

## 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 four 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 Family Violence Orders in the ACT

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 "Family Violence Orders (FVOs)".

#### Legal Guide to Image-Based Abuse Legislation in the ACT

This guide looks at what the law says about image-based abuse – when it is an offence to record or distribute intimate images and what legal options exist for victims of image-based abuse.

# Language

## '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

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 minor theft), are known as summary offences. Summary offences normally 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**

Criminal legislation usually describes the amount payable for a fine in a "penalty unit". Penalty units are used instead of dollar amounts because the rate for penalty units is indexed for inflation and may 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 2018, 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) (the “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). Distribution of intimate images is dealt with under Part 3A of the *Crimes Act 1900* (ACT). These are covered in the *Legal Guide to Criminal Offence in the ACT* and the *Legal Guide to Image-Based Abuse in the ACT*.

### 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 include handheld devices such as mobile phones and tablets with 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.

- **For example:** 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 its 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 hear 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 to the conversation.

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

See section 4 of the Act.

## Sharing of Private Conversations

### Sharing of private conversations unlawfully listened to

If you know of a private conversation directly or indirectly from having used a listening device, it is an offence to divulge or communicate 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 or 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 being, 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.

### **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;
- 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 or imprisonment for six months, or both.

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

See section 7 of the Act.

### **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.

### **Admissibility of evidence**

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 being:

- 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 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.

## **Telecommunications (Interception and Access) Act 1979 (Cth)**

The primary purpose of the *Telecommunications (Interception and Access) Act 1979 (Cth)* ("TIA Act") is to protect the privacy of individuals who use the Australian telecommunications system.

### **Intercepting telecommunications**

#### **When is it an offence to intercept telecommunications**

It is an offence to:

- intercept;
- authorise, suffer or permit another person to intercept; or
- do any act or thing that will enable him or her or another person to intercept;

a communication passing over a telecommunications system.

Exceptions to this offence exist but are related to law enforcement or the installation or maintenance of telecommunication systems by carriers, and are not relevant in the context of domestic violence.

'Communication' includes conversation and a message, and any part of a conversation or message, whether in the form of speech, music or other sounds, data, text, visual images, whether or not animated, signals or in any other form or in any combination of forms.

A communication starts 'passing over' a telecommunications system when it is sent or transmitted by the person sending the communication, and continues until it becomes accessible to the intended recipient of the communication.

A 'telecommunications system' means a system, or series of systems, for carrying communications by means of guided or unguided electromagnetic energy or both (but does not include a system, or series of systems, for carrying communications solely by means of radio communication) that is

- (a) is within Australia; or
- (b) partly within Australia, but only to the extent that the network is within Australia;

and includes equipment, a line or other facility that is connected to such a network and is within Australia.

**Maximum penalty:** Imprisonment for 2 years.

➢ **For example:** It is an offence for a person to record his partner's phone calls using an app he installs on her phone.

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

See sections 7 and 105. See sections 5 and 5F for definitions.

## **Gathering evidence to prove technology-facilitated stalking or abuse**

Sometimes it can be difficult to prove technology-facilitated stalking or abuse. Some tips for gathering evidence to show that technology-facilitated stalking or abuse has occurred are:

- Do not delete text messages, voicemail messages, photos
- Try and save any evidence to a computer/USB flash drive
- Use screenshots and save the image as the date & time it was taken. If taking screenshots of websites, always include the URL in the screenshot

- Keep a diary or voice notes of incidents including dates and times
- Consider giving police written permission to access your phone, computer, Facebook, email account etc. if a matter is being investigated

**Note:** certain other conduct in relation to technology-facilitated stalking or abuse may constitute a criminal offence. Please see the *Legal Guide to Image-based Abuse in the ACT* and the *Legal Guide to Relevant Criminal Offences in the ACT* for further information.