

## LEGAL RESPONSES TO NON-CONSENSUAL SMARTPHONE RECORDINGS IN THE CONTEXT OF DOMESTIC AND FAMILY VIOLENCE

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*The increasingly ubiquitous use of smartphones is further complicating the legal response to domestic and family violence ('DFV'). Perpetrators can now use smartphone recording facilities to record private conversations and activities of their (ex-)partners. Such behaviour may be a criminal offence of breach of a domestic and family violence protection order or stalking. On the other hand, those who have experienced DFV can record perpetrators and use the recordings in legal proceedings. The use of non-consensual smartphone recordings as evidence in DFV related cases is increasing and courts must determine when recordings are admissible. A key factor in making such determinations is whether the recording contravenes state-based criminal laws and listening and surveillance devices law. Drawing on reported experiences of the use of smartphone recordings in the context of DFV we show why further consideration and legal reform is needed if the law is to keep pace with this issue.*

### I INTRODUCTION

I've always got the phone in my pocket. I'm always armed, ready.<sup>1</sup>

I said you can't record me constantly ... that's like monitoring me.<sup>2</sup>

Increasingly, domestic and family violence ('DFV') is understood as involving a complex pattern of coercive and controlling behaviour.<sup>3</sup> Stark has

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1 Interview with Sandra (Brisbane, 8 October 2015); Heather Douglas, *Using Law and Leaving Domestic Violence Project: Domestic Violence Case Studies* (2014–17) TC Beirne School of Law <<https://law.uq.edu.au/research/our-research/using-law-and-leaving-domestic-violence/domestic-violence-case-studies>>. Note that pseudonyms are used when quoting the women who were interviewed for this study and that copies of all interviews are on file with the author Douglas.

2 Interview with Martha (Brisbane, 20 May 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

observed that coercive control includes structural forms of deprivation including the micro-regulation of everyday behaviour which, among other effects, subverts victims' rights to privacy. For Stark, DFV is a liberty crime which creates conditions of 'un-freedom'.<sup>4</sup> He explains that there are four factors that distinguish coercive control from domestic assault:

the extent to which its mode of oppression is embedded in objective structural constraints, its specific focus on enforcing gender stereotypes, its inextricable link to sexual inequality, and the extent to which it restricts autonomy and basic freedoms such as speech, movement and self-determination.<sup>5</sup>

He references the United States Supreme Court's seminal decision in *Griswold v Connecticut*, which established an affirmative protection against governmental intrusions into 'zones of privacy'.<sup>6</sup> These zones of privacy, Stark notes, 'encompass many of the material and social conditions of equality and self-determination violated by coercive control'.<sup>7</sup> Thus privacy can be understood as an aspect of freedom and autonomy, and coercive control as subverting the freedom of self-determination of the individual.

In the DFV context, it is clear that the use of technology can enhance perpetrator possibilities for limiting a victim's freedom.<sup>8</sup> There is a growing literature that has situated technology-facilitated abuse as DFV/coercive control. In the Australian context, research by Hand, Chung and Peters drew attention to the variety of information and communication technologies used by perpetrators to abuse and control their intimate or former intimate partners.<sup>9</sup> Woodlock's recent research identified the increasing use of technology, especially smartphones, by perpetrators to facilitate stalking and other forms of abuse in the context of DFV.<sup>10</sup> Research has also found that sexting coercion can be a form of

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3 See *Family Law Act 1975* (Cth) s 4AB; *Family Violence Protection Act 2008* (Vic) s 5; *Domestic and Family Violence Protection Act 2012* (Qld) s 8. See also Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press, 2007); Evan Stark, 'Rethinking Coercive Control' (2009) 15 *Violence against Women* 1509.

4 Stark, *Coercive Control*, above n 3, 13, 362, who identifies DFV as a liberty crime. See also Liz Kelly, Nicola Sharp and Renate Klein, 'Finding the Costs of Freedom: How Women and Children Rebuild Their Lives after Domestic Violence' (Report, Solace Women's Aid, 2015) 11–12 who reference Stark and use the term 'un-freedom'.

5 Stark, 'Rethinking Coercive Control', above n 3, 1516.

6 381 US 479, 484–5 (1965).

7 Stark, 'Rethinking Coercive Control', above n 3, 1521.

8 See Tammy Hand, Donna Chung and Margaret Peters, 'The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation' (Stakeholder Paper 6, Australian Domestic and Family Violence Clearing House, January 2009); Nicola Henry, Anastasia Powell and Asher Flynn, 'Not Just "Revenge Pornography": Australians' Experiences of Image-Based Abuse: A Summary Report' (Report, RMIT University, May 2017); Anastasia Powell and Nicola Henry, 'Digital Harassment and Abuse of Adult Australians: A Summary Report' (Report, RMIT University, 2015); Cindy Southworth and Sarah Tucker, 'Technology, Stalking and Domestic Violence Victims' (2007) 76 *Mississippi Law Journal* 667; Delanie Woodlock, 'Technology-Facilitated Stalking: Findings and Recommendations from the SmartSafe Project' (Report, Domestic Violence Resource Centre Victoria, 2013).

9 Hand, Chung and Peters, above n 8.

10 Delanie Woodlock, 'The Abuse of Technology in Domestic Violence and Stalking' (2017) 23 *Violence against Women* 584, 599. See also Katrina Baum et al, 'Stalking Victimization in the United States' (Special Report, Bureau of Justice Statistics, US Department of Justice, January 2009) 1, reporting that

intimate partner violence, providing perpetrators with another digital route for physical and sexual victimisation.<sup>11</sup> Technology-facilitated abuse is becoming an increasingly important area of research in part because it is experienced by such a large proportion of women and also because, as technology has become cheaper and easier to use, technology-facilitated abuse has become increasingly prevalent.<sup>12</sup> This is especially so in the context of smartphones, given the widespread use of such devices and the ability of smartphone technologies to challenge established notions of public and private spheres, or ‘zones’, as highlighted by Stark above. The application of privacy-related protections, in this context, is further complicated because privacy law has traditionally afforded greater protections to the private, rather than the public, sphere.<sup>13</sup> The once binary relationship between the private and privacy law protections accorded to such spheres is now widely recognised as problematic in the contemporary privacy law literature.<sup>14</sup> Likewise, it is becoming increasingly clear that the applications of new technologies, such as smartphones, are impacting upon individual relationships within such spheres.<sup>15</sup>

As this article shows, certain forms of technological output, such as smartphone recordings, can be used by both perpetrators and victims. Perpetrators can use non-consensual recordings for the purposes of coercively controlling their victim. However, victims are also employing non-consensual smartphone recordings of their abusive partners in an effort to protect themselves, and sometimes for evidence in subsequent legal proceedings. Accordingly, regulating the use of technology, and non-consensual smartphone recordings in particular, presents a conundrum for policymakers.<sup>16</sup> While technology can be used to perpetuate abuse it can also assist survivors to

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the risk of stalking victimisation (the study including technology-facilitated stalking) was highest for individuals who were divorced or separated – 34 per 1000 individuals – and women were at greater risk than men for technology-facilitated stalking victimisation.

11 Michelle Drouin, Jody Ross and Elizabeth Tobin, ‘Sexting: A New, Digital Vehicle for Intimate Partner Aggression’ (2015) 50 *Computers in Human Behaviour* 197.

12 Jerry Finn and Teresa Atkinson, ‘Promoting the Safe and Strategic Use of Technology for Victims of Intimate Partner Violence: Evaluation of the Technology Safety Project’ (2009) 24 *Journal of Family Violence* 53, 53–4.

13 Daniel J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1088, 1094. See also Law Reform Commission, *Privacy*, Report No 22 (1983) vol 2, 76 [1187]–[1188], representing the traditional perspective that privacy protections in relation to surveillance devices should not be accorded in public places where individuals could be expected to be observed, but would be accorded where there was a reasonable expectation of being safe from observation.

14 See, eg, Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press, 2010); Julie E Cohen, ‘What Privacy Is for’ (2013) 126 *Harvard Law Review* 1904; Neil Richards, ‘The Dangers of Surveillance’ (2013) 126 *Harvard Law Review* 1934.

15 See, eg, Karen Levy, ‘Intimate Surveillance’ (2015) 51 *Idaho Law Review* 679.

16 As Graycar and Morgan point out, Western thought is characterised by dichotomies and binary oppositions, including private versus public; while the public sphere is associated with men and regulation, the private sphere is associated with women and family and, according to liberal thought, regulation should be avoided in this space: Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002) 8–12. In the context of responding to domestic violence, the public/private dichotomy does not provide a clear resolution.

obtain the legal redress and safety they need.<sup>17</sup> The fact that a non-consensual smartphone recording can be used for both positive and negative purposes makes judicial considerations about such recordings complex.

Two similar non-consensual recordings, conducted by both perpetrator and victim in the context of DFV, can have very different purposes or uses and result in different legal consequences. How then are courts to differentiate between the two and determine whether a recording by an abuser is DFV and a form of stalking or intimidation, and whether a recording by a victim is for self-protection or a contravention of relevant listening and surveillance device legislation?<sup>18</sup>

The perspectives of survivors continue to be important in informing appropriate legal responses to DFV,<sup>19</sup> and in this article we draw on interviews undertaken as part of a qualitative study involving women who have experienced DFV and have engaged with the legal system. Interviewees in this study explained how smartphone recording may help to increase their sense of safety and provide valuable evidence for legal proceedings. However, in contrast to this, some interviewees also reported that where abusive partners undertake recording, this may be experienced as intimidating and cause an abused person to be fearful. There are several legal responses to recording depending on the context. In some cases, a person's act of recording may justify a criminal charge of stalking or intimidation. Depending on whether there is a domestic and family violence protection order ('DFVO') in place, and depending on the conditions of the DFVO, recording may be a breach of the DFVO. Finally, in some cases parties may seek to have the recording admitted into evidence and, in most cases, the deciding factor on admitting evidence seems to regard whether the recording is in breach of the various listening and surveillance devices legislation in place in each jurisdiction. In the next section, we provide some further background to the *Leaving Domestic Violence Study*.<sup>20</sup> We then draw on the reports of the interviewees to frame our discussion of legal responses to recording as abuse and then to recording as a response to abuse, before highlighting the complex

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17 Southworth and Tucker, above n 8; Jill P Dimond, Casey Fiesler and Amy S Bruckman, 'Domestic Violence and Information Communication Technologies' (2011) 23 *Interacting with Computers* 413, 420; Hand, Chung and Peters, above n 8, 9; Woodlock, 'The Abuse of Technology', above n 10, 599. See also the importance of recording police interviews: Nina Westera and Martin Powell, 'Prosecutors' Perceptions of How to Improve the Quality of Evidence in Domestic Violence Cases' (2017) 27 *Policing and Society: An International Journal of Research and Policy* 157; Nina Westera, 'Want the Best Evidence for Victims of Domestic Violence? Press the Record Button' (2016) 70 *Australian Police Journal* 8. Note recent developments in New South Wales allowing the admission of police-recorded statements as evidence in chief: see *Criminal Procedure Act 1986* (NSW) ch 6 pt 4B.

18 Thus, this article analyses the potential effects of the current laws that may be applicable in the context of DFV and smartphone recordings, and highlights its unintended consequences.

19 Jennifer R Weis and Hillary J Haldane, 'Ethnographic Notes from the Frontlines of Gender-Based Violence' in Jennifer R Weis and Hillary J Haldane (eds), *Anthropology at the Front Lines of Gender-Based Violence* (Vanderbilt University Press, 2011) 1, 2; Liz Kelly and Nicole Westmarland, 'Naming and Defining "Domestic Violence": Lessons from Research with Violent Men' (2016) 112 *Feminist Review* 113, 117.

20 Heather Douglas, *Using Law and Leaving Domestic Violence Project* (2014–17) TC Beirne School of Law <<https://law.uq.edu.au/research/our-research/using-law-and-leaving-domestic-violence>> ('*Leaving Domestic Violence Study*') (copies of transcripts on file with author Douglas).

concerns for courts in adjudicating legal responses to DFV involving smartphone recordings.

## II USING LAW AND LEAVING DOMESTIC VIOLENCE STUDY

Throughout 2014–17 a qualitative study was conducted by author Douglas involving interviews with 65 women in Brisbane, Australia who had experienced DFV and engaged with the legal system. We refer to the study as the *Leaving Domestic Violence Study*. While the objective of the study was to explore women's experiences of engaging with multiple legal processes, 29 women identified that they had been recorded by their abusive partner and/or that they had recorded their abusive partners. This article draws on the interviewees' reports on their experiences of recording their violent partners or being recorded by their violent partners to illustrate some of the legal issues that arise in this context.

In recruiting for the *Leaving Domestic Violence Study* the women were initially approached by their DFV support workers or lawyers from a range of organisations in Brisbane, Australia who discussed the proposed study with them. The women are all over 18 years old, had in the past six months leading up to the first interview experienced a violent relationship with an intimate partner and engaged with the legal system in some way to respond to the violence. Support workers or lawyers arranged interviews if the woman was interested in participating. A narrative interviewing style was used to encourage the participants to tell their stories and describe their experiences in detail at their own pace and as accurately as possible.<sup>21</sup> Interviews were between 40 to 90 minutes in length and were recorded and transcribed with the participants' consent. The interviews were analysed thematically. Pseudonyms are used when referring to the participants' comments and some details have been changed to protect the anonymity of the interviewees. The women's comments cannot be understood as a definitive description of the way victims and perpetrators of domestic abuse and use recording technologies in their relationships with one another.<sup>22</sup> This article does not purport to report on the *Leaving Domestic Violence Study* in any depth. Rather, the interviewees' comments about their experiences of the use of smartphone recordings are used simply to illustrate the range of complex issues that must be negotiated in legal responses.

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21 See Martine B Powell, Ronald P Fisher and Rebecca Wright, 'Investigative Interviewing' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005) 11; Uwe Flick, *Designing Qualitative Research* (SAGE Publications, 2007).

22 See Robert Dingwall, 'Accounts, Interviews and Observations' in Gale Miller and Robert Dingwall (eds), *Context and Method in Qualitative Research* (SAGE Publications, 1997) 52.

### III PERPETRATOR RECORDINGS AND COERCIVE CONTROL

As noted above, as part of the *Leaving Domestic Violence Study*, some women reported that non-consensual smartphone recordings were used by perpetrators as a form of domestic abuse. In this section, we set out some of the interviewees' comments about this issue and then consider legal responses to this form of coercive control.

#### A Reported Experiences Regarding Perpetrator Recordings

While all of the women involved in the *Leaving Domestic Violence Study* reported experiencing multiple forms of abuse, 14 of the women reported that their partner or ex-partner recorded them as part of their effort to intimidate and control them.<sup>23</sup> For some women, recording happened only once in the context of a coercive and controlling relationship. For example, Angelina had obtained a temporary DFVO that required her ex-partner to stay away from her. He had come to the house and recorded Angelina at the front door telling him 'you're not allowed to talk with me'.<sup>24</sup> He then stood out the front of her apartment taking pictures of the apartment and her car. Angelina described this behaviour as intimidating.

For other women, their partner's recording of them was a systematic part of their coercive and controlling behaviour. Women reported that sometimes the recording was done openly, but without their consent and at other times women reported that they discovered that the recordings had been undertaken covertly. Pari reported that her husband was extremely jealous. In giving an example of his jealousy, she explained that on one occasion she had accidentally bumped into a friend's husband at the library and began a conversation with him. Her husband arrived at the library and accused her of having an affair and then began to record the conversation. Pari explained that the situation within the relationship gradually became more controlling and she later realised that she was being constantly spied on and stalked by her husband. Pari reported: 'he said that "I'm recording all your calls" ... if we are talking normally also, he used to record that as well'.<sup>25</sup>

Similarly, Leah reported that towards the end of the relationship the whole house was wired up with recording devices, some devices obvious, some secretly installed. Leah explained that there were recording devices around the house: 'he had a recording watch, video and audio sensor right in front of the shower ... after coming home he would just plug it in ... play it back'.<sup>26</sup> Leah tried to resist being recorded: 'I broke them, I turned them off. I confronted him', but he would replace the devices. Martha explained that she was being constantly recorded by

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23 This figure does not include women who experienced other forms of technology-facilitated abuse including GPS tracking, texting and monitoring of their internet use and social media.

24 Interview with Angelina (Brisbane, 11 December 2014); Douglas, *Domestic Violence Case Studies*, above n 1.

25 Interview with Pari (Brisbane, 9 March 2013); Douglas, *Domestic Violence Case Studies*, above n 1.

26 Interview with Leah (Brisbane, 14 September 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

her partner and she confronted him: ‘I said you can’t record me constantly ... that’s like monitoring me’.<sup>27</sup> Fiona explained that during her abusive relationship her partner was jealous of others she spent time with and installed a recording device in her car and used this to record her conversations with passengers. This type of controlling behaviour continued after separation when her ex-partner broke into Fiona’s new house and covertly installed night vision cameras and recording devices throughout the house and underneath it. She eventually found the set top box hidden under pavers beneath the house and removed the devices. She does not know how long they were there before she removed them.

## B Legal Issues – Stalking, Intimidation and Breach of DFVOs

From the perspective of many of the interviewees, the recording behaviours described here were part of the coercive and controlling behaviour of the perpetrator and seemed to be undertaken for the purposes of harassment and intimidation or for monitoring. While many of these behaviours were reported to take place during the relationship, recording also took place after separation. While some recording was done openly, at other times it was covert. None of the women believed they had consented to the recording and they often actively resisted it once they became aware of it. Accordingly, these types of perpetrator recordings give rise to several legal issues.

### 1 Potential Stalking and Intimidation Offences

Many of the women interviewed for the *Leaving Domestic Violence Study* reported that the experience of being recorded by a partner or former partner was intimidating.<sup>28</sup> Recording may, in some circumstances, be an offence of stalking or intimidation depending on the jurisdiction. Stalking is a particular concern in cases involving DFV as it has been identified as a serious risk factor for future harm.<sup>29</sup> Since the 1990s, all Australian State and Territory jurisdictions have introduced the offence of stalking, in part as a response to DFV.<sup>30</sup>

In all states and territories, with the exception of Western Australia,<sup>31</sup> the definition of stalking (and intimidation in New South Wales) may be wide enough to encompass recording another person. Stalking is usually characterised by the repeated or protracted nature of the relevant act(s) or a combination of

27 Interview with Martha (Brisbane, 20 May 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

28 See also *Roncevic v Boxx* [2015] ACTSC 53, [70] (Penfold J).

29 Judith McFarlane, Jacquelyn C Campbell and Kathy Watson, ‘Intimate Partner Stalking and Femicide: Urgent Implications for Women’s Safety’ (2002) 20 *Behavioral Sciences and the Law* 51; Judith M McFarlane et al, ‘Stalking and Intimate Partner Femicide’ (1999) 3 *Homicide Studies* 300.

30 For an overview of each jurisdiction, see: National Council to Reduce Violence against Women and Their Children, ‘Domestic Violence Laws in Australia’ (Report, June 2009) 171–8.

31 In Western Australia, stalking is defined as ‘pursu[ing] ... with intent to intimidate’: *Criminal Code Compilation Act 1913* (WA) app B s 338E (‘*Criminal Code 1913* (WA)’). ‘Pursue’ is defined as: repeatedly communicating with the person directly or otherwise; repeatedly following the person; repeatedly causing the person to receive unsolicited gifts; or watching or besetting a place where the person lives or works or approaching the place: at s 338D(1) (definition of ‘pursue’ para (a)–(d)).

relevant acts.<sup>32</sup> In Victoria, Tasmania, the Northern Territory, South Australia and the Australian Capital Territory ('ACT'), the act of stalking is defined broadly to include acts that could reasonably be expected to cause apprehension or fear in the stalked person.<sup>33</sup> Notably, in the ACT case of *Roncevic v Boxx*, the offender was found guilty of stalking his former partner where the stalking behaviour included listening in on the victim's encounters with her new sexual partner.<sup>34</sup> In Queensland, and also the ACT, stalking behaviour may include intimidating, harassing or threatening acts.<sup>35</sup> Similarly, in New South Wales, the offence of intimidation, defined as harassment or molestation, may in some circumstances encompass recording.<sup>36</sup> In *Henderson v McKenzie*,<sup>37</sup> Higgins CJ pointed out that harassment in the context of stalking is not defined in the *Crimes Act 1900* (ACT) or in the *Criminal Code 2002* (ACT). His Honour suggested that it bore its 'usual' meaning: "to trouble by repeated attacks; harry; (1) to worry or unnerve (an enemy) by continuous small attacks; (2) to disturb, worry, torment, distress with annoying labour, care or misfortune"; "Vex by repeated attacks; trouble, worry".<sup>38</sup> These definitions of stalking and of intimidation would appear to be wide enough to capture recording in some of the contexts described by the women interviewed for the *Leaving Domestic Violence Study*. In their analysis of legislative definitions of domestic and family violence, the Australian Law Reform Commission ('ALRC') and New South Wales Law Reform Commission ('NSWLRC') identified that intimidation is defined variously to include conduct that causes reasonable apprehension or fear and in DFVO legislation it is usually a sub-category of emotional abuse.<sup>39</sup>

A variety of reasons may be given for recording in circumstances where there has been DFV and it may be difficult to prove that the offender subjectively intended to cause the victim to fear or apprehend harm. While the fault elements of stalking vary between jurisdictions, generally the offence of stalking does not

32 Repeated or protracted: see *Criminal Code Act 1899* (Qld) sch 1 s 359B(b) ('*Criminal Code 1899* (Qld)'); 'Course of conduct': see *Criminal Code Act 1924* (Tas) sch 1 s 192 ('*Criminal Code 1924* (Tas)'); *Crimes Act 1958* (Vic) s 21A(2). 'Repeated' or combination of acts: see *Criminal Code 1983* (NT) sch 1 s 189(1) ('*Criminal Code 1983* (NT)'). Repeated: see *Crimes Act 1900* (ACT) s 35(2); *Criminal Law Consolidation Act 1935* (SA) s 19AA(1)(a).

33 *Criminal Code 1983* (NT) s 189(1)(g); *Criminal Law Consolidation Act 1935* (SA) ss 19AA(1)(a)(v), (vi); *Criminal Code 1924* (Tas) ss 192(1)(d), (f); *Crimes Act 1958* (Vic) ss 21A(2)(f)–(g). Note also the stalking offence is 'aggravated' where it takes place in the context of previous or current intimate partners: *Crimes Act 1900* (ACT) s 35(2)(i); *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g).

34 [2015] ACTSC 53, [70] (Penfold J). The stalking also included the offender's installation of a tracking device on the victim's car so he could track her movements.

35 *Crimes Act 1900* (ACT) s 35(2)(j); *Criminal Code 1899* (Qld) s 359B(c)(vi). The stalking offence was introduced alongside other amendments to the ACT's domestic violence legislation in 1996: see the discussion in *Henderson v McKenzie* [2009] ACTSC 39, [7] (Higgins CJ).

36 *Crimes (Domestic and Personal) Violence Act 2007* (NSW) ss 7, 13. Note that in NSW, stalking is defined narrowly to encompass watching or frequenting of the vicinity of the victim, and would not encompass recording: see *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 8.

37 [2009] ACTSC 39.

38 *Ibid* [6] (citations omitted).

39 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) vol 1, 197–9 [5.35]–[5.40] ('*Family Violence: A National Legal Response*').



require proof of the subjective intent of the offender. In the Northern Territory, Tasmania and Victoria, if there is sufficient evidence that the offender carried out the stalking behaviour, that the behaviour caused fear or apprehension of harm in the stalked person and that an ordinary person would have been aware that such behaviour was likely to cause fear or apprehension of harm, the offence will be made out.<sup>40</sup>

Notably in some jurisdictions, it is not necessary to prove that the stalked person feared or apprehended harm even where the subjective intent of the offender cannot be determined. For instance, in the ACT it will be sufficient if the accused person was reckless about whether his or her behaviour would be likely to cause apprehension or fear of harm in the stalked person.<sup>41</sup> In Queensland, the accused person must intentionally direct the stalking behaviour at the stalked person but it is immaterial whether the accused person intended to cause apprehension or fear.<sup>42</sup> It is also immaterial in Queensland whether the stalking behaviour actually caused the stalked person to be fearful.<sup>43</sup> The test in Queensland is whether the purported stalking behaviour ‘causes detriment’ or ‘would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person’.<sup>44</sup> Notably, Queensland case law has determined that the stalked person must become aware of the stalking behaviour ‘at some time’ although this awareness may come after the relevant act is complete.<sup>45</sup> In Queensland, this may leave open the possibility for stalking to be charged in circumstances where the person has discovered they were recorded only after the recording is completed. In New South Wales, for a successful prosecution of the offence of intimidation, the Court must be satisfied that the accused intended to cause the other person to fear physical or mental harm. However, the provision also states that the offender is taken to intend to cause fear of physical or mental harm if he or she ‘knows that the conduct is likely to cause fear in the other person’.<sup>46</sup>

In South Australia, the stalking behaviour must be carried out with intent to cause ‘serious’ apprehension, fear or harm or to harass the person stalked.<sup>47</sup> In the context of a history of DFV it may be difficult to prove that the intent of the person carrying out recording was to cause serious fear, apprehension or harm to the person being recorded. In discussing the provision in *Phillips v Police*, Kourakis CJ considered the meaning of ‘serious’ and explained that the harm extends to: ‘an apprehension or fear of any adverse consequence which is accompanied by anxiety or emotional distress which interferes with a person’s

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40 *Criminal Code 1983* (NT) ss 189(1)–(1A); *Criminal Code 1924* (Tas) s 192(3); *Crimes Act 1958* (Vic) s 21A(3).

41 *Crimes Act 1900* (ACT) s 35(4).

42 *Criminal Code 1899* (Qld) ss 359B(a), 359C(4).

43 *Criminal Code 1899* (Qld) s 359C(5).

44 *Criminal Code 1899* (Qld) s 359B(d).

45 *Taylor v Director of Public Prosecutions (Qld)* (2009) 195 A Crim R 53, 59 (Applegarth J).

46 *Crimes (Domestic and Personal) Violence Act 2007* (NSW) s 13.

47 *Criminal Law Consolidation Act 1935* (SA) s 19AA(1)(b).

social, family or working life'.<sup>48</sup> Whether or not this type of interference will be classified as 'serious' requires 'an evaluative judgment by the tribunal of fact'.<sup>49</sup>

Some of the women in the *Leaving Domestic Violence Study* reported apprehension and fear and in some cases their level of apprehension or fear could be determined to be 'serious'. In any event, the intent may be focussed on intent to harass the person stalked. In *Duffy v Google Inc*, Blue J of the South Australian Supreme Court noted that the word 'harass' has a settled ordinary meaning, including to 'trouble', 'worry' or 'disturb persistently'.<sup>50</sup> This non-consensual recording might be interpreted as a form of harassment in South Australia, but this would require that the perpetrator's intent can be proven, which will often be very difficult to do.

## 2 Protection Orders and Breach of a Protection Order

Civil DFVOs are the most common legal response to DFV. Australian courts make over 80 000 DFVOs every year.<sup>51</sup> The aim of DFVOs is to protect a person from future DFV. Generally, in order to obtain a DFVO, a person must satisfy the court there is a risk of future DFV and that a DFVO is needed to deter it. Where an application for a DFVO is successful, it will have certain conditions attached to it. Usually conditions will include a condition to be of good behaviour and not to perpetrate further DFV.<sup>52</sup> The definition of DFV in DFVO statutes varies across states and territories but in all states and territories it is possible that non-consensual recording could fit the definition of DFV. In Victoria and Queensland, DFV includes behaviour towards an intimate partner that in any way 'controls or dominates' the victim or causes them to feel fear,<sup>53</sup> this definition would be broad enough to cover non-consensual recording.

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48 (2016) 125 SASR 427, 435 [25].

49 Ibid 433 [21].

50 (2015) 125 SASR 437, 533–4 [415]–[417]:

The word 'harass' has a settled meaning in ordinary parlance exemplified by dictionary definitions. The *Oxford English Dictionary* gives the following relevant definitions of the verb: 3. To trouble or vex by repeated attacks. To trouble, worry, distress with annoying labour, care, perplexity, importunity, misfortune, etc. The *Macquarie Dictionary* gives the following relevant definitions of the verb: 1. To trouble by repeated attacks, incursions, etc, as in war or hostilities; harry; raid; 2. To disturb persistently; torment, as with troubles, cares, etc.

51 See, eg, Queensland Courts, 'Magistrates Courts of Queensland: Annual Report 2014–2015' (2015) 53 (38 010 orders in year 2014–15); The Magistrates' Court of Victoria, 'Annual Report 2014–2015' (2015) 82 (final order numbers not available but at least 23 365 interim orders made in year 2014–15); Local Court of New South Wales, 'Local Court of New South Wales Annual Review 2015' (2015) 14 (26 009 orders were made in 2015). See Annabel Taylor et al, 'Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement' (Landscapes: State of Knowledge Paper, Australia's National Research Organisation for Women's Safety, December 2015) for an overview.

52 Karen Wilcox, 'Recent Innovations in Australian Protection Order Law: A Comparative Discussion' (Topic Paper No 19, Australian Domestic and Family Violence Clearinghouse, 2010).

53 *Domestic and Family Violence Protection Act 2012* (Qld) s 8; *Family Violence Protection Act 2008* (Vic) s 5.

Furthermore, in Queensland, Victoria and Tasmania, the definition of DFV also includes emotional or psychological harm<sup>54</sup> and it is conceivable that non-consensual recording could cause emotional harm where the survivor is aware that it is being carried out. Intimidation is included in the Northern Territory, Western Australian and New South Wales definition of DFV<sup>55</sup> and it is possible that this could capture some situations where non-consensual recording is carried out. Some DFVO statutes define DFV to include surveillance and monitoring,<sup>56</sup> and in some circumstances recording may be understood in this way. If recording is determined to be a form of DFV, then the behaviour could be a part of the DFV that justifies a court making a DFVO. Furthermore, non-consensual recording of a victim who has a DFVO in place could be determined to be a breach of the order and a criminal offence.<sup>57</sup> For example, in the circumstances outlined by Angelina, the recording behaviour could have been charged as a breach of the temporary DFVO. In those cases where a DFVO has been made and where a specific condition of the DFVO is that the parties not record each other, any future recording would be a breach of the DFVO and a criminal offence.

### C Summary

Interviewees' reports from the *Leaving Domestic Violence Study* illustrate that non-consensual recording is sometimes experienced as intimidating. As we have shown, in some cases, it may be possible for a person who engages in non-consensual recording of their partner or ex-partner to be charged with an offence of stalking or intimidation, depending on the jurisdiction. Certainly in Queensland the circumstances presented by Leah and Fiona may have been sufficient to justify charges of stalking. Non-consensual recording may also be a form of DFV and underpin a DFVO. Furthermore, where a DFVO is in place, and non-consensual recording by the perpetrator continues, this may be a criminal offence of breach of a DFVO.<sup>58</sup> However, as we explore below, non-consensual recording may be justified and defensible in contexts where the person has a lawful interest in recording. Nevertheless, as we also show, the line

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54 *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1)(b); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 8(1), (2)(b); *Family Violence Act 2004* (Tas) s 7(b)(ii); *Family Violence Protection Act 2008* (Vic) s 5(1)(a)(ii).

55 *Domestic and Family Violence Act 2007* (NT) s 5(c); *Restraining Orders Act 1997* (WA) s 6(1)(d); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(1). See also *Crimes Act 1900* (NSW) s 545B(2) (definition of 'intimidation'): 'the causing of a reasonable apprehension of injury to a person or to any member of his family or to any of his dependants, or of violence or damage to any person or property'.

56 See, eg, *Domestic and Family Violence Protection Act 2012* (Qld) s 8(2)(h); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(k).

57 See Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, above n 39, ch 12.

58 Although, on a practical level, the difficulty women face in seeking a criminal justice response in the context of DFV is well known: see Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39 *Melbourne University Law Review* 434; Adrian Howe, 'The Problem of Privatised Injuries: Feminist Strategies for Litigation' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, 1991) 148.

between non-consensual recording that is DFV and potentially a criminal offence, and where such behaviour is justified and defensible is far from clear.

#### IV VICTIM RECORDINGS FOR EVIDENCE AND PROTECTION

As noted above, as part of the *Leaving Domestic Violence Study*, some women reported that non-consensual smartphone recordings were used by perpetrators as a form of domestic abuse. However, some women in the *Leaving Domestic Violence Study* also reported that they used their smartphone recordings as a form of protection from, and evidence of, abuse. In this section we set out some of the interviewees' comments about this issue and then consider legal responses to this type of recording.

##### A Reports from Victims on How They Used Recordings

Eighteen of the interviewees recorded their abuser's behaviour. They had a variety of explanations for why they did this. They explained they recorded their ex-partner's behaviours to collect evidence to prove abusive behaviour had occurred, to make sure they were believed and to feel safe. Their comments speak to a wider literature that shows the difficulty women face in being believed and being understood as credible in the legal system.<sup>59</sup> While some of the women thought their recordings would be helpful in future court proceedings, there were a variety of other contexts in which they thought they might need evidence, including convincing themselves that their partner's behaviour was abusive, confronting their partner, and talking to police or lawyers.

For some women, the recordings, although sometimes covertly made, were for private use. Vera simply wanted proof that her partner was abusive. She said 'I want to record because I really want evidence that he always verbally abused me. That is my reason'.<sup>60</sup> Similarly, Rosa explained: 'I have a recording about [the abuse] because people don't believe me about what he's like'.<sup>61</sup> Some women suggested that recordings could be used to confront their partner with the problem behaviour in an effort to encourage change. Martha explained 'there were times he was threatening me ... when I would record him towards the end of it in the hope that we could try and work it out'.<sup>62</sup> In her interview Susan stated that, as she left her partner for the last time, she recorded him: 'he was calling me spiteful ... and all sorts of things, so I just left him to it'.<sup>63</sup> For her this was proof about why she left.

Many of the women recorded their (ex-)partner's behaviours to convince police, DFV support workers and lawyers that they were experiencing abuse and

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59 See, eg, Rosemary Hunter and Kathy Mack, 'Exclusion and Silence: Procedure and Evidence' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (Law Book, 1997) 171, 173–4, 191.

60 Interview with Vera (Brisbane, 13 March 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

61 Interview with Rosa (Brisbane, 16 October 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

62 Interview with Martha (Brisbane, 20 May 2015).

63 Interview with Susan (Brisbane, 22 May 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

therefore of their need for a DFVO. Maddy said ‘I’m just trying to keep a record ... like a proof of reasons why I have a right to have the [DFVO] out on him instead of it just being my word against him situation’.<sup>64</sup> She said, ‘I know the voice recordings ... don’t really stand up in court from an evidence standpoint but I figured I could play them to my solicitor so they could see what I am dealing with’.<sup>65</sup> In some cases, the women believed the recordings had enabled them to avoid protracted and stressful contested hearings in protection order matters. Jennifer reported that her recording of her ex-partner ‘threatening me was really ... the straw that broke the camel’s back’.<sup>66</sup> She explained that the recorded material had been shown to her ex-partner’s solicitor and had assisted her in obtaining a DFVO by consent. Jacinta had recorded her partner’s violent outburst and shown it to her DFV support worker who, according to Jacinta, said: “‘That’s all you need,’ it was that bad’.<sup>67</sup> Jacinta also believed that the recording convinced her ex-partner to consent to a DFVO.

Research has suggested that criminal charges in cases involving DFV may be difficult to prove.<sup>68</sup> Some of the women in this study recorded interactions with their violent partners in order to convince police and lawyers of the appropriateness of criminal charges. Roseanna had been severely abused by her ex-partner and her lawyer did not believe her. Roseanna had remained in telephone contact with the abusive partner and managed to record their telephone conversations. These eventually led to him making various admissions that were recorded and he was charged with criminal assaults arising from past incidents of DFV.<sup>69</sup> Similarly, Laura and Jennifer recorded their partners’ abuse; they showed the recordings to the police and charges of breach of a DFVO were laid. Fiona reported that the day after she obtained a DFVO her ex-partner came to her house ‘and they were taking everything. So I stood and recorded them ... Then I rang the police’.<sup>70</sup> Fiona believed the recording was pivotal in ensuring there was a breach of a DFVO charge laid. In several cases women reported that police encouraged them to make recordings of their partner’s abusive behaviour. Faith explained that a police officer who attended a call-out helped her to download a recording application on her phone and encouraged her to ‘start recording him’.<sup>71</sup>

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64 Interview with Maddy (Brisbane, 24 June 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

65 Interview with Maddy (Brisbane, 24 June 2015).

66 Interview with Jennifer (Telephone Interview, 31 March 2016); Douglas, *Domestic Violence Case Studies*, above n 1.

67 Interview with Jacinta (Brisbane, 25 May 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

68 Douglas, ‘Do We Need a Specific Domestic Violence Offence?’, above n 58.

69 Interview with Roseanna (Brisbane, 27 November 2015); Douglas, *Domestic Violence Case Studies*, above n 1. Such calls are often orchestrated as a part of the criminal investigation into sexual assault. Described as pretext calls, they can result in admissions and confessions that may be admissible at trial. See Jeremy Gans, ‘The Limits of the *Christie* Discretion’ (Paper presented at the Current Legal Issues Seminar: Issues of Discretionary Exclusion of Evidence, Supreme Court of Queensland, 13 October 2016) <<https://law.uq.edu.au/files/19271/The-limits-of-the-Christie-discretion.pdf>>.

70 Interview with Fiona (Telephone Interview, 1 July 2016); Douglas, *Domestic Violence Case Studies*, above n 1.

71 Interview with Faith (Brisbane, 5 August 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

Many parents report that abuse continues post-separation.<sup>72</sup> Some women reported that they recorded the child handovers in part to keep themselves safe but also, if there was trouble, they would have evidence for future court proceedings. Sandra pointed out that handover is now the only contact she has with her ex-partner, apart from emailing, and she sometimes recorded the hand over to chronicle any issues. Similarly, Rosa said her partner could be abusive when he came to the house to collect their son. She said she recorded his yelling in case he tried to claim that she was breaching the DFVO. Milly explained that she started recording when her ex-partner ‘started being very nasty and verbally aggressive at our [child] drop-offs’.<sup>73</sup> On some occasions, women did not have a specific expectation about how they would use the recording; rather recording was an important part of their protective arsenal. Ingrid explained: ‘It’s good that I keep recording ... [you know] there’s more stuff to come’,<sup>74</sup> and Sandra explained: ‘I’ve always got the phone in my pocket. I’m always armed, ready’.<sup>75</sup>

## **B Listening and Surveillance Device Legislation and the Admissibility of Victim Recordings for Evidence**

### ***1 History and Background***

The types of non-consensual recording detailed above give rise to potential contravention with various listening and surveillance device laws. Listening device legislation were the first privacy related laws to be introduced in Australian jurisdictions, beginning in the early 1970s.<sup>76</sup> These laws were specifically concerned with the use of new technologies to eavesdrop or overhear private discussions.<sup>77</sup> It is notable that when these laws were introduced their application in the context of DFV was not a consideration.<sup>78</sup> Accordingly, the laws criminalised ‘listening device’ uses for the purposes of recording ‘private conversations’ without the consent of conversational participants.<sup>79</sup> However, despite this being the relevant criminal offence, it should be noted for the purposes of this paper, that courts tend to use the applicability of listening and surveillance device legislation as a means for deciding whether a recording should be admitted as evidence, rather than determining criminal liability on behalf of the recorder.

As the use of different technologies developed so did concomitant privacy concerns, and some states extended the focus on listening devices to include surveillance devices.<sup>80</sup> These laws extended the type of device use that could give

72 Rae Kaspiew et al, ‘Experiences of Separated Parents Study (Evaluation of 2012 Family Violence Amendments)’ (Report, Australian Institute of Family Studies, October 2015) 45.

73 Interview with Milly (Brisbane, 5 May 2016); Douglas, *Domestic Violence Case Studies*, above n 1.

74 Interview with Ingrid (Brisbane, 9 April 2015); Douglas, *Domestic Violence Case Studies*, above n 1.

75 Interview with Sandra (Brisbane, 8 October 2015).

76 See, eg, *Invasion of Privacy Act 1971* (Qld); *Listening and Surveillance Devices Act 1972* (SA).

77 See Law Reform Commission, above n 13, vol 1, 342 [737].

78 *Ibid* vol 1, 342 [734].

79 *Ibid* vol 2, 47 [1127].

80 See, eg, *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 2007* (NT); *Listening and Surveillance Devices Act 1972* (SA); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 1998* (WA).

rise to criminal sanction. The expansion of applicable devices also created new offences in relation to the non-consensual recording of ‘private activities’. As such, whilst the conceptual basis of the various legal frameworks remained similar, as regards harm prevention, the application of the different listening and surveillance devices laws started to fragment in terms of their foundational definitions, offence requirements and exemptions. So much so that the ALRC concluded that a uniform surveillance device law was now required in Australia to ameliorate the gaps and inconsistencies arising from the state-based regimes.<sup>81</sup>

## 2 The Devices that Are Regulated

Every state and territory currently regulates the use of listening and surveillance devices either by private individuals or by law enforcement agencies.<sup>82</sup> In Queensland, a listening device is broadly defined under section 4 of the *Invasion of Privacy Act 1971* (Qld) as ‘any instrument, apparatus, equipment or device capable of being used to overhear, record, monitor or listen to a private conversation simultaneously with its taking place’.<sup>83</sup> However, the ALRC’s concerns start to become visible when the other laws are considered. For example, the ACT and Tasmanian laws use different words to define the uses of a listening device – namely, to ‘record or listen’ – and also do not have a requirement for the recording to take place simultaneously, as in Queensland.<sup>84</sup> The type of device also varies amongst different jurisdictions. In Queensland, a listening device can be any instrument, apparatus, equipment or device,<sup>85</sup> whereas in Victoria, a listening device can be ‘any device’<sup>86</sup> and in South Australia it is an ‘electronic or mechanical device’.<sup>87</sup>

Given the breadth of definitions, it is perhaps not surprising that a wide range of devices have been identified as listening devices by various courts. In *Steiner Wilson v Webster Pty Ltd v Amalgamated Television Services Pty Ltd*, a hidden microphone and camera employed by a television journalist was held to be a listening device under the ACT law.<sup>88</sup> Similar audio recording devices, such as a digital dictaphone,<sup>89</sup> a cassette recorder<sup>90</sup> and a microphone<sup>91</sup> have all been held to be listening devices, as has the use of such devices to record phone

81 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 78, 276–8.

82 It should be noted that *Surveillance Devices Act 2004* (Cth) only applies to law enforcement agencies when they are using surveillance devices under Commonwealth law and is thus not covered in this article.

83 *Invasion of Privacy Act 1971* (Qld) s 4.

84 *Listening Devices Act 1992* (ACT) s 2 (definition of ‘listening device’); *Listening Devices Act 1991* (Tas) s 3(1).

85 *Listening Devices Act 1992* (ACT) s 2 (definition of ‘listening device’); *Invasion of Privacy Act 1971* (Qld) s 4. See also *Surveillance Devices Act 1998* (WA) s 3; *Listening Devices Act 1991* (Tas) s 3(1).

86 *Surveillance Devices Act 1999* (Vic) s 3(1). See also *Surveillance Devices Act 2007* (NSW) s 4(1); *Surveillance Devices Act 2007* (NT) s 4(1) referring to ‘a device’.

87 *Listening and Surveillance Devices Act 1972* (SA) s 3.

88 (1999) Aust Torts Reports 81–537, 63 352 [319] (Crispin J). See also *Farris v Boase* [2013] WASC 227, [3] (Master Sanderson) regarding a recording device hidden in a glasses case.

89 *Alyssa Treasury Services Ltd v Commissioner of Taxation* [2011] AATA 578.

90 *R v Bandulla* [2001] VSCA 202.

91 *R v Regazzoli* [1993] QCA 154.

conversations.<sup>92</sup> A mobile phone has also been found to be a listening device in relation to hands-free use<sup>93</sup> and to record a phone conversation between participants.<sup>94</sup>

### 3 *Private Conversations and the Concept of Harm*

The first generation of listening device legislation focussed on the illicit recording of private conversations as the harm to be precluded. The primary offence of the *Invasion of Privacy Act 1971* (Qld) is detailed in section 43(1). It states that ‘a person is guilty of an offence ... if the person uses a *listening device* to *overhear, record, monitor or listen to a private conversation*’.<sup>95</sup> Similar, but not exact, definitions are also found in the other listening device legislation. The South Australian offence also has a consent requirement, namely that the use of a listening device in relation to a private conversation is only an offence if it is done without the explicit or implied consent of the parties to the conversation.<sup>96</sup> The Tasmanian offence, whilst similar to that of Queensland, has no consent requirement but only includes the use of a device to record or listen.<sup>97</sup>

The situation is further complicated by the requirement that offending recordings must be of ‘private conversations’, the definition of which, at least under section 4 of the Queensland Act, and some other laws,<sup>98</sup> is protracted.<sup>99</sup> However, it is clear that the definition envisages potentially infringing material as being material in respect of which the recorded party expresses a desire not to be recorded, or – in the case of a private conversation – has a reasonable expectation that it will not be recorded without their consent, unless the recording is undertaken by a party to the conversation.

Other listening device laws also employ different definitions, such as in South Australia, where a private conversation is ‘any conversation carried on in circumstances that may reasonably be taken to indicate that any party to the conversation desires it to be confined to the parties to the conversation’.<sup>100</sup> The situation is even further complicated with the addition of the surveillance device legislation, which again has similar but different definitions of private conversation as outlined above in relation to the offence of listening device use.

92 *De Costi Seafoods (Franchises) v Wachtenheim (No 2)* [2012] NSWDC 286; *W K v R* (2011) 33 VR 516; *Chao v Chao* [2008] NSWSC 584.

93 *Ponzio v Multiplex Ltd* (2005) 145 IR 431.

94 *De Costi Seafoods (Franchises) v Wachtenheim (No 2)* [2012] NSWDC 286.

95 *Invasion of Privacy Act 1971* (Qld) s 43(1) (emphasis added).

96 *Listening and Surveillance Devices Act 1972* (SA) s 4.

97 *Listening Devices Act 1991* (Tas) s 3(1).

98 See, eg, *Surveillance Devices Act 1998* (WA) s 3(1); *Surveillance Devices Act 1999* (Vic) s 3(1), and a similar definition in *Listening Devices Act 1992* (ACT) Dictionary (definition of ‘private conversations’):

any words spoken by one person to another person in circumstances that indicate that those persons desire the words to be heard or listened to only by themselves or that indicate that either of those persons desires the words to be heard or listened to only by themselves and by some other person, but does not include words spoken by one person to another person in circumstances in which either of those persons ought reasonably to expect the words may be overheard, recorded, monitored or listened to by some other person, not being a person who has the consent, express or implied, of either of those persons to do so.

99 *Invasion of Privacy Act 1971* (Qld) s 4.

100 *Listening and Surveillance Devices Act 1972* (SA) s 3 (definition of ‘private conversation’).



However, these laws also create a range of other offences regarding the use of different devices to record private activities.<sup>101</sup>

Given the definitional differences, it is not surprising that judicial consideration of what is a private conversation varies considerably, particularly in the context of cases involving business dealings.<sup>102</sup> There appears to be general agreement that the test to apply is objective, rather than subjective, in nature.<sup>103</sup> That said, some courts have taken an expansive position, whereas other decisions are much narrower in focus.<sup>104</sup>

As the definition indicates, the conversation must be of a certain type, namely, it has to be private. In *Thomas v Nash*, Doyle CJ indicated that a conversation was private if it was intended to be confined to the parties or known participants in the conversation.<sup>105</sup> ‘Private’ in the sense of the offence, therefore, does not connote ‘secret or confidential’ but is to be used in the context that it is not public.<sup>106</sup> Doyle CJ also reiterated that the meaning of private conversation, in the context of the South Australian Act, did not require the provisioning of ‘precise limits of the concept of a private conversation’.<sup>107</sup> Moreover, and again in keeping with the beneficial nature of the legislation, which aims to provide a broad privacy protection,<sup>108</sup> if a private conversation later becomes public, that would not preclude it from being classed as a private conversation.<sup>109</sup>

However, that does not automatically mean that a conversation which takes place on private property will be a private conversation. Rather, whether a conversation is private or not will depend upon the ‘tenor of the conversation’<sup>110</sup> and the intention of the participants, both of which have to be assessed objectively, on a case-by-case basis.<sup>111</sup> Conversations which take place in environments or situations in which there is a reasonable expectation that the conversation will not be recorded, such as a doctor’s surgery, are more likely to be classed as private, even if the conversation could possibly be overheard.<sup>112</sup> However, a conversation between persons held in a prison cell at a watch-house

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101 See, eg, *Surveillance Devices Act 2007* (NSW) s 11; *Surveillance Devices Act 2007* (NT) s 12(1); *Surveillance Devices Act 1998* (WA) s 6(1).

102 See, eg, *Alliance Craton Explorer v Quasar Resources* [2010] SASC 266, [31] (Sulan J); *Georgiou Building Pty Ltd v Perrinepod Pty Ltd* (2012) 261 FLR 211; *Clarke v Edwards* [2007] SADC 49; *Violi v Berrivale Orchards Ltd* (2000) 99 FCR 580.

103 See, eg, *R v East* (2003) 13 NTLR 91, 97–8 [23]–[28]; *Dimech v Tasmania* (2016) 257 A Crim R 495, 502–3 [33] (Estcourt J). Notably, in the context of this article, there is a long history of feminist criticism of objective versus subjective tests: see, eg, Graycar and Morgan, above n 16, 56–71.

104 See, eg, Kelly J in *Sands v South Australia* [2013] SASC 44, [704] stating that the definition of private conversation was intended to be construed in a ‘very wide’ sense; cf *Paull v Queensland All Codes Racing Industry Board* [2016] QCAT 74, [31]–[33] (Senior Member O’Callaghan).

105 (2010) 107 SASR 309, 316 [36].

106 *Ibid* 316 [37].

107 *Ibid* 316 [38].

108 See, eg, Australian Law Reform Commission, above n 81, 277 referring to the historical basis of listening device laws as ‘protection from surveillance’ which ‘is a fundamental form of protection of privacy’.

109 *Sands v South Australia* [2013] SASC 44; *Thomas v Nash* (2010) 107 SASR 309.

110 *Paull v Queensland All Codes Racing Industry Board* [2016] QCAT 74, [33] (Senior Member O’Callaghan).

111 See *Right v Stevens* [2009] WASC 102.

112 *Toth v DPP (NSW)* [2014] NSWCA 133.

was not a private conversation because there could be no reasonable expectation that the conversation would not be overheard.<sup>113</sup>

Ultimately, whether a conversation will be classed as a private conversation will depend on the circumstances, the intention of the parties and the expectations generated by the environment and the type of conversation undertaken. Put simply, if the recording or overhearing of a conversation is more likely to be deemed ‘sneaky’ then the discursive interaction is more likely to be classed as a private conversation because it is the very ‘sneakiness [of the recording that] makes it abhorrent to ordinary persons dealing with each other in a proper fashion’.<sup>114</sup> However, there are exemptions and defences in the listening and surveillance device legislation to justify potentially infringing behaviour, based on whether the person recording a private conversation is a party to the conversation or, more importantly in the context of this article, whether the person has a lawful interest that justifies the recording.

#### 4 *The Participant Monitoring and Lawful Interests Exemptions*

Some states, Queensland, Victoria and the Northern Territory allow for the surveillance of a private conversation or activity, if the person undertaking the recording or overhearing, is a party to the conversation.<sup>115</sup> More controversially, such actions can take place without the consent of the other members of the conversation.<sup>116</sup> Section 43(2)(a) of the *Invasion of Privacy Act 1971* (Qld) specifically exempts the use of a listening device where the person using the device is a party to a private conversation. Several decisions have also affirmed the scope of this exemption.<sup>117</sup>

The lawful interests exemption is less controversial but it is more complex in application, as demonstrated through judicial decisions. A lawful interest exemption of this form currently exists in several jurisdictions and recognises that some forms of non-consensual recording can be undertaken to gather evidence of wrongdoing which can be used as evidence in future actions, where reasonably necessary.<sup>118</sup> Section 7(3)(b)(i) of the New South Wales law exempts the use of a listening device in relation to a private conversation where the principal party making the recording consents and the recording is ‘reasonably

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113 *R v Henry* [1992] QCA 336.

114 *Lever v Australian Nuclear Science and Technology Organisation* (2009) 189 IR 362, 390 [103] (Drake SDP).

115 Australian Law Reform Commission, above n 81, 279 [14.18].

116 *Ibid* 287 [14.49].

117 See, eg, *Marigliano v Queensland Police Service* [2016] QCAT 110, [31] (Member Krebs). See also family law Federal Court actions, based in Queensland: *Hazan v Elias* (2011) Fam LR 475, 479 [16]; *Furnari v Ziegert* [2016] FCA 1080, [31].

118 See, eg, *Listening Devices Act 1992* (ACT) s 4(3)(b)(i); *Surveillance Devices Act 2007* (NSW) s 7(3)(b)(i); *Listening and Surveillance Devices Act 1972* (SA) s 7(1) (but note that this does not require that the person is a principal party, merely a party); *Listening Devices Act 1991* (Tas) s 5(3)(b)(i); *Surveillance Devices Act 1998* (WA) ss 5(3)(d), 6(3)(b)(iii). It should be noted also that the lawful interests exemption is different to the public interest exemption found in several states. Lawful interest focuses specifically on the interests of the principal party whereas public interest has a societal application.

necessary for the protection of the lawful interests of that principal party'.<sup>119</sup> The question accordingly shifts to what is 'reasonably necessary' in the context of such recordings. Again, as above, a number of judicial decisions have considered this issue and have come to differing conclusions about what actions deserve protection as a lawful interest, particularly in the context of DFV.

The determination of a 'lawful interest' is an evaluative judgment<sup>120</sup> to be determined on a case-by-case basis, based on the facts.<sup>121</sup> In cases that involve the use of non-consensual recordings to protect individuals from physical harm, judicial decisions have tended to require a direct link between the lawful interest entailed in non-consensual recording and the subsequent use of the recording for self-protection purposes. Not surprisingly, in these types of situations, the courts appear to have been more willing to identify a lawful interest in relation to the party undertaking the recording.

*Groom v Police (SA)*<sup>122</sup> regarded an appeal by an estranged male partner about a contravention of a DFVO during a child handover meeting in 2014. Previous to the meeting, there had been a significant history of DFV. The primary form of evidence adduced at first instance involved a surreptitious recording made by the appellant's partner, SB, at the time of the handover. Nicholson J had to decide whether the audio recording was properly admitted into evidence and thus whether SB's recording was a contravention of the *Listening and Surveillance Devices Act 1972 (SA)* or whether SB had a lawful interest to make the recording under section 7(1)(b) of the South Australian Act.

His Honour confirmed that if a surreptitious recording relates to a serious crime, then a court will more readily find that the recording was in protection of a person's lawful interests.<sup>123</sup> On its face, a breach of a DFVO may not, by itself, be a serious crime but such breaches 'are capable of constituting serious crimes'.<sup>124</sup> Significantly, more paramount for Nicholson J, however, was SB's concerns for her wellbeing in circumstances where she had 'a genuine concern for [her] own safety'.<sup>125</sup> This concern for individual safety had to be considered in the policy context of DFV and the use of DFVOs as a protective mechanism for victims. The DFVO is a 'first step' protection and thus respondents must be discouraged from contravening such orders as they would lose their protective value.<sup>126</sup>

Other decisions have also favoured the protection of a recorder's lawful interest involving this direct link between the recording and the use of the recording as a self-protective measure. Another South Australian case, *R v Coutts*<sup>127</sup> regarded the use of illicit recordings for evidence in a criminal case of

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119 A principal party is defined under *Surveillance Devices Act 2007 (NSW)* s 4 as 'a person by or to whom words are spoken in the course of the conversation'.

120 *R v Coutts* [2013] SADC 50, [24] (Tilmouth J).

121 *Groom v Police (SA)* (2015) 252 A Crim R 332, 342 [35] (Nicholson J) ('*Groom*'); *ibid* [26] (Tilmouth J).

122 (2015) 252 A Crim R 332.

123 *Ibid* 342 [35].

124 *Ibid* 342 [39].

125 *Ibid* 342 [40].

126 *Ibid*.

127 [2013] SADC 50.

rape and whether the recordings were conducted for a lawful purpose, as in *Groom*. The complainant made two surreptitious audio recordings on her mobile phone. The first involved an act of rape and sexual abuse by the accused. The second regarded a conversation between the complainant and the accused in the accused's car. The parties did not contest whether the mobile phone was a listening device.<sup>128</sup> Accordingly, the real issue before the Court was whether the complainant had a lawful interest in making the recordings to be used as evidence in the prosecution.

Tilmouth J surveyed the existing South Australian and New South Wales case law, with particular focus on the nature of protection outlined in *Sepulveda v The Queen*.<sup>129</sup> In that case, the NSW Court of Criminal Appeal concluded that protection, in the context of lawful interests, entailed 'defence from harm, danger or evil'.<sup>130</sup> Tilmouth J did not specifically endorse this test but it appears to have been at the forefront of his considerations. His Honour concluded that, at the time of the rapes, the complainant was trapped in a violent relationship from which she had no escape.<sup>131</sup> The only option available to her, in relation to the protection of her lawful interests, was the ability to make the surreptitious recordings that could be used as evidence in a subsequent prosecution. The decisions to make the recordings were made in the 'spur of the moment' in situations of 'high and inherent risk of danger'.<sup>132</sup> In other words, the danger had been set upon her and there was no possible consideration that the recording had been undertaken as a 'set-up or trap',<sup>133</sup> as in *Sepulveda*. Notably, in this case Tilmouth J also observed that even if the recording behaviour was determined to breach the listening devices legislation, a balancing of public policy considerations may still result in the recording being admissible.<sup>134</sup>

*R v Coutts* is clearly a decision where the degree and reality of threat was very significant to the complainant. Other decisions have also found the existence of a lawful interest in situations where the immediate threat was not as severe. *Corby and Corby*<sup>135</sup> regarded the use of four non-consensual audio recordings between the parties as evidence in a custody hearing. The applicant, the mother in the estranged partnership, contended that the respondent was sexually coercive, intimidating and physically violent during their relationship.<sup>136</sup> The question before Sexton J was whether the applicant had a lawful interest under section 7(3)(b)(i) of the *Surveillance Devices Act 2007* (NSW).<sup>137</sup> Her Honour decided that the applicant had a lawful interest in protecting herself from

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128 Ibid [13].

129 (2006) 167 A Crim R 108 ('*Sepulveda*'), which involved the clandestine recording of a conversation in which a person accused of child sex abuse admitted his crimes to one of his victims.

130 Ibid 132 [120] (Johnson J), quoting *Udini v Aldo t/as Fine Line Joinery Pty Ltd* [1998] NSWCC 21, [19] (Truss J).

131 *R v Coutts* [2013] SADC 50, [26].

132 Ibid.

133 Ibid.

134 Ibid [27]–[30]. See also *Evidence Act 1929* (SA) s 34P.

135 [2015] FCCA 1099 ('*Corby*').

136 Ibid [22].

137 Ibid [7].

intimidation, harassment and sexual coercion.<sup>138</sup> Moreover, the recordings were reasonably necessary because, similarly to *R v Coutts*, it may not have been a realistic option to report her predicament to the police<sup>139</sup> and the recordings were important evidence as they demonstrated the difference between the public and private ‘faces’ of the respondent.<sup>140</sup> Further, and similarly to other cases, Sexton J observed that even if she had been unable to find that the mother had a lawful interest in making the recording, given the circumstances she would have exercised her discretion to admit the recordings in evidence.<sup>141</sup>

Other courts have also found a lawful interest in the use of non-consensual recordings to protect children. Like *Corby, Gawley v Bass*<sup>142</sup> regards the use of recordings as evidence in child custody proceedings before the Federal Circuit Court. The male applicant installed a listening device in the estranged family home in order to protect his children from the female respondent’s ‘violent temper and ill-treatment’.<sup>143</sup> The respondent objected to the recordings being adduced on the basis that they were not in the principal party’s interests and were essentially a ‘fishing expedition’, and thus unreasonable.<sup>144</sup> Sexton J decided that the applicant had a lawful interest in the protection of the children, because a father has ‘an obligation to protect not only his interests but also the interests and protection of the children’.<sup>145</sup> In that sense, a father has a lawful interest ‘as a parent of the children to protect them from risk of harm’<sup>146</sup> and thus the recordings were reasonably necessary. Similarly, in *Latham and Latham*, Le Poer Trench J decided that audio recordings made in the family home, were ‘not gross’ or manufactured and were made in the process of the ordinary function of the family<sup>147</sup> to protect the applicant’s and the children’s interests, particularly when no other avenue of evidence collection was open to the applicant.<sup>148</sup>

The proximity of threat and the immediacy of non-consensual recording usages, to protect lawful interests, has been a point of analysis for courts.<sup>149</sup> In cases involving potential allegations of DFV, the courts are more likely to reject arguments regarding lawful interest if the recorded material is historical in nature or the recording is not used with relative immediacy. For example, in *Huffman*

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138 Ibid [23].

139 Ibid [29].

140 Ibid [30].

141 Ibid [32], [33], [36] in consideration of *Evidence Act 1995* (Cth) s 138.

142 (2016) 313 FLR 346.

143 Ibid 350 [25].

144 Ibid 353 [51].

145 Ibid [52].

146 Ibid.

147 [2008] FamCA 877, [14] (*Latham*), where no breach of the now defunct *Listening Devices Act 1984* (NSW) took place because ‘[the] husband was entitled to be present at the place where the recordings were made. The husband was entitled to listen to and participate in the conversation between the mother and the children’.

148 Ibid [28]. Similarly, Le Poer Trench J found that if he was wrong in the determination that there was a lawful interest, he would have permitted the evidence pursuant to the discretion provision, *Evidence Act 1995* (Cth) s 138, given the potential importance of the evidence.

149 See, eg, *Sepulveda* (2006) 167 A Crim R 108; *Alliance Craton Explorer v Quasar Resources* [2010] SASC 266, [48] (Sulan J).

and *Gorman*,<sup>150</sup> the applicant father made a number of non-consensual recordings detailing incidents of conflict and violence between himself and the respondent. The recordings took place over a two-year period between 2006 and 2008 using a dictaphone. Transcripts of six tapes were then adduced in evidence at the commencement of proceedings in 2013. Foster J decided that the transcript material should not be put before the Single Expert in this case.<sup>151</sup> On its face, there is an apparent conflict of rationale between *Huffman* and *Latham* given that the latter recordings were essentially made in ‘the process of the ordinary function of the family’ and consequently not in contemplation of future legal actions as a protective measure. The importance of the evidence, its probative value, and other public policy considerations are important factors in these cases and are key to determining both lawful interests and the admissibility of the recording into evidence in these types of cases.<sup>152</sup>

Finally, it is worth examining the small number of cases where children have been used as agents for recordings. These cases are not directly relevant to court constructions of what is a lawful interest, but they are worded strongly enough to infer future decisions on this exact topic are not likely to be classified as a justifiable lawful interest of self-protection. *Callahan and Callahan*<sup>153</sup> regarded a recording of a phone conversation by the child of the applicant and respondent. The question before the Court concerned a potential breach of section 11 of the *Surveillance Devices Act 2007* (NSW), which relates to the publication or communication of a private conversation, and whether the transcript of the conversation should be admitted. Scarlett J contended that it should not and was unambiguous as to his reasoning. He observed that the court has a discretion to exclude improperly or illegally obtained evidence by virtue of section 138(1) of the *Evidence Act 1995* (Cth), but he was

... not satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained by a child recording a telephone conversation with his mother and passing it on to his father. It is not desirable to encourage or even condone a child taking a partisan attitude to proceedings between his parents.<sup>154</sup>

A similar rationale was employed in *Alexander and Turner*<sup>155</sup> which dealt with the more acute problem of whether a non-consensual recording by a child could be used as evidence of a breach of a non-denigration parenting order. The youngest child, Y, recorded a video conversation of the applicant and Y’s step-mother and then provided a copy of the recording to Y’s mother some months later. The reason for Y’s action was unclear but it was admitted by the applicant that the video contained footage in which he denigrated Y’s mother, in

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150 [2014] FamCA 150 (*Huffman*). See also *Huffman and Gorman [No 2]* [2014] FamCA 1077 (*Huffman [No 2]*) where Hannam J also found no lawful interest in the recordings; *Evidence Act 1995* (Cth) s 138.

151 See generally Family Court of Australia, ‘The Changing Face of the Expert Witness’ (Discussion Paper, Family Court of Australia, 2002) 15–16.

152 See also *Farmer and Killen [No 2]* [2015] FamCA 809; *Howard & Lipschitz* [2014] FamCA 272, [45] (Austin J).

153 [2014] FCCA 2930 (12 December 2014).

154 *Ibid* [68].

155 [2015] FCCA 3197.

Y's presence.<sup>156</sup> The applicant tried to exclude the video on the basis that its collection and use breached section 6 of the *Surveillance Devices Act 1999* (Vic). One of the issues that the Court had to resolve was whether the admission of the recording was necessary to protect Y's legal interests.<sup>157</sup> This gave rise to competing public policy considerations, especially regarding the role of children as surreptitious evidence collectors.<sup>158</sup>

The final case pertinent to these issues is *Simmons and Simmons*.<sup>159</sup> In *Simmons*, the mother placed a recording device on her child so that she could record supervised time with the child's father. The father had also used conversations with the child to encourage uncooperative behaviour by the child that could be used as evidence for a complaint to authorities. McGuire J decided to admit the recorded evidence, but not before roundly criticising both parties.<sup>160</sup>

### C Summary

The brief overview of legislation and judicial decisions reveals some of the fragmentation concerns raised by the ALRC, demonstrating a range of different foundational definitions which trigger different legal consequences in relation to the admissibility of smartphone recordings as evidence. Before we outline some key points of fragmentation regarding how the law would apply to the study findings, we first note the more readily identifiable considerations, particularly in relation to the admission of recordings as evidence. As detailed in the cases above, in the context of the study findings and DFV cases in general, a smartphone will most likely be regarded as a listening device in relation to all jurisdictional listening and surveillance device laws.<sup>161</sup> Similarly, it is likely that conversations conducted either at home or elsewhere, such as child handover locations in public, would be classed as private conversations.<sup>162</sup> Accordingly, most, if not all, of the conversations as described in the study would be classifiable as 'private conversations'. The more complex question regards the application of the participant monitoring and lawful interests exemptions, and it is here that the ALRC's concerns become readily visible.

In many ways, the interviewees highlight the very concern that the ALRC noted about the participant monitoring exemption, namely, that a party to a conversation should not be able to infringe the privacy of the other party, by

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156 Ibid [56] (Harland J).

157 Ibid [54] (Harland J).

158 Ibid [55] (Harland J). Note there was also consideration of *Evidence Act 1995* (Cth) s 138.

159 [2013] FCCA 304 ('*Simmons*').

160 Ibid [109], where McGuire J stated:

On the material before me and, in particular, the tape recordings, I am satisfied on the balance of probabilities that the father did act in this way. This is insightful and selfish behaviour. It fails to recognise the potential effect on a young child of being embroiled in such a way in parental dispute. Similarly, however, the mother's actions in sending the child for supervised visits with recording equipment secreted on her is similarly appalling behaviour. The actions of both these parents are at best naïve and at worst a form of child abuse. In this sense they are equally culpable.

161 See, eg, *R v Coutts* [2013] SADC 50.

162 See, eg, *Groom* (2015) 252 A Crim R 332; *Latham* [2008] FamCA 877; *Gawley v Bass* (2016) 313 FLR 346.

covertly recording a conversation when there is a reasonable belief that it should be private.<sup>163</sup> As regards application to the study, it is important to note that all of the interviews were undertaken in Queensland. As such, all of the women who reported the use of non-consensual recording techniques would be able to rely on the participant monitoring exemption, as they are each a party to the conversation and therefore do not require the consent of the other party to make the recording.<sup>164</sup> The complex issue of admissibility of recorded evidence as a protective mechanism requires virtually no judicial consideration in the context of participant monitoring, which is clearly a positive aspect for victims seeking to rely on this evidence.

However, the same could also be said for perpetrator recordings if, again, the perpetrator is a party to the conversation, even if those recordings are used for intimidation and control. In terms of the study findings, these would include the ex-partner recordings of Angelina on her doorstep and of Pari in the library and on the phone. In that sense, the participant monitoring exemption could provide a broad ranging protection potentially for both perpetrators and victims alike, where both the perpetrator and the victim are parties to the conversation. The breadth of the exemption is potentially tempered by the application of section 138 of the *Evidence Act 1995* (Cth), which would provide judicial discretion regarding the admission of evidence obtained improperly. However, it is difficult to see how either a perpetrator or victim could be considered to have acted improperly in making a recording of a conversation they are both parties to. This point re-emphasises the ALRC's concern about the breadth of the participant monitoring exemption, particularly in the context of 'readily available consumer technologies that allow for surreptitious recording'.<sup>165</sup> The only types of surreptitious recordings not covered by the exemption are those more radical situations of secret or illicit installation of listening devices, such as the *Leaving Domestic Violence Study* reports of Leah, Martha and Fiona, where the perpetrator is clearly not a party to a conversation with the victim.

As we have noted above, the use of smartphones is becoming increasingly ubiquitous, which significantly challenges the basis of different jurisdictional exemptions for admitting non-consensual recordings as evidence. If, for example, the study interviewees resided in New South Wales or South Australia, then they could not, of course, rely on a participant monitoring exemption and would instead have to demonstrate to a court that the non-consensual recording was reasonably necessary to protect their lawful interests, before it could be admitted. As detailed above, this is a very different consideration which places a significant evidential burden on victims. The benefits of the participant monitoring exemption for victims now become apparent because all study interviewees, who used recordings as a protection, would now have to demonstrate a lawful interest in the recording to secure its admission as evidence. Uncertainties increase

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163 Australian Law Reform Commission, above n 81, 287 [14.49].

164 See, eg, *Marigliano v Queensland Police Service* [2016] QCAT 110.

165 Australian Law Reform Commission, above n 81, 287 [14.49].



further for victims given that, as highlighted above, judicial considerations on this point vary significantly, particularly in relation to the facts of any given case.

The New South Wales and South Australian courts appear willing to find a lawful interest, particularly in DFV situations, where the threat is severe or where the potential criminal activity is serious.<sup>166</sup> Roseanna's use of phone recordings that captured her ex-partner's admission of prior criminal assault is a case in point. Furthermore, it would appear that if a party can demonstrate a substantial link between the seriousness of the threat and the use of the recording to protect their interest, then the courts are more likely to define a lawful interest in the action.<sup>167</sup> Thus, those interviewees, such as Laura and Jennifer, who can establish a direct link between past incidents of DFV and the recordings, are more likely to be successful in arguing that the recordings should be admitted as evidence.

Less clear cut are situations where the threat is not so serious or the threat is not immediate.<sup>168</sup> In terms of the study, those interviewees who were recording conversations for private and personal longer-term purposes, such as Vera and Martha, may encounter more difficulties in having the recordings admitted as evidence under the lawful interests exemption.<sup>169</sup> Similarly, those interviewees, namely Ingrid and Sandra, who simply recorded all interactions would also possibly encounter admissibility issues before the courts because the recordings were not undertaken for a specific protective purpose that could be directly linked to some form of DFV. In these cases, it would appear that the courts will assess whether a lawful interest arises on a case-by-case basis in relation to the factual circumstances presented.<sup>170</sup> The distance between the perceived threat and the temporal use of the recording will be a factor that the courts consider, particularly in the context of the evidential value of the recording. The greater the temporal distance, and thus the less evidential value, the more likely that a lawful interest will not be found. Thus, simply recording conversations without a specified protective and legal use, will more likely mean that the recordings will not be admitted as evidence. This could have a detrimental effect on the admissibility of recordings undertaken by some of the study's interviewees. Maddy, who recorded conversations to 'just ... keep a record' and Sandra who recorded everything and 'was always armed' would be situations in point.

Equally, it can be inferred that a court is very unlikely to identify a lawful interest in admitting illicit recordings if the recording party uses their children to make the recording.<sup>171</sup> This is an important point given that findings from the interview study indicate that recording of child handover points was relatively common, as this was a site of potential conflict recorded by Sandra, Rosa and Milly. However, if recordings are undertaken to protect a child's interest, such as in Rosa's case, then it is more likely that the recording will be admitted as part of a lawful interest.

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166 See, eg, *Groom* (2015) 252 A Crim R 332; *R v Coutts* [2013] SADC 50.

167 See, eg, *Corby* [2015] FCCA 1099.

168 See, eg, *Huffman & Gorman* [2014] FamCA 150. See also *Huffman [No 2]* [2014] FamCA 1077.

169 See, eg, *Sepulveda* (2006) 167 A Crim R 108; *Gawley v Bass* (2016) 313 FLR 346.

170 See, eg, *Groom* (2015) 252 A Crim R 332.

171 See, eg, *Alexander and Turner* [2015] FCCA 3197; *Simmons* [2013] FCCA 304.

This brief overview of the key judicial considerations regarding the application of the participant monitoring and lawful interests exemptions highlights the fragmentation concerns presented by the ALRC and the uncertain application of different regimes to the same issues of DFV. It should also be noted that our research only covers the application of the participant monitoring and lawful interests exemptions and does not cover the other three types of exemption identified by the ALRC.<sup>172</sup> In that sense, there is likely to be a greater degree of fragmentation and uneven application when the use of exemption considerations are extended to all jurisdictions, as both individual rights and liabilities in this area ‘are highly contingent upon their location’.<sup>173</sup> With that in mind, we conclude our article by highlighting some key points for future discussion, most notably regarding the suitability of listening devices law as a means for admitting evidence and, in doing so, we argue that a broader jurisprudential understanding of privacy and surveillance in the context of DFV is required.

## V CONCLUSION

Our analysis demonstrates the uncertainty that prevails around the lawfulness of recording others via smartphone in the context of DFV. While prosecutions of stalking and intimidation involving non-consensual recording appear to be rare, it is likely that non-consensual recording is part of the coercive and controlling behaviour that underlies some women’s experiences of DFV, some applications for DFVOs and subsequent charges of breach of a DFVO.<sup>174</sup> Notably, prosecutions under listening device statutes, especially in the context of DFV, are rare. However, the lawful interests provisions have been considered by the courts on a number of occasions in the context of determining the admissibility of recordings covertly obtained. While many cases have considered that where a lawful interest can be demonstrated, the recorded evidence will be admissible, many of the decisions also identify an alternative way to examine this question. That is, despite the recording being improperly or illegally obtained, on application of the discretionary exclusion under evidence law, public policy considerations will be considered (including the probative value of the evidence, its importance and the impropriety of the contravention) and the recording may be admissible.<sup>175</sup>

A person’s actions in recording another person could be a criminal offence of stalking or breach of a DFVO, and at the same time the recording could be

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172 Australian Law Reform Commission, above n 81, 279 [14.18].

173 Ibid 280 [14.19].

174 This is difficult to assess given that most cases are heard in the Magistrates’ courts and are not reported. Note also Woodlock’s call for technology-facilitated stalking to be treated as a serious offence: Woodlock, ‘The Abuse of Technology’, above n 10, 599.

175 See *Janssen v Janssen* (2016) 55 Fam LR 439, 422 [11] (McClelland J). This issue was further discussed by McClelland J in *Janssen and Janssen [No 2]* [2016] FamCA 796. See also *Evidence Act* (1995) (Cth); *Bunning v Cross* (1978) 141 CLR 54.

admitted into evidence. Where a DFVO includes a condition prohibiting parties recording each other, recording the other party will clearly be a breach of the order. However, where parties rely on conditions of good behaviour or that they not commit domestic or family violence, it seems less clear whether the recording would be determined to be a breach of the DFVO. In any event, even if the DFVO is breached by the recording behaviour, the recording may still be admissible – and may make the breach worthwhile for the perpetrator. Similarly, whether a person commits an offence of stalking by recording another party will depend on the circumstances and in many cases will depend on whether an ‘ordinary person’ would apprehend or fear further harm as a result of the recording. Yet again, the recording obtained while undertaking the unlawful stalking activity may still be held to be admissible in evidence.<sup>176</sup>

In their 2010 report, *Family Violence: A National Legal Response*, the ALRC and NSWLRC identified inconsistent definitions of domestic and family violence across jurisdictions and recommended a consistent approach be introduced.<sup>177</sup> Given the diversity of the contexts of DFV in which smartphone recording now takes place and the reasons for it, it seems impossible to be sure in what contexts it will be legally undertaken. This complexity is increased manifold by the fragmentation issues identified by the ALRC regarding the listening and surveillance device legal regime. In this sense, the diversity of DFV contexts buttresses head-first into the fractured listening devices regime which can have the effect of applying equal protections for perpetrators and victims alike, under the participant monitoring exemption, and uneven application to victims, under the lawful interests exemption.

Furthermore, the question of whether a smartphone recording is legally undertaken at the time may have little or no bearing on whether the recording itself will later be admissible in evidence. Individuals may be placing themselves at risk of prosecution, while at the same time, judges will respond to individual fact scenarios in an ad hoc, case-by-case way to assess the admissibility of the recording. A blanket response that essentially penalises victim smartphone recordings for protective measures may have the effect of punishing abused women by removing a key protection mechanism, the use of non-consensual recordings as evidence, as identified in the study. However, the blunt application of the participant monitoring exemption may effectively protect abusers who use smartphone recording as a way of intimidating their partners or former partners, as well as victims.

The ALRC clearly indicated that, in its view, the participant monitoring exemption should be repealed because the ‘protections offered by surveillance device laws are significantly undermined if a party to a private activity (including a private conversation) may record the activity without the knowledge or consent of other parties’.<sup>178</sup> In essence, expectations of individual privacy protection would be undermined by covert recording activities and this could lead to a

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176 *Janssen v Janssen* (2016) 55 Fam LR 439, 442 [11] (McClelland J).

177 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, above n 39.

178 Australian Law Reform Commission, above n 81, 287 [14.49].

‘chilling effect’ that discourages free participation in private conversations, particularly in an age where consumer technologies that facilitate surreptitious recording are now commonplace.<sup>179</sup>

With the accessibility of smartphones, recording is now at our fingertips and we are able to do it with the press of a button. According to some of the women interviewed in the *Leaving Domestic Violence Study*, police and lawyers are, in some cases, encouraging people experiencing DFV to record their partners. Many judicial officers, through admission of recordings made by parties to proceedings, implicitly encourage this behaviour as well. Should we accept that recording is ubiquitous and amend our statutes to reflect this? This would clearly avoid uncertainty. However, this approach risks the ‘chilling effect’ identified by the ALRC<sup>180</sup> and, in the context of DFV, places many people at risk of the harassment and intimidation experienced by being illicitly recorded.

It should also be noted that, whilst there are a limited number of judgments on this topic, the vast majority of cases have been decided in the last three years. This rash of decisions, in conjunction with the reports of the interviewees detailed above, highlight that the admissibility of non-consensual recordings as evidence in cases involving DFV is an important issue across the Australian jurisdictions. Thus far, there has been no indication from either the Commonwealth or state governments about the ALRC’s recommendation to replace the participant monitoring exemption. If legislative reform is not going to emanate, then it is important for courts to identify the conceptual and jurisprudential basis for assessing lawful interests in the context of DFV, from a broader privacy context, that considers the role of privacy in the circumstance of coercive control and protections of autonomy, rather than by a compatibility assessment based on the case-by-case evaluation of surveillance and listening device legislation.

Doing so will give effect to Stark’s well-founded observation that DFV is a liberty crime in which victims are not free to live their lives as they desire.<sup>181</sup> However, in order to achieve this, the courts will have to develop a broader jurisprudential understanding of privacy as a protector and facilitator of individual autonomy rather than an ad hoc, factual balancing metric to assess the admissibility of evidence decisions. This is not an easy task for a common law jurisdiction that is generally bereft of historical or contemporary considerations of privacy and has yet to consider the gendered context of technologically-facilitated DFV. However, we contend that Australian courts and law will have to consider this point deeply if future judicial decisions are to keep pace with the increasingly complex relationships of surveillance and technological ubiquity in the DFV context.

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179 Ibid.

180 Ibid.

181 Stark, *Coercive Control*, above n 3, 13, 362.