

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 four guides that looks at areas of law relevant to people experiencing technology-facilitated stalking and abuse.

Legal Guide to Surveillance Legislation in TAS

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 TAS

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 TAS

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)**.

Legal Guide to Image-Based Abuse Legislation in TAS

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 (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.

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 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 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

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 *Penalty Units and Other Penalties Act 1987* (Tas) states the dollar amount for one penalty unit. As of July 2018: one penalty unit = \$163. Therefore, an offence with a maximum penalty of a fine of 50 penalty units will have a maximum fine of \$8,150.

SURVEILLANCE LEGISLATION IN TASMANIA

Listening Devices Act 1991 (Tas)

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.

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.

- **For example:** 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 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. It is also an offence for a person to *record* a private conversation to which the person is a party.

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: 40 penalty units or imprisonment for two years, or both.

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)* (see below).

Where can I find this information in the Act?

See sections 3, 5 and 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).

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.
- **For example:** 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 and 5 of the Act.

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.

Maximum penalty: 40 penalty units or imprisonment for two years, or both.

Where can private conversations be shared?

There are a number of exceptions to this offence in the Act. 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 e.g. breach of confidence.

Exceptions apply, notably where 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 such an interest in the private conversation as to make it reasonable in the circumstances to share it.

Maximum penalty: 40 penalty units or imprisonment for two years, or both.

Where can I find this information in the Act?

See sections 10 and 12 of the Act.

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, notably 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; or
- in connection with proceedings for an offence against this Act.

Maximum penalty: 40 penalty units or imprisonment for two years, or both.

Where can I find this information in the Act?

See section 11 and 12 of the Act.

Telecommunications (Interception and Access) Act 1979 (Cth)

The primary purpose of the *Telecommunications (Interception and Access) Act 1979* ("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

- is within Australia; or
- 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 two 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.

Dealing with intercepted information

When is it an offence to deal with intercepted information

A person must not communicate to another person, make use of, or make a record of, or give evidence in a proceeding any information that has been intercepted (subject to the other provisions of Part 2-6).

Maximum penalty: Imprisonment for two years (see section 105).

Where can I find this information in the TIA Act?

See sections 63 and 105.

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 TAS* and the *Legal Guide to Relevant Criminal Offences in TAS* for further information.