

MAKING A PHOTOGRAPHIC OR VIDEO RECORD OF PERSONS ENGAGED IN PRIVATE OR UNLAWFUL ACTIVITY IN WESTERN AUSTRALIA

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Introduction

What if you want to take a photo, film or video record of an unlawful activity in Western Australia? Can you make such a record without the consent of the parties to the activity? To whom can you lawfully show such a record and under what circumstances? What are the possible consequences for you for making such a record?

The primary statute that regulates the photographic or video recording of a *private activity* in Western Australia² is the *Surveillance Devices Act 1998* (the *Surveillance Act*).³ The *Surveillance Act* regulates,

- ≠ the use of listening devices in respect of private conversations;
- ≠ optical surveillance devices in respect of private activities; and
- ≠ tracking devices in respect of the location of persons and objects.

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² Specific legislation on the subject of privacy, listening and photographic and video recordings include, see *The Privacy Act 1988 (Cth)*; *Telecommunications (Interception) Act 1979 (Cth)*; the *Australian Federal Police Act 1979 (Cth)*; *Customs Act 1901 (Cth)*; *Evidence Act 1995 (Cth)*; *Income Tax Assessment Act 1936 (Cth)*; the *Privacy Committee Act 1975 (NSW)*; the *Listening Devices Act 1984 (NSW)*; the *Invasion of Privacy Act 1971 (QLD)*, which is an Act to make provision for the licensing and control of credit reporting agents, for regulating the use of listening devices and for other purposes, in which there are special provision relating to private dwellings, see Part IV Listening Devices, section 48A; and the *Listening Devices Ct ? (SA)*; the *Surveillance Devices Act 1999 (VIC)*; the *Listening Devices Act 1992 (ACT)*; and the *Listening Devices Act 1996 (NT)*.

³ There is no specific privacy legislation in Western Australia. (The publishing or showing of a photographic or video record of an unlawful activity may constitute defamation but the person publishing the record may have the defence of truth to answer such a complaint.)

The taking of photos or making of video recordings would fall within the second category of optical surveillance.

Interpretation

Under the *Surveillance Act*,⁴

- € *Party* in relation to a *private activity* means a person who takes part in the activity or a person who with the express or implied consent of any person taking part in the activity, observes or records the activity;
- € *Principal party* in relation to a *private activity* means a person who takes part in the activity;
- € *Private activity* means any activity carried out in circumstances that may reasonably be taken to indicate that any of the *parties* to the activity desires to be observed only by themselves, but does not include an activity carried out in circumstances in which the *parties* to the activity ought to reasonably expect that the activity may be observed.⁵
- € *Public interest*⁶ 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.

Private or public activity?

If an activity which is recorded by a photo or video is not a *private activity*, there is no prohibition under the *Surveillance Act* against recording or publishing⁷ that activity.

Techniques of statutory interpretation applied to the definition of *private activity* under the *Surveillance Act* suggest that at least one *party* but not all the *parties* to a *private activity* must subjectively hold the desire that the activity be private but the phrase, *ought reasonably expect that the activity may be observed* requires that that desire must in all the circumstance be reasonable when looked at objectively.⁸ In determining whether an activity is private, the circumstances as a whole are considered and caution should be exercised before concluding that just because an activity takes place outside a building, it is not private.⁹ See the remarks by His Honour Justice Owen at page 5 of *Re Surveillance Devices*

⁴ Where the following definitions are used in the article they will be *italicised*.

⁵ See section 3(1) of the *Surveillance Act*.

⁶ Only for the purpose of Part 5 of the *Surveillance Act*.

⁷ For the purpose of this article publication includes communication.

⁸ Also see *Re Surveillance Devices Act 1998; Ex parte TCN Channel Nine Pty Ltd* [1999] WASC 246 (2 December 1999) (the TCN case), paragraph 19.

⁹ See Commentary on Order 81H of the Rules of the Supreme Court 1971, at Order 81H.4.2; and the TCN case at paragraph 19

Act 1998; Ex parte TCN Channel Nine Pty Ltd [1999] WASC 246 (2 December 1999) (the TCN case),

“...Obviously, the location and physical environment in which the incident took place will be of great significance in deciding what the parties expected...”

Justice Owen in the TCN case was not required to consider the proposition that criminal activity cannot fall within the ambit of *private activity*, and merely suggested that this point was for consideration another day. As a matter of public policy, it is arguable that certain unlawful activities should not be regarded as *private activities*. Furthermore, it might be suggested that an activity that takes place on public lands such as State forests or public roads could not be expected by a reasonable person to occur in private, without more. There is no doubt that there are competing public interests,¹⁰ the outcome of which would have to be determined in any given set of circumstances.¹¹ Judicial interpretation of the *Surveillance Act* may expand our understanding of what is and is not a *private activity*.

The question to decide now is: Is the activity I am going to record a private or public activity?

Making, possessing or publishing a photo, film or video of a private activity

The *Surveillance Act* prohibits the use of a listening or optical surveillance device to observe *private activities*.¹²

A person who is unlawfully in possession of *surveillance information* commits an offence for which the penalty is \$5,000.¹³ Any person lawfully may be in possession of *surveillance information* if the *surveillance information* was obtained in accordance with Part 5 of the Act; or the *surveillance information* was obtained by the person from a person who was lawfully in possession of that information and in circumstances where the publication or communication of the *surveillance information* to the person was not an offence.¹⁴

Surveillance information includes photos, films or video recordings (of a *private activity* by a person) that has been obtained (directly or indirectly) through the use of a surveillance device.¹⁵

The *Surveillance Act* restricts the publication of records of *private activities*.¹⁶ It is an offence for a person to knowingly publish or communicate a record of a

¹⁰ The right to privacy versus the need for evidence to prove a criminal offence.

¹¹ See for example *Vale v the Queen* [2001] WASCA 21.

¹² See sections 6 of the *Surveillance Act*.

¹³ Regulation 9(1) of the *Surveillance Devices Regulations 1999*.

¹⁴ Under section 9 of the *Surveillance Act*.

¹⁵ See regulation 9(3) of the *Surveillance Devices Regulations 1999*.

¹⁶ Part 3 of the *Surveillance Act*.

private activity that has come to the person's knowledge as a direct or indirect result of the use of an optical surveillance device.¹⁷ The penalties for this offence are,

- € for an individual, \$5 000 or imprisonment for 12 months, or both; and
- € for a body corporate, \$50 000.

Clearly the making of a photographic, film or video record is an offence under the *Surveillance Act*. The question then is: Do I have a defence to this offence?

Defences against the offence of publishing a photo or video

Publishing a record of a *private activity* is not an offence,¹⁸

- € where the publication is made,
 - Ø to a *party* to the *private activity*;
 - Ø with the express or implied consent of each *principal party* to the *private activity*;
 - Ø to any person or persons authorised for the purpose by the Commissioner of Police, the chairman or any 2 members of the Anti-Corruption Commission or the Chairperson of the National Crime Authority;
 - Ø by a law enforcement officer to the Director of Public Prosecutions of the State or of the Commonwealth or an authorised representative of the Director of Public Prosecutions of the State or of the Commonwealth;
 - Ø in the course of the duty of the person making the publication;
 - Ø for the protection of the *lawful interests*¹⁹ of the person making the publication;

¹⁷ See section 9(1) of the *Surveillance Act*, but subject to subsection 9(2) of the *Surveillance Act* (to which I will return).

¹⁸ See subsection 9(2) of the *Surveillance Act* which provides that subsection 9(1) does not apply in certain circumstances.

¹⁹ There has been judicial consideration of this phrase in a similar context under the *Listening Devices Act 1984 (NSW)*, see *Amalgamated Television Services v Marsden* [2000] NSWCA 167, para 30; *Queen v Eade* (2000) 118 A Crim R 449 at 459-460; *See v Hardman* [2002] NSWSC 234, in which it was held that notwithstanding it was a *lawful interest* to record a private conversation (to which the recorder was a party) so that the recorder could revisit the conversation for further private consideration, in the particular circumstances it was not a *lawful interest*; and see *Violi v Berrivale Orchards Ltd* [2000] FCA 797 in which it was held that it is a

- ∅ in accordance with Part 5 — Use of Surveillance Devices in the Public Interest, of the *Surveillance Act*; or
- ∅ in the course of any legal proceedings;
- ≠ where the publication is made to a member of the police force of the State or of another State or a Territory in connection with,
 - ∅ any indictable²⁰ matter of such seriousness as to warrant the publication; or
 - ∅ where the person making the publication believes on reasonable grounds that it was necessary to make that publication in connection with an imminent threat of serious violence to persons or of substantial damage to property.

The foregoing exceptions only provide a defence if the publication,

- ≠ is not more than is reasonably necessary,
 - ∅ in the *public interest*;
 - ∅ in the performance of a duty of the person making the publication; or
 - ∅ for the protection of the *lawful interests* of the person making the publication;
- ≠ is made to a person who has, or is believed on reasonable grounds by the person making the publication to have, such an interest in the *private activity* as to make the publication reasonable under the circumstances in which it is made.²¹

matter of objective judgement whether a recording was necessary for the protection of an actual *lawful interest*, existing at the time of the conversation which determines if there is an existing *lawful interest*; and under the *Listening Devices Act 1972 (SA)* see the *T V Medical Board (SA) [1992] 58 SASR 382*. In the SA case a recording of a telephone conversation between a doctor and a patient (made by the patient without the doctor's knowledge) was not inadmissible under the *Telecommunications (Interception) Act 1979 (Cth)* but was inadmissible under the *Listening Devices Act 1972* because it was not made to protect a lawful interest nor was it in the *public interest*. See also the *Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund [2001] FCA 1267* for *lawful interest* under the *Bankruptcy Act 1996 (Cth) 1996*.

²⁰ An indictable offence is generally an offence triable by a judge and jury and prosecuted by a plea from the Crown. However, there are different classes of indictable offences and some may be dealt with between the parties and determined summarily by a magistrate. The Western Australian Criminal Code makes a distinction between indictable and simple offences. Indictable offences are further categorised into crimes and misdemeanours (thereby indicating the seriousness of the offence) and any offence not otherwise designated is a simple offence.

²¹ See section 9(3) of the *Surveillance Act*.

So if I am planning on committing the offence of making and publishing a recording of an unlawful private activity which is not expressly authorised by the parties, the question I should ask is: Am I protecting a *lawful interest* or is it in the *public interest*?

Photos or videos taken to protect a lawful interest

Lawful interest is not defined in the *Surveillance Act*. Judicial interpretation suggests a variety of tests for what might be a *lawful interest* under the *Surveillance Act*. At the end of the day what is or is not a *lawful interest* it will always be a matter to be determined objectively in the particular circumstances at a time immediately before the recording was made and balanced against other competing public interests.

Photos or videos taken in the public interest

Part 5 — Use of Surveillance Devices in the Public Interest, of the *Surveillance Act*²² deals with the use of surveillance devices in the *public interest*, although it may also apply to law enforcement agencies, see the *Surveillance Act* and the TCN case.²³

Part 5 of the *Surveillance Act*²⁴ is inapplicable if during the course of the recording of the *private activity* an act is done that is unlawful under any Act, other than the *Surveillance Act*. So for example if the person undertaking the recording broke into premises to make the recording, trespassed on land or photographed restricted material, a defence under Part 5 may not be available.

Any person may take a photo or video of a *private activity*²⁵ in the *public interest* when one or more of the parties to the recording has consented, expressly or impliedly.²⁶

Any person may make an emergency use of an optical surveillance device to observe a *private activity* without the consent of any of the parties to the activity if there are reasonable grounds for believing that the circumstances are so serious and the matter of such urgency that the use of the device is in the *public interest*.²⁷

²² Sections 24 – 33 of the *Surveillance Act*.

²³ See paragraph 6.

²⁴ See section 25 of the *Surveillance Act*.

²⁵ See Division 2 of Part 5 of the *Surveillance Act*.

²⁶ See sections 26 and 27 of the *Surveillance Act*, and the TCN case paragraph 12.

²⁷ See Division 3 of Part 5 of the *Surveillance Act*, sections 28 and 29 of the *Surveillance Act*, and the TCN case paragraph 10.

A photo or video taken²⁸ of a *private activity* with or without the consent of a *party* may only be published under the provisions of the *Surveillance Act* or by an order of the Supreme Court.²⁹ Furthermore, if the photo or video is taken without the consent of a *principal party* a report must be supplied to the Supreme Court along with the photo or video.³⁰ The relative gravity of the *private activity* recorded may influence the Court's decision as to whether or not it is in the *public interest* that the photo or video be published.³¹

The public interest

There is a wide public interest in the exclusio of evidence illegally obtained. There may be a balancing act to be undertaken to determine which public interest will prevail.³² For the purpose of Part 5 the use of optical surveillance devices is in the *public interest* if it is in 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.³³ This list is not exhaustive and may include other interests.

Private activity recorded without the parties' consent

Unless another provision of the *Surveillance Act* applies, a person who takes a photo or video record of a *private activity*,³⁴ in the *public interest* without the consent of the parties and who wishes to publish that record, must deliver without delay a written report to a Judge of the Supreme Court,

- € giving particulars of the device used;
- € giving particulars of the use of the device and the period during which it was used;
- € specifying the name, if known, of any person whose *private activity* was observed or visually recorded;
- € specifying the circumstances that caused the person to believe that it was necessary to observe or visually record the *private activity*, and
- € containing particulars of the general use made or to be made of any evidence or information obtained by use of the device.³⁵

²⁸ Under Division 2 or Division 3 of Part 5.

²⁹ See section 31 of the *Surveillance Act*; and the TCN case at paragraph 9.

³⁰ See section 30 of the *Surveillance Act*; and the TCN case at paragraph 10.

³¹ See the TCN case at paragraph 10.

³² See *Violi v Berrivale Orchards Ltd* [2000] FCA 797.

³³ See section 24 of the *Surveillance Act*.

³⁴ Under Division 3 — Emergency use of listening devices and optical surveillance devices, section 28 or 29 of the *Surveillance Act*.

³⁵ See section 30 of the *Surveillance Act*.

An application to the Supreme Court for a publication order³⁶ is required,

- ∉ to be in writing;
- ∉ to set out the grounds on which the application is based;
- ∉ to include an affidavit, by the person making the application, deposing to the facts required by the Judge to enable the Judge to deal with the application;³⁷ and
- ∉ must not be heard in open court.³⁸

An application for a publication order may be made upon notice³⁹ or *ex parte*⁴⁰ as the Judge thinks fit.⁴¹

I must now decide: Do I need a publication order? If I do, will I need legal advice and representation to obtain the publication order? To whom do I want to publish the record?

Report to a Judge of the Supreme Court

Where a report is provided to a Judge, the Judge may direct that any record of evidence or information obtained by the use of the surveillance device to which the report relates be brought before the Judge.⁴² The photos or video brought before a Judge must be kept in the custody of the Court if the Judge is satisfied that it is necessary to protect or further the *public interest*.⁴³ The Judge may also order that they be returned, made available to any person⁴⁴ or destroyed.⁴⁵

A Judge may make an order that a person may publish photo or video of a *private activity* that has come to the person's knowledge as a direct or indirect result of the use of an optical surveillance device⁴⁶ if the Judge is satisfied, upon

³⁶ Under section 31 of the *Surveillance Act*.

³⁷ See section 32(1) of the *Surveillance Act*.

³⁸ See section 33 of the *Surveillance Act*; and Order 81H of the Rules of the Supreme Court Commentary at 81H.4.1.

³⁹ With notice to the parties to the activity.

⁴⁰ Without notice to the parties to the activity.

⁴¹ For an application under section 31, see section 32(2) of the *Surveillance Act*.

⁴² See section 30(3) of the *Surveillance Act*.

⁴³ See section 31(3) of the *Surveillance Act*.

⁴⁴ Including to the police force of the State or of another State or a Territory; the Anti-Corruption Commission, the Australian Federal Police or the National Crime Authority.

⁴⁵ See section 30(4) of the *Surveillance Act*.

⁴⁶ Under Division 2 or 3 of the *Surveillance Act*,

application being made in accordance with the *Surveillance Act*,⁴⁷ that the publication should be made to protect or further the *public interest*.⁴⁸

A Judge, when making an order under the *Surveillance Act*,⁴⁹ may impose such conditions or restrictions as the Judge considers necessary in the circumstances.⁵⁰

If a Court makes an order that a record may be published under⁵¹ the *Surveillance Act*, that order will apply to the person making the application and not anyone else.⁵² This may leave a somewhat peculiar result that a record may be published and become part of the public domain but anyone else who publishes the record may be in breach of the *Surveillance Act*.⁵³

Evidence

Photographs, films and videos⁵⁴ of an actual event may be admitted,

- ∄ as real evidence assisting testimonial evidence given by witnesses;⁵⁵
- ∄ as real evidence standing alone;⁵⁶ or
- ∄ indirectly by evidence of a person who has seen such a record that is no longer available.⁵⁷

Whatever the provisions of an Evidence Act required, in respect of photographs, films or video recordings, it would be prudent to endorse the original record with,

- ∄ a time and date that the record was made;
- ∄ the place from which the record was made;
- ∄ the name of the person who made the record; and

⁴⁷ See section 32 of the *Surveillance Act*.

⁴⁸ See section 31 (1) of the *Surveillance Act*.

⁴⁹ See section 31(1) of the *Surveillance Act*.

⁵⁰ See section 31(2) of the *Surveillance Act*.

⁵¹ Under section 31 of the *Surveillance Act*.

⁵² See section 31 of the *Surveillance Act*.

⁵³ See the TCN case paragraphs 24 -26.

⁵⁴ These are *documents* for the purpose of the *Evidence Act 1906 (WA)* see the *Interpretation Act 1984 (WA)* definition of *document*. See sections 62 -65A, 79B -79G & 79 of the *Evidence Act 1906 (WA)* about the admission of *documents* in Western Australia.

⁵⁵ *R v Sitek* [1988] 2 QdR 284; (1987) A Crim R 421; Halsbury's Laws of Australia [195 -5035].

⁵⁶ *R v Sitek* [1988] 2 QdR 284; (1987) A Crim R 421.

⁵⁷ *R v Sitek* [1988] 2 QdR 284; (1987) A Crim R 421; *Simpson Timber Co. (SASK) Ltd v Bonville* [1986] 5WWR 180, at 186.

≠ the purpose for which the record was made,

and have the record signed by a JP as soon as possible.

If I want the record I have made to be used as evidence what do I have to do to make the evidence admissible?

Record made in good faith

No civil or criminal proceeding can be taken against a person for or in respect of any act or thing done in good faith under the *Surveillance Act*.⁵⁸

Furthermore, if a member of the police force or a government department officer threatens certain consequences to a person lawfully making or possessing a photographic or video record, then such a threat may constitute a criminal threat and should quite reasonably generate, at the very least, a written complaint to their superior.

Conclusion

Any person may make a video recording or take a photo of any *public activity* unless specifically prohibited.

Any person may make a video recording or take photos of a *private activity* with the consent of one of the parties to the activity.

Any person may make a video recording or take photos of a *private activity* without the consent of any of parties to the activity, to protect a *lawful interest* or (if there are reasonable grounds for believing that the circumstances are so serious and the matter of such urgency) the use of the device is in the *public interest*

Any person may publish a photo or video record, without a Supreme Court order, to a member of the police force where the person making the publication believes on reasonable grounds that it was necessary to make that publication in connection with an imminent threat of serious violence to persons or of substantial damage to property.

The video recording or photo of a *private activity* may not be more than is reasonably necessary and must be in the *public interest*.

The photo or video recording of a *private activity* (together with a report about the circumstances of the recording if it was taken without consent of a *party*) must be

⁵⁸ See section 42 of the *Surveillance Act*.

provided to a judge of the Supreme Court who may then make an order in the *public interest* concerning the recording.⁵⁹

Neither civil nor criminal proceedings can be taken against a person taking a video or photo in good faith under the *Surveillance Act*.

⁵⁹ Unless it is published to a police officer as described above.