

LEGAL GUIDE TO SURVEILLANCE LEGISLATION IN TASMANIA

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 Tasmania

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 Tasmania

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 Family 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 Tasmania these protection orders are called **Family Violence Orders (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.

SOME NOTES ...

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.

Terminology

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 Penalty Units and Other Penalties Act 1987 (Tas) states the dollar amount for one penalty unit.

As of July 2015: one penalty unit = \$154.

Therefore, an offence with a maximum penalty of a fine of 50 penalty units will have a maximum fine of \$7,750.

SURVEILLANCE LEGISLATION IN TASMANIA

The Listening Devices Act 1991 (Tas) ('the Act') regulates the use of **listening devices** in Tasmania. It does not address the regulation of other surveillance devices such as optical surveillance, tracking, and data surveillance devices.

1. Use of Listening Devices

A 'listening device' means any instrument, apparatus, equipment or device capable of being used to record or listen to a private conversation simultaneously with its taking place.

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 for a person to **use**, or **cause or permit to be used**, a listening device to record or listen to a **private conversation**, whether or not that person is a party to the 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 parties in the conversation desires the conversation to be listened to only—

- by themselves; or
- by themselves and by some other person (with the express or implied consent of all parties 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: a fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years, or both

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 sections 3, 5 & 12 of the Act

When can a listening device be used

There are a number of exceptions to this offence in the act. The most relevant are below.

It is an exception to use a listening device to obtain evidence or information in connection with an **imminent threat** of **serious violence** to persons or of **substantial damage to property**. For this exception to apply, the person using the listening device must have believed on reasonable grounds that it was necessary to use the device immediately to obtain that evidence or information.

Note that this exception applies to both parties and non-parties to a private conversation.

A person who uses a listening device in this manner must, within **three days** of first using the device, provide a report to the Chief Magistrate containing particulars of the circumstances in which the device is being, or was, 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. However, it may be an offence to communicate or publish that information (see below at 1.3).

It is also an exception if a party to a private conversation uses a listening device to record the conversation and all of the principal parties to the conversation **expressly or impliedly consent** to the listening device being used. *Principal parties* are those who spoke or were spoken to in the private conversation.

It is also legal for a party to a private conversation to use a listening device to record a conversation if a principal party to the conversation consents to the listening device being used and:

- the recording of the conversation is **reasonably necessary** for the **protection of their lawful interests**; or
- the recording of the conversation is **not made for the purpose of communicating or publishing** the conversation, or a report of the conversation, to persons who are not parties to the conversation.

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 may argue she was protecting her lawful interest or using it to obtain evidence of an imminent threat

Where can I find this information in the Act?

See section 3 & 5 of the Act.

2. Sharing of Private Conversations

Sharing of private conversations unlawfully listened to

It is an offence for a person to **knowingly communicate** or **publish** a private conversation, or a report of that conversation, that came to their knowledge as a direct or indirect result of the **unlawful use** of a listening device or that was **unintentionally heard** using a listening device.

To see if it was an unlawful use, see above at 1.2.

Maximum penalty: a fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years, or both

Where can private conversations be shared?

There are a number of exceptions to this offence in the Act. The most relevant are below.

For example, knowledge of a private conversation obtained through the use of a listening device may be shared if the communication or publication is made:

- to a party to the private conversation; or
- with the express or implied consent of all principal parties to the private conversation; or
- in the course of proceedings for an offence against this Act.

Sharing of a private conversation is also permissible if the person believes on reasonable grounds that it was necessary to make that communication or publication in connection with an **imminent threat of serious violence** to persons or of **substantial damage to property**.

Where can I find this information in the Act?

See section 9 of the Act.

Sharing of private conversations by parties to that conversation

It is an offence for a person who was a party to a private conversation who recorded the conversation using a listening device (whether unlawful or not), to subsequently communicate or publish any record of the conversation to any other person

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. Note that other laws might apply in such a situation – eg breach of confidence.

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

- made to another party to the private conversation
- made with the express or implied consent of all other parties to the private conversation by or to whom words are spoken (principal parties)
- not more than reasonably necessary for the protection of the lawful interests of that person

It is also an exception if a party to a private conversation ('person A') shares the private conversation with person ('person B') where person A believes on reasonable grounds, that person B has an interest in the private conversation to make it reasonable in the circumstances.

Maximum penalty: a fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years, or both

Where can I find this information in the Act?

See sections 10 & 12 of the Act.

3. Possession of a Record of a Private Conversation

It is an offence for a person to possess a record of a private conversation knowing that it has been directly or indirectly obtained by the unlawful use of a listening device or as the result of the unintentional hearing through a listening device.

Exceptions apply, this includes where the record is in the possession of a person:

- with the consent, express or implied, of all of the principal parties to the private conversation; or
- as a consequence of a communication or publication of that record in circumstances that do not constitute an offence in the Act
- in connection with proceedings for an offence against this Act;

Where can I find this information in the Act?

See section 11 & 12 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.