversation as a public Facebook status update
- A person has made a covert recording of another person getting undressed in private and then publishes that recording online on a public website

Where can I find this information in the Act?

See section 9 of the Act.

When can private conversations or activities be shared

There are several exceptions that apply, these include:

- Where the publication or communication is made to a party to the private conversation or the private activity. For example, sending an electronic version of the recording to the other person who was a party to the conversation
- Where all of the other principal parties to the private conversation or activity **consent** (expressly or impliedly) to it being published or communicated
- To **protect the lawful interests** of the person and the publication or communication was not more than was reasonably necessary to protect their interest
- Where the person making the publication or communication believes on **reasonable grounds** that it was necessary to make that publication or communication in connection with an **imminent threat of serious violence** to persons or of **substantial damage to property**
- Where a judge can make an order it may be communicated or published

The exceptions are also defences to the sharing offence if the publication or communication is made to a person who has, or is believed on reasonable grounds by the person making the publication or communication to have, such an interest in the private conversation or activity as to make the publication or communication reasonable under the circumstances in which it is made.

Where can I find this information in the Act?

See sections 9 and 31 of the Act.

4. Possession of a surveillance device for an unlawful purpose

It is an offence to possess a surveillance device in the knowledge that it is intended or principally designed for an unlawful use.

Maximum penalties: for an individual, \$5,000 or 12 months imprisonment (or both). For a company, \$50,000.

Where can I find this information in the Act?

See section 34 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.